Federal Criminal Defendants: Ask Not What Madoff Will Do to You, Ask What You Can Do under Booker

By Joshua C. Gillette Esq. – July 2009

2139. That is the year in which Bernard Madoff will be released from Butner Federal Correctional Institution, if he earns the entire 20-year, 15 percent good-time credit off his 150-year sentence. By this time, the federal sentencing landscape will have changed in ways we cannot begin to predict.

For now, though, white collar criminal defense lawyers are in the process of distilling the shorter-term implications of the recent sentencings of Madoff and Marc Dreier. Broadly speaking, these cases illustrate the convergence of recent developments that have drastically altered federal criminal practice. While Madoff and Dreier were committing their frauds, other notorious financial crimes (Enron, Worldcom, Adelphia), followed by economic collapse, sparked public desire for retribution, and for “sending a message” of deterrence to potential fraudsters, leading to increased punishments for fraud.

At the same time, the Supreme Court’s 2005 decision in *Booker* [1] reintroduced discretion to federal sentencing, enabling judges to consider factors other than the amount a defendant obtained via fraud in setting a sentence. Greater sentencing discretion, in turn, altered the dynamics of plea bargaining, which under mandatory sentencing guidelines had given prosecutors power to force harsh sentences through charging and plea decisions, with little opportunity for defense counsel to highlight individual aspects meriting mercy.

Sentences for similarly situated defendants under mandatory guidelines could be expected to cluster around certain data points. While sentencing courts post-*Booker* have wider discretion, they are still cabined by the instruction of 18 U.S.C. § 3553(a)(6) that sentencing courts “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” Thus each sentence in the post-*Booker* regime serves as a potential data point for future sentencing courts analyzing potential disparity. The possibility of enormous punishments, coupled with sentencing judges’ newly restored discretion, could make high-profile criminal cases like Madoff’s and Dreier’s all the more important as guideposts to prosecutors, defense lawyers, and judges in future cases, creating the risk that these “hard cases [will] make bad law” [2] for future, differently situated defendants.

Will the “Bernie Benchmark” Irrationally Decouple Sentence Length from Deterrence?

Madoff sentencer Judge Denny Chin himself, in testimony to the Sentencing Commission days after the Madoff sentence, said the sentence raised questions such as: “What are the goals of punishment? Did the sentence further those goals? Should helping victims heal be a goal of punishment? Is a financial crime such as securities fraud really ‘evil?’ Is there any point to a sentence of years far longer than a defendant is expected to live? Is such a sentence merely pandering to the public?” [3]

Reacting to the Madoff sentence, sentencing expert Douglas Berman predicted it would set a new "Bernie benchmark." "Before Madoff, defendants like Ebbers and Jeff Skilling and other prominent white-collar defendants who were sentenced to around 25 years often served as the functional benchmark for sentencing debates for corporate fraudsters," Berman wrote. Further, he said:

> Now, the most prominent benchmark will be Madoff and the number 150. Because there will be few other Madoffs (we all hope), I suspect that few other defendants will also get the magic number 150. But if the original Madoff got only about 15 or 20 years in this case, lots of lesser fraudsters likely would be claiming that they deserved only a few years because Madoff caused so much more harm. But now that Madoff got 150, only the prosecutors are likely to be talking about the sentencing benchmark that his case has now set. [4]

Of course, as was noted after the sentencing, Madoff's sentence was not the longest sentence ever, even for a white-collar fraud; that distinction belongs to Sholam Weiss, who got an 845-year sentence from a Florida federal judge in 2000 for racketeering, wire fraud, and money laundering in the $450 million collapse of National Heritage Life Insurance. And Berman recently pointed out drug and robbery sentences exceeding 300 years. [5] In fact, federal sentencing statistics show only a slight (five-month) uptick in the average prison sentence imposed for white collar "economic crimes"—fraud, embezzlement, tax crimes, money laundering—from 2004 to 2008, as judges began exercising discretion after *Booker* was decided in 2005. [6] But coming as it does when sentencing law is in flux, Madoff's sentence could have greater ripple effects than pre-*Booker* sentences like Weiss's.

Congress has commanded federal judges to impose prison sentences "sufficient, but not greater than necessary . . . to afford adequate deterrence to criminal conduct," among other sentencing goals. [7] The contrast between the 150-year sentence imposed on Madoff by Judge Chin, who followed the federal Sentencing Guidelines, and the 20-year sentence imposed weeks later on Dreier by Judge Jed Rakoff, who varied from the guidelines, highlights the somewhat speculative nature of the relationship between sentence length and deterrence of white collar crime. It is generally agreed that specific deterrence is rarely necessary—white collar fraudsters generally need not be incapacitated to prevent them from committing further crimes. As to general deterrence, once losses reach a certain magnitude, it is hard to see how added prison time can achieve incremental deterrence, even for a theoretical "rational" white collar criminal calibrating his theft to the prospective sentence. Once someone has stolen $20 million and becomes eligible for six to eight years in prison, will the prospect of 20, 30, or even 50 additional years cause the person to leave the next hundreds of millions in the pockets of potential victims?

While some argue such steep penalties are necessary to deter crimes like fraud, which can be difficult to detect, others (such as Dreier's counsel Gerald Shargel) argue that it is the certainty of a prison sentence rather than its duration that matters, and that the prospect of a "short but definite" sentence is enough to deter white collar crime. In the *Adelson* case, [8] Judge Rakoff varied downward from the guideline sentence of 85 months to 42 months, and decried "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." He noted the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders." [9] Indeed, the Sentencing Commission itself, in its 2004 study "Fifteen Years of Guidelines Sentencing," stated "that the Sentencing Guidelines were written, in part, to 'ensure a short but definite period of confinement for a larger proportion of these 'white collar' cases, both to ensure proportionate punishment and to achieve deterrence." [10]

Likewise, Justice Stephen Breyer, an architect of the guidelines, stated in 1988 that "the Commission believed that a short but definite period of confinement might deter future [white collar] crime more effectively than sentences with no confinement condition." [11] Dreier's sentencing memo also denounced using the loss table as a proxy for criminal culpability, arguing that doing so "is both unreasonable and counter-productive" because

> it simply cannot be a rational statement of sound public policy that the most serious aggravating factor in all of federal criminal law—by almost double the amount of the next highest enhancement—is the amount of fraud loss in a white collar case. . . . As colossal frauds capture national headlines, sentences for white collar offenders must not become disproportionately long. In many ways, the goals of sentencing as embodied in 18 U.S.C. § 3553(a) have suffered collateral damage in the war on white collar crime.

Rather than a benchmark, Madoff's 150-year sentence seems likely to be an outlier, one that counsel for other white collar fraud defendants can readily distinguish in several ways. For one thing, the scope and means of carrying out his fraud, which according to prosecutors caused more than $13 billion in loss (so far), qualified him for nearly every guideline enhancement possible: his literally off-the-charts offense level of 52 (the guidelines sentencing table tops out at 43, above which any level calls for a life sentence) was reached by increasing the base offense level of 7 with enhancements for loss of more than $400 million, more than 250 victims, part of the scheme being committed outside the United States, endangering the financial security of 100 or more individuals, committing the crimes through a registered investment adviser or broker-dealer, and being an organizer or leader (with a modest reduction for pleading guilty). The government itself pointed out in its sentencing memo that Madoff's conduct was sui generis, in language that could prove useful to future defendants fighting any "Bernie benchmark":

> Any comparison of Madoff's case to recent, long-lasting and substantial fraud cases prosecuted in this District—for example, Bernard Ebbers (WorldCom; 25 years), John and Timothy Rigas (Adelphia; 12 and 17 years, respectively, on re-sentencing), Phillip Bennett (Refco; 16 years), and Samuel Israel (Bayou; 20 years)—simply underscores the enormity of the harm caused by defendant's conduct, the scope and complexity of his schemes, and the duration of his fraud. While the above-cited defendants engaged in egregious conduct meriting severe punishment, Madoff's conduct is unique in its scope and duration. His fraud was perpetrated month-by-month and year-by-year, at his own choosing and under his direction, for decades, and involved billions and billions of dollars in investor losses.

Two weeks later, however, the government no longer portrayed Madoff as so unique, invoking Madoff's sentence to argue that Dreier, at a level 44 with losses in the millions rather than billions, should receive a 145-year sentence, only five years shorter than Madoff's.

Notably, while Madoff's scheme spanned from as early as the 1980s until December 2008 when he turned himself in, its last six years were especially costly to him in sentencing terms, because of increases in white collar fraud sentences effected by the Sarbanes-Oxley Act of 2002. [12] Had Madoff been sentenced before these enhancements, assuming the same guideline calculation and more than $400 million in loss, his offense level would have been 40, which would have yielded a guideline range of 24 to 30 years—still likely a life sentence at his age, but only one-fifth of the sentence he received.

Another distinction from many other white collar cases is that Madoff's numerous victims provided vivid and wrenching victim impact statements, which is not always the case. Further, Madoff did not provide, and so did not receive sentencing credit for, cooperation in identifying others who may have been involved in the fraud, and the trustee seeking to identify his assets wrote to Judge Chin that Madoff had "not provided meaningful cooperation or assistance to the Trustee since his arrest." It remains possible Madoff would do so in exchange for post-sentencing reduction under Fed. R. Crim P. 35(b), although it's unclear whether any cooperation he might offer could reduce the sentence below an effective life sentence. Finally, Madoff provided not a single letter of support at sentencing, in contrast to volumes of letters that white collar defendants often provide, a lapse that Judge Chin noted played a significant part in his sentencing decision.

It is interesting to note that Madoff pled "open", that is, without a plea agreement in which the government agreed to a lower sentence in exchange for his plea. The tactical reason that defendants plead "open" is to preserve the freedom to try to persuade the sentencing judge that a lenient sentence is warranted by all of the sentencing factors in 18 U.S.C. § 3553(a)—especially the nature and circumstances of the offense, and the history and characteristics of the defendant—rather than bargain away that freedom in a plea agreement binding the defendant to accept a guidelines sentence and not make such § 3553(a) arguments. Madoff pled "open", but failed to offer much mitigation evidence—perhaps because little was available, or because adducing character evidence based on his personal and family life would invite government scrutiny of those he seemed determined to shield at all costs.

Perhaps Madoff's only hope for early release is the thus-far unsuccessful efforts of those opposed to "warehousing" of federal prisoners to provide second chances, either by restoring parole in the federal system (which was abolished as of November 1, 1987 by the act creating the federal sentencing guidelines) or increasing the sentence credit for good behavior and prison work. But such hopes are slim, and would do little for those with Madoff-length sentences. For example, one bill before Congress (though with little prospect of passage), the Federal Prison Work Incentive Act of 2009 (H.R. 1475), would enable federal prisoners serving sentences other than life to receive more time off for good behavior and work. But even under that bill, which would allow 10 days' credit for each month of any sentence exceeding 10 years, Madoff could only lower his 150-year sentence to 100 years.

Will White Collar Defendants with Huge Exposure Still Plead Guilty after Madoff?
After Madoff's sentence, some white collar practitioners highlighted the potential impact on plea bargaining in high-profile cases, noting that Madoff could not possibly have done any worse by making the government prove his fraud—and the loss amount that drove sentencing—beyond a reasonable doubt at a trial. The attorneys contended that he gained nothing by turning himself in, confessing, and entering an "open" plea.

Madoff's case seems more a one-off than a game-changer. While Madoff (and Dreier) got little credit for pleading guilty—the three-point maximum reduction provided for by the guidelines still left each at an extremely high offense level—the reality is that in cases involving such huge theft from multiple victims, it is the ability to avoid a highly public trial, at which the misdeeds of the defendant, and possibly family accomplices, would be aired with very little likelihood of acquittal, that provides ample inducement to plead guilty. Each defendant is different, however, and those going forward with a more compelling personal story may either bargain harder for a plea agreement that limits exposure to prison, or plead "open" and tell their story to the sentencing judge. Such defendants are no doubt placing their futures in the hands of these judges, and can only hope that they keep in mind the Supreme Court's recent reminder that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." [13]

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Joshua C. Gillette practices in the criminal defense department at Gibbons, P.C. in Newark, New Jersey.

End Notes

1. United States v. Booker, 543 U.S. 220 (2005).
2. N. Sec. Co. v United States, 193 US 197, 400 (1904) (Holmes, J., dissenting).
3. www.ussc.gov/AGENDAS/20090709/Chin_testimony.pdf
4. http://sentencing.typepad.com/sentencing_law_and_policy/2009/06/a-new-whitecollar-benchmark-the-main-reason-the-number-150-matters-in-madoff.html
5. http://sentencing.typepad.com/sentencing_law_and_policy/2009/07/a-couple-new-federal-sentences-making-madoffs-sentence-seem-short.html
6. *See* www.ussc.gov/ANNRPT/2008/fige.pdf.
7. 18 U.S.C. § 3553(a)(2)(B).
8. United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006), *aff'd*, 301 Fed. Appx. 93, at ** 1 (2d Cir. Dec. 9, 2008).
9. *Id.* at 514.
10. *Id.* at 56 (emphasis in original).
11. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 22 (1988).
12. Pursuant to Sarbanes-Oxley, the commission increased the Sentencing Guidelines loss table and added other enhancements to "punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen" and "address congressional concern regarding particularly extensive and serious [corporate] fraud offenses." USSG. App. C, amend. 647. The 2002 amendment increased the loss table, which had topped out at a 26-level enhancement for more than $100 million, to a 30-level enhancement for loss of more than $400 million. It also added 2 levels for more than 250 victims (previously the maximum was 4 levels for more than 50 victims), and added 2 levels for endangering the financial security of 100 or more individual victims. A 2003 amendment (USSG. App. C, amend. 653) added a 4-level increase for committing the crime through a registered investment adviser or broker-dealer.
13. Gall v. United States, 128 S. Ct. 586, 594–95 (2007) (citing Koon v. United States, 518 U.S. 81, 113 (1996)).
