NEGOTIATING FEDERAL PLEA AGREEMENTS IN THE POST-BOOKER WORLD: "SAME AS IT EVER WAS"[1]

By Barry Boss, Kathryn Yingling and Nicole L. Angarella

"*And you may ask yourself, how do I work this?"* Talking Heads, *Once in a Lifetime*

In January of 2005, immediately after the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), there were cries from all corners of the federal criminal justice system that the sky had fallen and chaos undoubtedly would reign until Congress saved the day with a legislative fix. John Gibeaut echoed popular sentiment when he wrote in the American Bar Association Journal E-Report, on January 15, 2005, "prosecutors likely won't be the only ones on shaky ground after this week's U.S. Supreme Court decision….The earth also could be moving beneath defendants and judges, sentencing experts predict." The "chicken little" perspective has proven somewhat histrionic and the sky does not seem to be falling. The balance in the federal system, which is weighted heavily towards government prosecutors, has changed little, if all, post-*Booker*, notwithstanding the Department of Justice's claims that the current system presents a "clear danger" to the gains we have made in "reducing crime and achieving fair and consistent sentencing." Statement of William Mercer, Principal Associate Deputy Attorney General, Before the House Subcommittee on Crime, Terrorism, and Homeland Security, March 16, 2006.

For those of us in the trenches, the new system comes with the same old challenges. While the Supreme Court has now emphasized on numerous occasions that the post-*Booker* sentencing court must consider a myriad of sentencing factors in addition to the sentencing guidelines, *see, e.g., United States v. Gall*, 128 S. Ct. 586 (2007), the fact remains that the overwhelming majority of sentences are within the applicable guideline range. In 2009, less than 16% of cases involve what we call "*Booker* variances," which involve sentences below the guideline range based on consideration of the statutory factors set forth in 18 U.S.C. § 3553(a). Thus, the Sentencing Guidelines, which have been ratcheted upwards over the years, continue to play an important role at sentencing, and as a result, they remain a core issue during plea negotiations. While many commentators expected that the decisions in *Gall* and *Kimbrough v. United States* would result in a significant increase in non-guideline sentences, the most recent Sentencing Commission data reflect no substantial change in this regard. *See* United States Sentencing Commission 2009 Annual Report 38 (2009), available at www.ussc.gov/ANNRPT/2009/Chap_509.pdf. (non-government sponsored below Guideline range sentences increased from 12.3% pre-*Kimbrough* and *Gall* to 15.9% in 2009).

Several factors help explain why there remains such a heavy focus on the sentencing guidelines post-*Booker*. Shortly after the *Booker* decision, the Deputy Attorney General issued a memorandum directing prosecutors to seek sentences within the guideline range. *See* Memorandum to all Federal Prosecutors from James B. Comey regarding Department Polices and Procedures Concerning Sentencing (January 28, 2005) ("Comey Memorandum") at 2. Moreover, there is tremendous pressure on judges to sentence defendants to a guideline sentence

[1] An earlier version of this article appeared in the Summer 2006 issue of the ABA's <u>*Criminal Justice*</u> magazine.

due to DOJ reporting rules which are set forth in the Comey Memorandum and legislative oversight. *See* 28 U.S.C. 994(w); 8 U.S.C. 3553(c)(2). In addition to prosecutors seeking guideline sentences and an implicit threat that hangs over the head of any judge who varies from the guidelines, the sentencing guideline range itself is entitled to a presumption of reasonableness in most circuits. *See, e.g., United States v. Ellis,* 440 F.3d 434 (7th Cir. 2006), *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006), *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006). Of course, the Supreme Court has held that such a presumption of reasonableness on appeal does not offend the Sixth Amendment. *See Rita v. United States*, 127 S. Ct. 2456 (2007). And, as Justice Souter noted in his *Rita* dissent, "what works on appeal determines what works at trial;" accordingly, there is a "substantial gravitational pull" for sentencing judges to impose a sentence within the guideline range. *Id.* at 2487. In this article, we discuss general plea bargaining principles with an emphasis on those plea bargaining practices which *have* changed in our post-*Booker* world and discuss several strategies defense attorneys may want to consider before negotiating with the prosecutor.

Charge Bargaining

There are two basic types of plea negotiations: charge bargaining and sentencing bargaining. Charge bargaining is, as the name suggests, negotiating about the specific charges to which a defendant will plead guilty. In most instances, the specific charge to which the defendant will plead will have little impact on the ultimate sentence because, in calculating the advisory guideline level, all relevant conduct is considered regardless of the specific count of conviction. U.S.S.G. §1B1.3. However, there are some notable exceptions. Before considering the exceptions, it is important to understand DOJ policies regarding charge bargaining. Charge agreements are governed by DOJ policy and the sentencing guidelines. Generally, a prosecutor must pursue the most serious, readily provable charge consistent with the nature and extent of the defendant's criminal conduct. DOJ Manual, § 9-27.430. There are certain limited exceptions to this policy. They include cases involving a "fast track" program (usually cases in border districts involving immigration offenses); cases where there is a post-indictment reassessment due to factors like suppression of the evidence or unavailability of a witness; cases where the defendant has provided substantial assistance; cases where there are potential statutory enhancements and there is supervisory approval to waive the filing of enhancement papers; and cases where there are other exceptional circumstances. *See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors Re: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), http://files.findlaw.com/news.findlaw.com/nytimes/docs/doj/ashcroft92203chrgmem.pdf ("Ashcroft Memorandum").[2]

According to the Ashcroft Memorandum, the "exceptional circumstances" exception recognizes that the "aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system." The memorandum further provides that, with the approval of the designated supervisory attorney, the prosecutor can abandon the most serious charge for various reasons, including that the particular U.S. Attorney's office is overburdened, the duration of the trial would be exceptionally long, or proceeding to trial would

[2] DOJ is purportedly in the process of revising its policy concerning charging criminal offenses, disposition of charges, and sentencing.

significantly reduce the total number of cases disposed of by the office. However, "such case by case exceptions should be rare." Ashcroft Memorandum.

Prosecutors continue to apply the Ashcroft Memorandum principles in a manner that results in the defendant having to plead to the charge which produces the highest advisory guideline calculation; however, the justification for this approach has eroded substantially over the past few years. When the guidelines were mandatory, it followed that the most "serious" charge was the one that produced the highest offense level. Nonetheless, under the now-advisory system which requires the sentencing court to consider the full panoply of Section 3553(a) factors, the most "serious" charge should be determined in light of these broader sentencing factors and not merely the guideline calculation. Thus, under our new sentencing paradigm, prosecutors should have far greater discretion in determining the charge to which the defendant would have to plead guilty.

Charge agreements may be useful in certain cases. For example, where you represent a non-citizen, the statute of conviction may have a dispositive impact on whether the defendant will be deported. In addition, where the advisory guideline range would result in a significant prison sentence or fine, the count of conviction can serve as a cap which limits the client's exposure. Also, the applicability of statutory mandatory minimum sentences is controlled by the count of conviction, rather than relevant conduct. Finally, there may be collateral consequences like debarment or professional disciplinary sanctions that are impacted by the specific count of conviction rather than "relevant conduct."

With regard to charge agreements which serve to cap a sentence below the otherwise applicable guideline range, this may be more tempting to prosecutors than they would choose to admit. Particularly in cases involving multiple defendants, prosecutors do not want to fact bargain or guideline bargain in a manner that might come back to haunt them when it comes time for your client to testify against others (assuming a cooperation deal) or to seek a substantial sentence for the co-defendant or co-conspirator who chose to go to trial. Obviously, where there are other defendants or potential defendants involved, a prosecutor will want your client to commit to a version of the offense that is consistent with what the prosecutor hopes to prove against the remaining targets or defendants. In addition, the prosecutor will not want to agree to a guideline calculation other defendants could point to later as justifying a more lenient sentence. Where, for example, your client definitely is facing more than five years at the time of sentencing under the advisory guidelines and where you expect a judge would impose the guideline sentence, you should push for a plea to a statute with a five year maximum, like 18 U.S.C. § 371. This achieves your goal of limiting your client's sentencing exposure but permits the prosecutor to set forth all of the incriminating facts he or she hopes to prove against the co-defendants and establish the "appropriate" advisory guideline range.

Sentencing Agreements

The second type of plea bargaining involves sentencing agreements where you seek concessions from the government regarding its sentencing position. A sentencing agreement may provide:

--no agreement regarding sentencing and the parties are free to make any recommendation or argument to the court;

--the government will make no recommendation to the court regarding sentencing (but keep in mind that under the new broad victims' rights statute, 18 U.S.C. § 3772, the government's silence does not restrict victims from making a recommendation);

--the government will recommend a particular sentence (*see* FED. R. CRIM. P. 11(c)(1)(B));

--the government will not oppose the defendant's requested sentence (*see* FED. R. CRIM. P. 11(c)(1)(B));

--the government agrees to a specific sentence, sentencing range or guideline factor, and that agreement is binding on the judge (*see* FED. R. CRIM. P. 11(c)(1)(C)).

With regard to any sentencing recommendation or agreed-upon sentence, the advisory guidelines instruct that the court should not follow the recommendation or accept the plea agreement unless the sentence falls within the applicable sentencing guideline range or departs from that range for justifiable reasons. U.S.S.G. § 6B1.2(b). Post-*Booker*, this provision can no longer be considered binding on sentencing courts because, not only are the guidelines no longer mandatory, but the provision itself reflects the old sentencing regime where justifiable departures were the only ones permitted by the guidelines. Now, of course, the court must consider a broader array of factors under § 3553(a) in determining the "justified" sentence. Indeed, even in our pre-*Booker* world, some courts refused to consider this guideline provision as binding on a sentencing court. *See United States v. Coney*, 390 F. Supp. 2d. 844, 853-54 (D. Neb. 2005); *see also United States v. Goodall*, 236 F.3d 700, 704-05 (D.C. Cir. 2001)) (holding that, unlike other policy statements, § 6B1.2 was promulgated "to guide, not to constrain," courts in deciding whether or not to accept a plea agreement).

In the pre-indictment context, before a matter is assigned to a particular judge, both sides have greater incentive to negotiate a resolution pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which provides for a binding agreement with regard to a particular sentence or sentencing factor. If the judge refuses to accept the agreement, the defendant may withdraw the plea pursuant to Federal Rule of Criminal Procedure 11(c)(5)(B). Post-*Booker*, the government is, in many instances, more willing to discuss a binding plea agreement in order to achieve greater certainty regarding the ultimate sentence. From a defense perspective, such certainty can be an appealing feature. It is important to remember that the rule permits a binding agreement with regard to sentencing factors like the advisory guideline range. Even where the parties cannot agree on an ultimate sentence, it is often worth exploring whether you can agree on the guideline score, or even a guideline factor (like the absence of a role adjustment for organizer or leader).

Given the directive in the post-*Booker* Comey Memorandum that prosecutors must continue to attempt to obtain a guideline sentence, the real challenge is trying to get the government to agree to a sentence that is below the otherwise applicable guideline range. *See* Comey Memorandum. The best approach is to try and convince the government that there is a

reasonable alternative guideline calculation so that the agreed-upon sentence is within the guideline range and, thus, consistent with the Comey mandate. There also may be guideline departures (as opposed to *Booker* variances) that permit the government to accept your desired sentencing range as consistent with the guidelines. Although it is rare for the government to agree to guideline departures, it is even more unusual for the government to agree to a *Booker* variance.

Where the government is unwilling to consider a binding agreement with regard to sentencing factors or an ultimate sentence, the next step is to discuss what the government is willing to recommend, or at least not oppose. In such instances, the government often will request either a stipulation that a sentence within the guideline range is *a* reasonable – but not necessarily *the only* reasonable – sentence, or that the defendant waive his or her right to appeal any sentence. The former language (without an appellate waiver) dramatically reduces, if not eliminates, any hope to obtain a sentence outside of the guideline range because the stipulation means that any guideline sentence is essentially immune from challenge on appeal. Post-*Booker*, however, an appellate waiver by both the government and the defense may prove advantageous to defendants. Where the defense has a strong argument for a downward departure under the guidelines or a *Booker* variance, an appellate waiver by the government may cause a sentencing judge to consider the request more favorably because there is no risk of being embarrassed in the court of appeals. This is a somewhat risky strategy given the possibility that you will not be able to challenge a sentence above the advisory guideline range; however, in the appropriate case where the mitigating factors truly predominate and where you know the history and practices of your sentencing judge, it may be a risk worth taking. In any case, even without an appellate waiver, given the deferential abuse of discretion standard articulated by the Supreme Court in *Gall,* a district court that provides a reasoned basis for imposing a sentence below the advisory-Guideline range is unlikely to be reversed.

For defendants facing statutory mandatory minimum sentences, *Booker* does not directly provide the district court with any greater discretion to sentence a defendant below the statutory minimum sentence. However, there are two mechanisms for such defendants to obtain below-minimum sentences. The first is cooperation in order to receive a downward departure for substantial assistance, pursuant to U.S.S.G. § 5K1.1, or a post-sentence reduction under Federal Rule of Criminal Procedure 35(b). The incentive to cooperate remains largely unchanged for those defendants facing statutory mandatory minimum sentences who are not eligible for the "safety valve," 18 U.S.C. § 3553(f), because substantial assistance motions provide the only realistic mechanism to obtain a sentence significantly below the minimum statutory sentence. *See* 18 U.S.C. § 3553(e).

The "safety valve" provides the second mechanism which might provide a defendant with the opportunity for a below-minimum sentence. *See* 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2. The safety valve provides first-time offenders who meet the criteria set forth in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 with the opportunity to be sentenced below the statutory mandatory minimum sentence. Post-*Booker*, the safety valve may provide more substantial relief to qualifying individuals. When the guidelines were mandatory, safety valve defendants were sentenced within the guideline range because of the application of the guideline provision irrespective of the mandatory minimum sentence. 18 U.S.C. § 3553(f). However, post-*Booker*, the guidelines must be treated as advisory; thus, a sentencing court is free to sentence a safety

valve defendant to whatever sentence is appropriate after consideration of the 18 U.S.C. § 3553(a) factors, without regard to the statutory minimum sentence. *See United States v. Duran*, 383 F. Supp. 2d 1345, 1347 (D. Utah 2005) (Cassell, J.).

For defendants not facing mandatory minimum sentences, cooperation plea agreements need to be evaluated carefully by defense counsel. In our pre-*Booker* world, where the guideline sentence was mandatory, many defendants depended on cooperation as the only potential avenue for a below-guideline sentence. Now, of course, the advisory guidelines are only one part of the sentencing calculation and a 5K1 motion is not required for a below-guideline sentence. In addition, some courts have held that the defendant may receive credit for cooperation even where the government does not file a motion for substantial assistance. *See United States v. Fernandez*, 443 F.3d 19, 33 (2d. Cir. 2006) (sweeping nature of section 3553(a)(1) "presumably includes the history of the defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation"); *see also United States v. Gapinski*, 561 F.3d 467, 477 (6th Cir. 2009) (vacating sentence where the record did not reveal that the district court fully considered the defendant's argument for a variance based on his substantial assistance to the government); *United States v. Knox*, 573 F.3d 441, 453 (7th Cir. 2009) (agreeing that "as a general matter," the sentencing court may consider the defendant's cooperation, but finding that the court's failure to do so in this case was not an abuse of discretion). Thus, in order to advise the defendant intelligently on whether he or she should enter into a cooperation plea agreement, defense counsel must discuss the potential for a *Booker* variance in the absence of cooperation or based upon cooperation deemed insufficient by the government to justify a motion for substantial assistance. As a practical matter, it appears that 5K1.1 motions still provide most defendants with the greatest opportunity for a below-guideline sentence; however, it is no longer the only opportunity.

Pleading Without any Express Agreement

In our post-*Booker* world, it also is important to consider pleading without any plea agreement. Post-indictment, a defendant always can plead to the entire indictment. Pre-indictment, it is possible to plead to an information without any plea agreement between the parties, although the government's consent is essential and the government rarely will do so. Given the greater sentencing discretion enjoyed by district judges, at least on a theoretical basis, there is less of a need to enter into a plea agreement with the government, which usually gives up many of your client's rights with only modest concessions from the government. As a practical matter, given that judges generally continue to follow the guidelines, plea agreements continue to be prudent in most cases.

While it is important to understand this new sentencing landscape and consider it when negotiating a plea deal with the government, the reality is that the new system has not yet brought any radical change to plea or sentencing practices. Because judges by and large continue to sentence defendants within the applicable guideline range, it tends to be business as usual when it comes time to negotiate plea agreements. Although the guidelines are advisory, the guideline range likely will be applied to your client; thus, as in pre-Booker days, obtaining guideline concessions from the government remains a critical part of plea bargaining. But, if (as many expect) the district courts begin to flex their new-found post-*Gall* muscle and impose sentences that are less-tethered to the advisory Guidelines, it would seem likely that plea

bargaining practices will have to evolve to reflect this new sentencing reality. Stay tuned, "The Times, They [May Be] A Changing."