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SENTENCING

Two attorneys with Patterson Belknap discuss the recent case from the Second Circuit involving a substantively unreasonable sentence. While the case involved child pornography, the authors explain how defense counsel can use the arguments from the decision to rebut the fraud guidelines.

Second Circuit Vacates Child Pornography Sentence as Substantively Unreasonable and Provides a Road Map for Financial Fraud Defendants

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For the third time in the past year, the Second Circuit in *United States v. Jenkins*, No. 14-4295 (Kearse, Jacobs, Parker), has vacated as substantively unreasonable a sentence imposed under the sentencing guideline for child pornography offenses, U.S.S.G. § 2G2.2. See *United States v. Sawyer*, 15-2276 (2016); *United States v. Bennett*, 15-0024 (2016); see also *United States v. Brown*, No. 13-1706 (2016) (vacating sentence but subsequently withdrawing opinion and affirming in a 2-1 decision). The divided nature of the panel's decision reflects the complicated nature of post-Booker sentencing, as courts even more than a decade later continue to try to balance the competing goals of due regard for the Guidelines and case-specific fairness under Section 3553(a). Although *Jenkins* relates directly to the child pornography guideline, the decision has general relevance to any federal sentencing and is particularly relevant to sentencing conducted under the loss amount guideline in U.S.S.G. § 2B1.1.

Background

Jenkins was arrested by Canadian authorities for possessing child pornography while traveling from New York to Quebec to visit his parents' vacation home. After he failed to show in court, the Canadian authorities provided his electronic devices (two laptops and several thumb drives) to the United States, which successfully brought charges for possessing and transporting child pornography in violation of 18 U.S.C. § 2252A. The statutory maximum for the two offenses was 10 and 20 years, respectively. Although Jenkins's base offense

level was 22, the Probation Office recommended an increase of 13 levels based on four enhancements under the applicable guideline:

- possessing material involving a prepubescent minor;
- possessing material portraying sadistic or masochistic conduct;
- using a computer; and
- possessing 600 or more images.

The government additionally sought a two-level enhancement for obstruction of justice based on false statements that Jenkins had made at trial, resulting in an offense level of 37 and a guideline range of 210 to 262 months.

During a “stormy” sentencing hearing, Jenkins defiantly claimed that his court-appointed attorneys had all been “idiots,” that the court was without authority to sentence him, and that the judge should be removed. After rebuking Jenkins, adopting Probation’s findings, and granting the government’s requested enhancement, the district court imposed a sentence of 10 years for possession (the statutory maximum) and 225 months for transportation (just short of the 20-year maximum), citing the factors set forth in Section 3553(a) and Jenkins’s lack of respect for the law and the proceedings, which in the court’s view showed that he was very likely to reoffend. The court also imposed a 25-year term of supervised release that prohibited Jenkins from using any device with online capabilities except at his place of employment; barred him from having any direct or “indirect” contact with anyone under the age of 18 unless supervised by a person approved by his probation officer; and required him to get approval from his probation officer prior to obtaining employment, incurring any charges to credit cards, or opening a line of credit, and inform potential employers of his offense.

The Panel Decision

Writing for the court, Judge Barrington D. Parker began by reiterating the lessons of *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010). There, the court recognized that U.S.S.G. § 2G2.2 is “fundamentally different” from most other guidelines and must be applied with “great care” because it is not based on the Sentencing Commission’s expertise (but rather Congress’s direction), its four enhancements are effectively triggered for any first-time offender and result in a range near the statutory maximum, and it irrationally recommends a higher sentence than applies to adults who actually engage in sex with minors. These observations had been bolstered, the court said, by “important advances in our understanding of non-production child pornography offenses since we decided *Dorvee*.” Statistics now confirmed that the enhancements were all-but-inherent to the offense—for instance, 96 percent of defendants received the prepubescent-minor enhancement, and 95 percent received the enhancement for use of a computer. Further, the Sentencing Commission had produced a report to Congress effectively disavowing the guideline due to its failure to meaningfully account for differences in culpability. Slip op. at 13.

The concerns underlying *Dorvee* applied “with even more force here,” as Jenkins was a first-time felony of-

fender and there was no evidence that he had had any involvement in the production or distribution of child pornography or had attempted to contact a minor. *Id.* at 12. Moreover, Jenkins had “transported” pornography (carrying the much higher 20-year maximum) in only the “most narrow and technical sense” of bringing his devices with him for personal use while traveling for vacation. *Id.* at 16. Nonetheless, the district court had failed to consider any of these factors and had imposed a sentence that treated Jenkins like the most culpable violator of the statute when he was not. Among defendants convicted of transportation, 89 percent had engaged in knowing distribution to another, yet Jenkins (who had not) had received a sentence near the statutory maximum. Jenkins’s sentence was also substantially higher than the typical sentence of persons who engage in sex with a minor (137 months), produce child pornography (136 months), or possess but do not distribute pornography (52 months). *Id.* at 19–20.

The panel held that the factors cited by the district court could not bear the weight of the sentence imposed because, beyond a formulaic recitation of the Section 3553(a) factors, the court had simply relied on Jenkins’s conduct at trial and sentencing and his general lack of respect for the proceedings. The court’s frustration, while understandable, could not justify decades in prison, and its conclusion that Jenkins’s lack of respect made him more likely to reoffend was contradicted by statistics showing that recidivism substantially decreases with age; Jenkins was already 39 at the time of sentencing. The panel rejected the government’s contention that the seriousness of the offense justified the sentence because consumption of child pornography encourages the market and spurs the abuse of children. While the offense was serious, the court reasoned, the government’s point “is true of virtually every child pornography offender,” and it was the district court’s duty to account for differences in culpability and reserve sentences at or near the statutory maximum for the worst offenders. *Id.* at 18.

The terms of supervised release were also substantively unreasonable as they were not reasonably related to the nature and circumstances of the offense or Jenkins’s history and characteristics, and were not reasonably necessary to promote the purposes set forth in Section 3553(a). The 25-year term itself was “unusually harsh” and unreasonable, particularly when Jenkins would be incarcerated for nearly 19 years and would be 63 years’ old upon release. The court was also “troubled” by the specific conditions of release, which effectively prohibited Jenkins from engaging in “routine family interaction,” finding meaningful employment, or even “buying a drink on an airplane or taking an Uber ride or making a purchase on Amazon unless the transaction is pre-approved by a probation officer.” These conditions made it unlikely that Jenkins would ever “be able to pay his debt to society” or “lead anything that remotely resembles a ‘normal’ life.” *Id.* at 23. At the same time, both the conditions and length of the term of supervised release bore no apparent relation to his crime. The court accordingly vacated the sentence and remanded for resentencing, with this specific panel retaining jurisdiction over any subsequent appeal.

The Dissenting Opinion

In a short dissent, Judge Amalya L. Kearsse reasoned that the guideline range was properly calculated, and

the sentence was not substantively unreasonable given that it fell within the range and was based on Jenkins's repeated—and continuous—lack of respect for the law or acceptance of responsibility. Judge Kearse noted that, even in his pro se sentencing memorandum on appeal, Jenkins had brazenly “blamed the children depicted in the pornographic images and videos he transported,” saying that they had produced and broadcast the videos themselves “and should be prosecuted.”

Analysis of the Decision

Jenkins continues the court's practice of taking a hard look at sentences in child pornography cases and requiring district courts to consider carefully the need to avoid unwarranted disparities by imposing a term that is tailored to the culpability and circumstances of the defendant. It is notable that the majority did not dispute the district court's application of the enhancements or its calculation of the guideline range, as Judge Kearse observed in dissent; ordinarily, this leads to affirmance. Moreover, the district court's sentence, while at or near the statutory maximum for each offense, was only slightly above the bottom of the guideline range. This suggests that, in light of the foundational problems with Section 2G2.2, courts cannot rely on the fact that their sentence is within the resulting range, but rather must seriously consider whether a below-guideline sentence is necessary for less culpable offenders. The panel's reference to national sentencing statistics (which are compiled by the Sentencing Commission) and the typical sentence imposed on other offenders (ranging from 52 to 137 months) provides further guidance and may cause courts to err on the side of below-guideline sentences, particularly where the run-of-the-mill enhancements apply and trigger a substantially higher range.

The panel also seemed troubled by the idea that Jenkins received a longer sentence based on his offensive comments about the victims of the offense and the court personnel, including the judge. In his landmark book, *Criminal Sentences*, Judge Marvin Frankel memorably wrote about a judge who told his fellow jurists at lunch that he gave a defendant five years' imprisonment instead of four because the defendant “excoriate[ed] the judge, the ‘kangaroo court’ in which he'd been tried, and the legal establishment in general.” Judge Frankel dismissed the idea that the longer sentence was based on “insufficient evidence of remorse and prospects of reform” and asked the rhetorical question of whether we would “tolerate an act of Congress penalizing such an outburst by a year in prison.” The panel here appeared to be channeling this concern that a defendant's outburst—rather than his individual circumstances—may have led to a longer sentence.

In a sense, it is hard to argue with Judge Kearse's perspective. A substantive reasonableness reversal for a sentence that is within the applicable Guidelines range is uncommon, as appellate courts are required under *Gall v. United States*, 552 U.S. 38 (2007), to apply a deferential abuse-of-discretion standard of review, and the Guidelines are generally considered to be “the product of careful study based on extensive evidence.” Likewise, it is impossible to justify or countenance a statement by a defendant in a child pornography case that the children who were illegally videotaped or photographed are responsible for their own victimization.

Nonetheless, the majority was unwilling to affirm on the particular record found here; it was simply too troubled by the explanation offered in support of the sentence and what it perceived as an overly deferential stance with respect to a guideline that the Second Circuit has viewed as flawed since its decision in *Dorvee*. The panel also did not believe that the “punishment fit the crime,” even when taking into account the defendant's courtroom dramatics and his failure to accept responsibility for his action.

The Relevance of *Jenkins* To Sentencing in General

There are many aspects of this decision that will lead it to be cited repeatedly by defendants in the coming years. First, the court's analysis of the low likelihood of recidivism will be cited by older defendants. This reduced risk of recidivism has long been known to be real and it is good for the Second Circuit to have said so. Second, the court's reliance on Sentencing Commission statistics to analyze what sentences are actually being imposed reflects an openness to seeing whether the Guidelines are actually guiding anyone. If the Guidelines are not being followed, this fact should be considered by district court judges. Third, to the extent that certain guidelines—like the child pornography guideline—are not based on fact-finding but on congressional dictates, defense counsel should challenge their persuasive force. Fourth, to the extent that Guidelines enhancements are applicable in virtually all cases, such as the sophisticated means enhancement in off-shore account cases sentenced under Section 2T1.1, defense counsel should point out the foolishness of a Guidelines provision that does not draw distinctions between different categories of offenses. Fifth, the decision should be cited in appeals in which the supervised release term or conditions are imposed without apparent regard to the real world consequences to the defendant. Should a defendant be on supervised release at all when he is 85 years' old? Is it sensible to prohibit a defendant from making a purchase at Amazon.com? In short, *Jenkins* is an important sentencing decision that should have consequences well beyond the specific context of the child pornography guideline.

The Relevance of *Jenkins* To Fraud Sentencing

Counsel also should consider drawing an analogy between the child pornography guideline and the fraud guideline in Section 2B1.1. Both of these guidelines have been followed with declining frequency since *United States v. Booker*, 543 U.S. 220 (2005), made the Guidelines advisory, not mandatory. According to the *Jenkins* decision, a total of 54.6 percent of non-production child pornography offenses involve the imposition of a sentence that is below the Guidelines range. Slip op. at 19 n.6. In other words, more than half of the defendants who are sentenced for offenses like those at issue in *Jenkins* receive a below-range sentence. Likewise, the fraud guidelines also repeatedly recommend sentences that are far longer than courts are willing to impose. See, e.g., *United States v. McDonnell*, No. 3:14-cr-00012 (E.D. Va. Jan. 6, 2015) (two-year sentence imposed after Guidelines recommended more

than 10 years' imprisonment), *reversed on other grounds*, 136 S. Ct. 2355 (2016); *United States v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012) (two-year sentence imposed after district court determined a Guidelines range of six-and-a-half to eight years). In the Southern District of New York, where many of our nation's most serious fraud cases are brought, only 23.7 percent of defendants in fraud cases are sentenced within the guidelines range; almost twice as many (43.5 percent) receive downward departures based on an application of the factors in section 3553(a). See U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2016, Southern District of New York, Table 10, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/nys16.pdf>. Another 25.9 percent of defendants receive a downward departure for substantial assistance, meaning that a total of 69.4 percent of defendants are not being sentenced within the Guidelines. *Id.*

In addition, neither Guidelines provision is based on the Sentencing Commission's findings or expertise. *Jenkins* explains that the child pornography guideline is

based on Congress's decisions to ratchet up the severity of the applicable penalties and therefore is due less deference than other Guidelines provisions. Slip op. at 11. This holding is an echo of the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), which held that the crack cocaine guideline was entitled to diminished regard because it was based on congressional mandatory minimums rather than the Commission's "characteristic institutional role" and did not "take account of empirical data and national experience." *Id.* at 109. The fraud guideline, like these other guideline provisions, was ratcheted higher and higher based on congressional directives in Sarbanes-Oxley and other federal statutes, rather than the Commission's fact-finding or empirical experience. See, e.g., U.S.S.G., amend. 653 (Nov. 1, 2003).

In short, there is no need for *Jenkins* to be confined to the particular context of child pornography offenses. Whether or not the panel intended to do so, the decision has within it the seeds of arguments about the fraud guidelines that could be of use to defense counsel at sentencing.