Statutory Maximum/Minimum Sentences and Application of Offense Levels

Caroline Rule - November 28, 2017

Most federal district court judges are accustomed—even in this age of "advisory" U.S. Sentencing Guidelines (Guidelines or U.S.S.G.)—to sentencing a criminal defendant by first calculating the applicable "Offense Level," which provides for a range of months of imprisonment, in the "Sentencing Table" of the Guidelines. It is then second nature for many judges to grant departures and/or variances from that initial Offense Level by calculating a specified number of levels downward or upward and then sentencing the defendant within the range of months corresponding to the resulting Offense Level.

But when a statutory maximum or mandatory minimum sentence conflicts with the otherwise applicable Offense Level—and, obviously, the statute controls—most judges, at least on the surface, completely abandon their usual method of sentencing and grant departures and/or variances by a seemingly arbitrary number of months, with no overt reference to departing or varying by any number of Offense Levels.

With judges so habituated to perceiving their sentencing decisions in terms of Offense Levels, however, they may in fact be following their usual sentencing practice, albeit perhaps subliminally, by assigning to a determinate maximum or minimum sentence a corresponding Offense Level and calculating downward or upward by a specific number of levels, as usual, even though they ultimately announce the result as a departure or variance by a number of months.

The problem with this sub rosa reference to an Offense Level is that a statutory maximum or mandatory minimum sentence may fall into a number of different Offense Levels. For example, a statutory maximum sentence of 24 months could fall within one of threepossible Offense Levels: Level 15, 18–24 months; Level 16, 21–27 months; or Level 17, 24–30 months.

News & Analysis

- Practice Points
- Articles
- Audio
- Programs & Materials
- About
- Announcements

Newsletter

» Fall 2017

Read More Criminal Litigation Newsletters

Section Publishing

Section of Litigation Publications

Section of Litigation Books

CLE & Events

Jan. 11 — Effective Cross-Examination: Case Studies from Recent Trials — Web

Jan. 18-20 — 2018 Section of Litigation Winter Leadership Meeting (Invitation Only) — In-Person

The Guidelines themselves are of no help. They simply provide that a statutory maximum or mandatory minimum sentence itself becomes "the guideline sentence" if it conflicts with the otherwise applicable Offense Level. U.S.S.G. § 5G1.1. The Guidelines nowhere mention a corresponding Offense Level in the Sentencing Table. Obviously, however, if a judge follows, consciously or not, a deep-rooted habit of starting a sentencing decision with a particular Guidelines Offense Level, there will be a very different result depending on whether the judge decides to apply the *highest* or the *lowest* possible Offense Level that corresponds with the statutory maximum or mandatory minimum sentence.

Offense Levels: An Overview

Since *United States v. Booker*, 543 U.S. 220, 245–46 (2005), a sentence calculated according to the Guidelines is, of course, merely advisory, not mandatory. Nevertheless, a sentencing court must still consider the Guidelines Offense Level that applies to a defendant; then rule on any defense and/or government motions for a downward departure, or any government motion for an upward departure; and then apply all of the factors that bear on sentencing under 18 U.S.C. section 3553(a) and/or Federal Rule of Criminal Procedure 32 to determine whether to vary from the Guidelines. *See, e.g.*, *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (en banc); *see also Rita v. United States*, 551 U.S. 338, 351 (2007).

District courts routinely refer to sentences in relation to the applicable Guidelines Offense Level, with that level's concomitant range-of-months imprisonment, and routinely calculate departures and variances by numbers of levels. *See, e.g.*, *United States v. Hayes*, 5 F.3d 292, 294 (7th Cir. 1993) (referring to district court's two-level downward departure); *United States v. Shimp*, 353 F. App'x 740, 742 (3d Cir. 2009) (referring to district court's six-level downward departure); *United States v. Jones*, 233 F. Supp. 2d 1067, 1075 (E.D. Wis. 2002) (departing downward by two levels). Hundreds or more cases referring to departures and/or variances by numbers of levels could be cited here.

Maximum/Minimum Sentences Trump Offense Levels

Statutory maximum or mandatory minimum sentences often fall way outside the Guidelines Offense Level that would otherwise apply. As noted, U.S.S.G. section 5G.1.1 purports to solve this problem. Subsection 5G1.1(a) provides that "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence." Mirroring this, subsection 5G1.1(b) provides that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."

Jan. 18 Web **Intellectual Property Considerations in Venture Capital Financing Transactions**

More Section Events

Committee Leadership

Cochairs
Sunil Harjani
Emily Crandall Harlan
Geeta Malhotra

Newsletter Editors
Farrah Champagne
Tara Sidney

Web Editor
Andrea Halverson

Committee Membership

Membership Roster

How-to Guide: Sorting Committee Membership Roster by Geography

Follow the Section!

In the rare case where the statutory maximum or mandatory minimum sentence does fall within the applicable Guidelines Offense Level, the judge may not impose a sentence above the statutory maximum or below the mandatory minimum sentence (without departing), within that Offense Level's range. For example, "[i]f the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51–60 months. . . ." Commentary; *see also* Guidelines § 5G1.1(c).

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010), illustrates how statutory maximum and mandatory minimum sentences trump Offense Levels. In that case, the Offense Level was 39, or 262–327 months in prison. The statutory maximum sentence, however, was 240 months. The district court sentenced the defendant to 233 months' imprisonment, below the statutory maximum, but repeatedly stated during sentencing that the "guideline imprisonment range is 262 to 327 months." *Id.* at 181. The Second Circuit held that the district court committed plain error because it "continued to treat 262 to 327 months as though it were the benchmark for any variance" even though the statutory maximum sentence was 240 months. *Id.*; *see also United States v. Shaw*, 313 F.3d 219, 223 (4th Cir. 2002) (where Offense Level was 360–life but the statutory maximum was 240 months, the court "agree[d] with [the defendant] that 240 months was the applicable guideline sentencing range by operation of § 5G1.1(a), and that, as a result, 240 months should have served as the starting point for any downward departure the district court exercised its discretion to grant"); *United States v. Murphy*, 591 F. App'x 377, 381 (6th Cir. 2014) (a district court must "use[] the statutory maximum sentence as the benchmark for a downward departure").

Cryptic Application of Offense Levels to Maximum/Minimum Sentences

From personal observation, and from review of the case law, where a statutory maximum or mandatory minimum "guideline sentence" applies under U.S.S.G section 5G1.1, most courts simply mention that "guideline sentence" and announce a departure and/or variance by a number of months, without overtly assigning any Offense Level from which they calculate their departure and/or variance. This is so even when those very same courts otherwise routinely calculate departures and/or variances by starting with the applicable Guidelines Offense Level and then departing and/or varying downward or upward by a specified number of Offense Levels.

Under U.S.S.G. section 5G1.1(a), if a criminal statute provides for a maximum sentence of, say, 24 months in a case where the Guidelines Offense Level would otherwise be Level 20, or 33–41 months imprisonment, 24 months' imprisonment itself becomes the "guideline sentence." But where does that "guideline sentence" fit into the Sentencing Table of Offense Levels to which judges are

so accustomed to refer? As noted, 24 months could fall into Offense Level 15, Offense Level 16, or Offense Level 17. A judge who habitually thinks of sentences, departures, and variances in terms of Offense Levels will view a defendant who falls into Level 15 very differently from a defendant who falls into Level 17, even though the maximum possible sentence for both defendants under the statutory maximum is 24 months; and the Offense Level into which a judge decides to slot this statutory maximum sentence (again, a judge may do so only subconsciously) will surely make a significant difference to the outcome.

For example, picture a case where the statutory maximum sentence is 24 months; the Guidelines Offense Level is well over 24 months; the government makes a motion for a downward departure under Guidelines section 5K1.1, in recognition of the defendant's substantial assistance; and the judge determines (consciously or subconsciously) that the defendant's cooperation warrants a six-level downward departure. By starting with the 24-month "guideline sentence" under Guidelines section 5G1.1(a) and departing downward by six levels, the judge could arrive at Level 9, 4–10 months, if he began at Level 15; Level 10, 6–12 months, if he began at Level 16; or Level 11, 8–14 months, if he began at Level 17. The defendant, therefore, could face anything from four to 14 months' imprisonment, depending on what Offense Level the sentencing judge determined should originally apply. If the judge then decided to grant a further two-level variance, Level 9 (two levels down from Level 11) would leave the defendant in Zone B of the Sentencing Table (where probation is permitted but only with intermittent confinement, community confinement, or home detention); whereas Level 7 (two levels down from Level 9) would take the defendant into Zone A (where probation alone is a permissible sentence).

The judicial practice of seeming to pay no attention to an Offense Level that corresponds to a statutory maximum or mandatory minimum sentence, while likely in fact consciously or subconsciously referring to such an Offense Level, leaves a defendant in even greater limbo than the usual federal defendant facing sentencing. It also stymies defense counsel (and maybe prosecutors), who might otherwise point out to a sentencing judge that he departed by a certain number of Offense Levels in a similar case; cite cases where other courts departed by a given number of Offense Levels; and/or cite cases where a district court's decision to so depart was affirmed on appeal.

Starting Departure Point: Highest or Lowest Offense Level?

So, where into the Sentencing Table should the judge slot a statutory maximum or mandatory minimum sentence? Two courts—the Seventh Circuit and the Eastern District of Wisconsin (which is in the Seventh Circuit)—have specifically addressed this issue and determined (correctly, I believe) that a sentencing court should start its deliberations at the lowest Guidelines Offense Level

that corresponds to statutory maximum or mandatory minimum sentence and calculate any departure and/or variance from there.

Courts are often inclined toward the high end. Sentencing courts often instinctually begin their sentencing calculation at the highest possible applicable Offense Level. This tendency is illustrated by cases where courts tried to do just that, even though a lower statutory maximum "guideline sentence" applied under U.S.S.G. section 51.1(a). These cases were properly reversed.

For example, in *United States v. Shimp*, 353 F. App'x 740, 742 (3d Cir. 2009), the Guidelines Offense Level would have been 87–108 months' imprisonment but for a statutory maximum sentence of 60 months. The Third Circuit discussed how the district court granted the government's motion for a downward departure under Guidelines section 5K1.1: according to the Third Circuit, the district court properly calculated a five-level downward departure (to Offense Level 20, 33–41 months) that it deemed appropriate, by starting from the Guidelines Offense Level that corresponded to 60 months. (The Third Circuit stated that the district court had departed by six Levels but this is obviously mathematically incorrect; six Levels above Level 20—Level 26—provides for a sentence of 63–78 months, greater than the statutory maximum.)

But *Shimp* exactly illustrates the problem with Guidelines section 5G1.1 and these cases. Five Offense Levels above Level 20 (the level to which the *Shimp* court departed) is Level 25, 57–71 months, into which 60 months does indeed fall. But 60 months also falls into Level 24, 51–63 months. Five Levels down from Level 24 is Level 19, which corresponds to 30–37 months in prison, meaningfully less than the 33–41 months at which the district court arrived in *Shimp*—after obviously choosing, without discussion, to slot the 60 months' statutory maximum sentence into the highest possible Offense Level that could apply.

Courts endorse lowest Offense Level. The Seventh Circuit has specifically addressed into which of various possible Guidelines Offense Levels a determinate sentence should fall, but only in connection with mandatory minimum sentences. In *United States v. Hayes*, the court affirmed the district court's decision, where a mandatory minimum sentence was five years, to determine the extent of a two-level downward departure by "starting with *the lowest offense level consistent with a 60-month*sentence." 5 F.3d 292, 294 (7th Cir. 1993); *see also United States v. Thomas*, 930 F.2d 526, 531 (7th Cir. 1991) (likewise choosing "the lowest possible offense level for which a ten-year [mandatory minimum] sentence may be imposed" as

the base offense level from which the district court should determine a departure); *United States v. Washington*, 293 F. Supp. 2d 930, 935, n.3 (E.D. Wis. 2003) (Adelman, J.) ("Because the mandatory minimum sentence fell within the guideline range, I simply departed [downward eight levels under U.S.S.G. section 5K1.1] from the offense level specified by the guidelines" (citing *Hayes*).).

More recently, Judge Lynn Adelman of the Eastern District of Wisconsin applied the method of sentencing that this article believes is the fairest in cases where there is a statutory maximum or mandatory minimum sentence, i.e., first applying the lowest possible Guidelines Offense Level into which the statutory sentence could fit and then departing by a specific number of Offense Levels. In *United States v. Jones*, 233 F. Supp. 2d 1067 (E.D. Wis. 2002), which involved a statutory maximum sentence, he wrote thus:

> Having determined that a departure is appropriate, the next question is from where on the sentencing table do I depart. . . .
>
> I have found no case addressing the present situation. . . . [But], following the logic of *Hayes* [a mandatory minimum case], I depart [down two levels] from the lowest range that would support the statutory maximum sentence.

Id. at 1075.

To avoid the potential for a court consciously or subconsciously to start its deliberations at the highest possible corresponding Guidelines Offense Level, it may be helpful for defense counsel to suggest this lowest-possible-level method of sentencing to a court where there is a statutory maximum or mandatory minimum sentence.

Conclusion

Given federal district judges' sentencing habits—an ingrained practice of calculating an applicable Guidelines Offense Level and then determining any departure and/or variance from that initial Offense Level upward or downward by a specific number of levels—Guidelines section 5G1.1 should be amended to specify that a statutory maximum or mandatory minimum sentence must be treated as falling within the lowest possible corresponding Offense Level. In any event, counsel—citing *Hayes*, *Thomas*, and *Jones*—should consider suggesting this method of sentencing to a judge.

Caroline Rule is a partner at Kostelanetz & Fink, LLP, in New York, New York and Washington, D.C.

Copyright © 2017, American Bar Association. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. The views expressed in this article are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).