Fighting for Downward Sentencing Variances for 'White Collar' Defendants: Useful Post-*Booker* and Post-*Gall* Trends

Today's white collar criminal defense attorney will appear with clients before a sentencing judge that, for better or for worse, has more substantive discretion than she did before the Supreme Court's decisions in *United States v. Booker*[1] and *Gall v. United States*.[2] Since these landmark rulings, much has been written about the danger that the "new sentencing regime" is leading to sentencing disparities and inequities that, as one circuit court judge recently complained, "can be explained by little more than the identities of the sentencing judges."[3] Notwithstanding the need for meaningful reform of draconian Sentencing Guidelines, defense counsel is constrained to work within the existing system to obtain the best sentence possible for the client.

This article highlights a number of successful, post-*Booker* arguments that have been used to obtain below-Guidelines sentences for white collar criminal defendants, and that have withstood appellate scrutiny post-*Gall*. Although these arguments are of particular utility to the white collar practitioner, they also highlight sentencing factors that could apply to a much broader range of defendants.

Downward Variances Based on Section 3553(a) Analysis

Perhaps the most significant sentencing trend to emerge post-*Booker* is that judges have been increasingly receptive to imposing below-Guidelines sentences that are based on a subjective analysis of the factors set forth in the Sentencing Reform Act at 18 U.S.C. § 3553 (known as a "downward variance"),[4] and which are not based on the traditional and narrowly prescribed downward departure options under the Guidelines. Judges now may base a below-Guidelines sentence on a § 3553(a) analysis of such subjective factors as a defendant's health, employment history, and lack of prior criminal record — despite the fact that the Guidelines "discourage" consideration of many of these factors.

More than one commentator has suggested that this post-*Booker* trend away from slavish adherence to the Guidelines could or should result in white collar defendants receiving "lighter" sentences than they did pre-*Booker*, both because the Guidelines are perceived as providing overly harsh sentences for "corporate" criminals and because white collar defendants are particularly situated to take advantage of subjective factors such as community service and a strong employment history.[5] Indeed, the most recent federal sentencing data released by the U.S. Sentencing Commission indicates that since *Booker* was decided in 2005, there has been a slow but meaningful increase in the total percentage of below-Guidelines sentencing variances for all criminal defen-

BY MATTHEW NEWCOMER

dants, including white collar defendants.[6] The remainder of this article will focus on the factors and arguments that sentencing judges have relied on, post-*Booker* and post-*Gall*, to justify below-Guidelines sentencing variances for white collar criminal defendants.

Charitable Works

A white collar defendant's record of charitable works can be a powerful § 3553(a) factor supporting a downward variance, even if the works were performed post-indictment, and even when the works are not particularly "exceptional." Two recent post-*Gall* circuit court opinions are instructive on these points — *United States v. Tomko*[7] and *United States v. Thurston.*[8]

1. Tomko: Post-Indictment Charitable Works

Bill Tomko pleaded guilty to one count of tax evasion[9] for using his construction business to avoid paying over $200,000 of taxes on the construction of his multimillion dollar home. The Guidelines range for his offense was 12 to 18 months' imprisonment, but the district court granted him a downward variance and sentenced him to one year of home confinement (in his new mansion, no less), plus probation and a large fine. One of the principal factors cited in the district court's § 3553(a) analysis was Tomko's "involvement in exceptional charitable work and community activity."[10]

The record showed that the sentencing court had received several dozen letters explaining Tomko's pre-indictment charitable acts that involved donating his money as well as his personal time. Defense counsel put on evidence that Tomko helped numerous needy families during the holiday season, participated in a holiday gift drive for several years, and helped a woman who lost her husband and was left to raise four small children. Defense counsel also put on testimony that, post-indictment, Tomko devoted significant time and money to a local Habitat for Humanity, and was personally involved in the construction and rehabilitation of several houses.[11]

In affirming Tomko's sentence on appeal, the Third Circuit devoted several paragraphs of its opinion to recounting Tomko's charitable acts, confirming that the district court's reliance on these facts was both "logical and consistent with the factors set forth in § 3553(a)."[12] The Third Circuit acknowledged the possibility that Tomko's post-indictment charitable works were less than sincere. However, on this point, the *Gall*-mandated "abuse of discretion" standard of appellate review required the circuit court to defer to the sentencing judge — who was "on the ground and [could] better separate sincerity from self-seeking."[13]

2. Thurston: 'Non-Exceptional' Charitable Works

William Thurston was the vice president of a clinical laboratory and was convicted by a jury of conspiracy to defraud Medicare of over five million dollars. Thurston's Guidelines range was capped by a 60-month statutory maximum, but the district court (pre-*Booker*) granted a downward departure based on the Guidelines and sentenced him to three months' incarceration and 24 months' supervised release.

The judge cited only two factors to justify the *downward departure* — one of which[14] was Thurston's "exceptional" good works.[15] Factually, the record showed that Thurston was a member of a church, tithed 10 percent of his income, and devoted time every week to unpaid service with the church in a variety of positions. He was also helpful to his neighbors and at times had temporarily taken extended family members and others into his home.[16]

The First Circuit originally vacated the sentence (pre-*Booker*) after concluding that Thurston's good works, viewed objectively, were not "exceptional" enough to justify a downward departure, especially because "good works" was a discouraged basis for a departure under the Guidelines.[17] After the Supreme Court vacated and remanded the First Circuit's decision following *Booker*, a different district court judge applied a § 3553(a) analysis to these facts and imposed the same three-month sentence, again based in large part on Thurston's good works. This time, however, the judge based its below-Guidelines sentence entirely on a downward variance under § 3553(a), instead of on a downward departure under the Guidelines.

On appeal for a second time, the First Circuit conceded that Thurston's good works — whether they were "exceptional" or not — could now justify a "somewhat shorter" sentence based on an analysis of the § 3553(a) factors.[18] Nevertheless, it still vacated the sentence after finding that this analysis did not support the district court's steep downward variance, and remanded to the district court with instructions to impose a sentence of no less than 36 months' imprisonment.[19]

The First Circuit's decision was reversed and remanded yet again, following the Supreme Court's ruling in *Gall*. Addressing Thurston's below-Guidelines sentence for a third time, the First Circuit delivered a concise opinion that held, somewhat begrudgingly, that post-*Booker* and post-*Gall* it was constrained to find that the record in Thurston's case — including his good works — adequately supported the district court's "dramatic" downward variance.[20]

Thurston and *Tomko* provide two valuable lessons concerning the use of good or charitable works as a § 3553(a) factor justifying a downward sentencing variance: (1) charitable work need not be "exceptional" to support a downward variance; and (2) even post-indictment charitable work can support a downward variance.[21]

Remorse at Sentencing

The Third Circuit, in *United States v. Howe*,[22] recently upheld a below-Guidelines sentence where the sentencing court's § 3553(a) analysis factored in the defendant's remorse at sentencing. As set forth below, practitioners should note that a defendant's remorse need not be "exceptional" to support a downward variance. Furthermore, the fact a defendant maintains his innocence at trial does not preclude the court from considering his post-conviction remorse as a factor supporting a below-Guidelines sentence.

Malcolm Howe was convicted by a jury of two counts of wire fraud for submitting bills to the U.S. Air Force for $152,850 worth of military encryption modules that were never delivered. According to the court, Howe subsequently engaged in a "sustained effort" to obstruct the ensuing Air Force investigation and to "hide his crimes," and then steadfastly maintained his innocence throughout his jury trial.[23] Following his conviction, Howe made a statement during his sentencing hearing that the district court found "showed genuine remorse," notwithstanding the fact that up to that point he had fought the charges tooth and nail. The court specifically cited to Howe's remorse as a § 3553(a) factor justifying a downward variance, and sentenced him to two years' probation despite a Guidelines range of 18 to 24 months' imprisonment. [24]

On appeal, the government took the position that because Howe "went to trial, … denied the element of intent to defraud … and sought, though counsel, to blame an uncharged third party," the district court's finding of remorse was

factually erroneous, rendering Howe's sentence procedurally defective under *Gall*.[25] The Third Circuit disagreed, ruling that Howe's defense strategy at trial "has nothing to do with" the district court's finding of remorse.[26]

Next, the government argued that a defendant's remorse can *never* properly support a § 3553(a) downward variance because it reflects a characteristic that most white collar defendants exhibit at sentencing. The Third Circuit disagreed, citing a string of federal decisions where the record showed a convicted white collar defendant who exhibited little or no remorse at sentencing.[27] In light of this precedent, the Third Circuit held that a white collar defendant's remorse at sentencing can be a § 3553(a) factor that "may distinguish him from the universe of white collar offenders." Citing *Gall,*[28] the court went on to note that a defendant's remorse does not have to be extraordinary to qualify for consideration as a § 3553(a) factor.

The government also argued that Howe's sentence was substantively unreasonable because the district court "was inconsistent in not granting a downward departure based on acceptance of responsibility, yet granting a downward variance in part because of Howe's remorse."[29] The Third Circuit disagreed, concluding that a defendant's degree of remorse at sentencing may be considered as a basis for a downward variance regardless of whether the defendant had previously accepted responsibility.

With *Howe* as precedent, defense counsel can comfortably argue that a white collar defendant's remorse at sentencing — extraordinary or otherwise — should be taken into consideration in the court's § 3553(a) analysis. Importantly, the fact that a defendant exercised his constitutional right to a jury trial does not preclude the court from later considering the defendant's remorse as a factor warranting a below-Guidelines sentence.

Employment Factors

1. Impact of Incarceration on Defendant's Employees

In granting Bill Tomko a downward variance to a sentence of probation, as discussed above, the sentencing judge was also persuaded by the argument that Tomko's incarceration could have a detrimental impact on his company's "innocent" employees. The record demonstrated that Tomko owned a construction company that employed over 300 people. At sentencing, Tomko's attorneys introduced testimony from the company's chief financial officer that if Tomko went to jail his company would be "in danger" of losing its line of credit, which in turn would put the company in "dire straits financially and the jobs of its 300-plus employees would be threatened."[30] The Third Circuit found the district court's reliance on this fact was "logical and consistent" with a § 3553(a) analysis.[31]

Given the current economic recession and its accompanying high rate of unemployment, this type of employee-focused argument may achieve heightened resonance with a sentencing judge. Thus, where appropriate, counsel should be prepared to present evidence at sentencing to highlight any negative effects that the defendant's incarceration may have on the defendant's "innocent" employees or on the community at large.

2. Military Service

In *Howe*, discussed above, the district court based its downward variance in part on the defendant's 20-year employment history with the Air Force. The Third Circuit rejected the government's argument that Howe's military service did not "meaningfully distinguish" him from other white collar defendants, and held that it would not disturb a sentencing court's reliance on military service — exceptional or otherwise — as a § 3553(a) factor justifying a downward variance.[32] Again, the court noted that "the argument that any military service must be 'exceptional' is not suitable to our review of a district court's analysis under § 3553(a)."[33]

Based on this precedent, defense counsel should not hesitate to put a client's positive military history on the record at sentencing and argue that this military service is a factor justifying a downward departure.

3. Otherwise 'Strong' History Of Employment

In *United States v. Ruff,*[34] the Ninth Circuit upheld Kevin Lee Ruff's below-Guidelines sentence that was based in part on the (somewhat ambiguous) factor of his "history of strong employment." Ruff had abused his authority as the Materials Supervisor at a hospital to steal $644,866 of medical equipment, which he then auctioned off on eBay. Ruff pleaded guilty to several counts of health care fraud, embezzlement and money laundering, which convictions resulted in a Guidelines range of 30 to 37 months. The district court granted Ruff a downward variance and sentenced him to only one day of incarceration and three years' supervised release, with one year of the "release" to be spent at a residential detention facility, which allowed him to continue working. The Ninth Circuit upheld a challenge to the substantive reasonableness of the judge's § 3553(a) analysis, which relied in part on Ruff's "history of strong employment" prior to the offending conduct.[35]

Ruff and *Tomko* are significant because in both cases the defendants committed their illegal conduct in the course of their employment, and in both cases this fact did not preclude the judges from relying on "strong" employment history as a factor justifying a below-Guidelines sentence. Thus, a defense attorney whose client possesses a strong record of employment prior to the offending conduct should not be deterred from making this argument at sentencing merely because the offending conduct was employment-related.

4. Non-Prison Sentences

Post-*Gall*, some appellate courts are giving district courts leeway to impose downward variances that result in below-Guidelines, non-prison sentences for white collar defendants with strong employment histories. The white collar defendants in *Tomko*, *Ruff,* and *Howe* all obtained downward variances resulting in non-prison sentences, which allowed all three men to continue employment while serving their sentences. The strong employment history of each of these defendants was a factor that all three sentencing judges found persuasive in imposing non-prison sentences. Each of the judges in these cases also cited the defendant's low risk of recidivism as part of the § 3553(a) analysis. On appeal, the circuit courts not only concluded that these sentences were substantively reasonable, but also affirmatively attacked the government's attempt to paint the sentences as unfairly lenient.

For example, the Ninth Circuit rejected the government's argument on appeal that Ruff's custodial sentence was a substantively unreasonable "slap on the wrist." The court found that this characterization "directly flout[s] the Supreme Court's instruction [in *Gall*] that courts should not quantify variances from the Guidelines as a certain percentage of the maximum, minimum, or median prison sentences recommended by the Guidelines because this gives no weight to the substantial restriction of freedom involved in a term of supervised release or probation."[36] The court also noted that Ruff's subsequent probation "is also subject to

several special conditions that drastically curtail his financial autonomy."[37]

Similarly, the Third Circuit dismissed the government's argument that Tomko's sentence of probation was a "100 percent variance" as being "misleading" because his sentence was only 12 months below the low end of the Guidelines range, and because "deviations from the Guidelines range will always appear more extreme — in percentage terms — when the range itself is low."[38]

The Third Circuit also rejected the government's "gilded cage" argument that Tomko's confinement to his multimillion dollar home was substantively unreasonable on its face, given that he partially funded the home with illegal tax proceeds. The Court refused to "second guess" the sentencing court's "fact-bound" determination that home confinement was appropriate for Tomko, noting that "[e]ven the Guidelines leave [the determination of the location of home confinement] to the sound discretion of the sentencing court."[39]

These decisions are valuable precedent for the white collar defense attorney advocating for a non-prison sentence for his client, especially where there is credible evidence of a strong work history and low risk of recidivism, and where the recommended Guidelines range is relatively low (Tomko, Ruff, and Howe all had maximum Guideline ranges of three years' imprisonment or less). Where appropriate, defense attorneys should argue that U.S. Supreme Court and circuit court precedent has rejected the notion that non-prison sentences are inherently "lenient," and in fact these sentences can be significantly oppressive in their own right. Finally, to combat the government's frequent practice of quantifying a downward variance as a "percentage" of the recommended Guidelines range, counsel should not hesitate to point out that, post-*Gall*, this type of fuzzy math has been frowned upon as "misleading."

Defending the 'Deterrence' Argument

When attacking defense counsel's arguments for a downward sentencing variance, one of the sharpest arrows in the government's quiver is its argument that a lesser sentence will fail to "afford adequate deterrence" under Section 3553(a)(2)(B).[40] Yet several recent sentencing decisions in the white collar arena provide tools to take the edge off of the government's deterrence argument. Chief among these is the argument that for white collar defendants, *any* sentence of incarceration — however short — has a significant deterrent effect.[41]

1. Any Term of Imprisonment Deters the White Collar Criminal

United States v. Adelson[42] involved Richard Adelson, the Chief Operating Officer of a publicly traded company specializing in cancer diagnosis testing, who was convicted by a jury of conspiracy, securities fraud, and filing false reports with the U.S. Securities and Exchange Commission. Adelson was not the architect of the conspiracy (which involved overstating the company's financial performance), but upon learning of his subordinate's misconduct he joined the conspiracy and took steps to conceal it.

The district court calculated Adelson's Guidelines offense level to be 46 (primarily due to the large monetary loss involved), which equated to a life sentence capped only by an 85-year statutory maximum. In a colorful opinion lamenting the "utter travesty of justice that sometimes results from the Guidelines' fetish with abstract arithmetic," the court granted Adelson a downward variance and sentenced him to 42 months' imprisonment, plus $50 million in restitution and an immediate forfeiture of $1.2 million.[43]

In justifying this massive downward variance in light of the government's deterrence objection, the district court explained that "there is considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."[44] The court cited several law journal articles for this proposition, as well as the Sentencing Commission's statement that the Guidelines were written in part to ensure a "short but definite" period of confinement for white collar defendants.[45]

The court also noted that Adelson's sentence of three-and-a-half years was not short "in any practical sense," and in any event was considerably longer than the sentence imposed "on such high visibility 'white collar' offenders as Martha Stewart."[46] The court also pointed out that the government had not "presented any evidence or cited to any studies indicating that a sentence of more than three-and-a-half years was necessary to achieve the retributive and general deterrence objectives applicable to a case like this one."[47] The Second Circuit affirmed on appeal, holding that the district court had carefully and appropriately considered the requisite § 3553(a) factors.[48]

The district court in *Thurston*, discussed above, was also receptive to the defendant's argument that "white collar defendants typically are more concerned about whether they will go to prison than with the actual length of imprisonment."[49] The district court addressed the deterrence factor by explaining that "the most significant decision in sending a message to potential white collar criminals is the decision to send the defendant to prison. It's not so much the amount of time, it's whether you go away."[50]

In the First Circuit's initial post-*Booker*, pre-*Gall* opinion, it conceded that the "district court is not alone in viewing long prison sentences as unnecessary to deter white collar crimes."[51] Nevertheless, it found the district court's rationale to be "problematic," in large part because it read post-*Booker* jurisprudence as prohibiting sentencing variances based on a court's "general disagreement with the broad-based policies enunciated by Congress or the Commission."[52]

On appeal following the Supreme Court's decision in *Gall*, however, the First Circuit affirmed Thurston's three-month sentence without voicing any objection to the district court's treatment of the deterrence factor. The First Circuit's silence on this issue was likely due to the Supreme Court's recent ruling in *Kimbrough v. United States*[53] that judges do have the discretion to impose non-Guidelines sentences based on a policy disagreement with the Guidelines. Thus, the door remains open for defense attorneys to advocate for below-Guidelines terms of incarceration (or perhaps even non-incarceration restrictions on liberty) based on the deterrent effect that any term of imprisonment (or restriction) — short or long — has on prospective white collar criminals.

2. Government Investigation As Deterrent

In *United States v. Gardellini*, the U.S. Court of Appeals for the District of Columbia Circuit upheld a below-Guidelines sentence that was based in part on the sentencing judge's finding that the defendant had already "suffered substantially" due to his criminal prosecution and guilty plea for filing a false income tax return. Gus Gardellini faced a Guidelines range of 10 to 16 months of imprisonment, but the court granted him a downward variance and sentenced him to five years' probation.[54] The court based the variance primarily on four factors, including its finding that Gardellini had already suffered from the prosecution as evidenced by his treatment for depression due to the stress of the government investigation.[55] The district court opined that

"what really deters" tax evaders — besides bad press — is the "efforts of prosecutors … in vigorously enforcing the laws."[56]

The D.C. Circuit confirmed that the fact Gardellini had already suffered substantially prior to sentencing — as well as his acceptance of responsibility, low risk of recidivism, and cooperation — were all "directly relevant" to a § 3553(a) analysis and justified the district court's downward variance.[57] In rejecting the government's "deterrence" argument, the court explained that "the government's argument based on deterrence alone is flawed because it elevates one § 3553(a) factor — deterrence — above all others." It upheld the district court's decision that balanced "a number of factors — not all of which … point in the same direction."[58]

Thus, when responding to a prosecutor's argument that a below-Guidelines sentence fails to provide adequate deterrence, *Gardellini* opens the door for defense counsel to argue that the government's investigation is *itself* a deterrent, and that the defendant's suffering and mental anguish caused by the investigation and prosecution are factors that can justify a below-Guidelines sentence pursuant to § 3553(a).

Sentencing Data

The U.S. Sentencing Commission's post-*Booker* analysis of sentencing data indicates that judges are becoming increasingly comfortable with imposing below-Guidelines sentences that are justified under a § 3553(a) analysis.[59] When advocating for a downward variance, defense counsel may also find it beneficial to share this data with the sentencing court as helpful context.

Conclusion

Notwithstanding government protestations about alleged sentencing discrepancies and inequities in this post-*Booker*, post-*Gall* world, there are opportunities for defense counsel to lever the existing system to obtain below-Guidelines sentences for their white collar clients. The key to successful advocacy in the current sentencing climate is convincing the judge that a client is entitled to a downward variance based on full and creative explications of the § 3553(a) factors.

Notes

1. *United States v. Booker*, 543 U.S. 220 (2005).

2. *Gall v. United States*, 552 U.S. 38 (2007).

3. *United States v. Gardellini*, 545 F.3d 1089, 1096 (D.C. Cir. 2008).

4. As the Third Circuit recently explained, "As a matter of terminology, we now speak in terms of sentencing departures, which are based on specific Guidelines provisions, and sentencing variances, which are based on the § 3553(a) factors." *United States v. Tomko*, 562 F.3d 558, 562 n.3 (3d Cir. 2009) (citing *United States v. Vampire Nation*, 451 F.3d 189, 195 n.2 (3d Cir. 2006)).

5. *See, e.g.,* S. Patrick Morin Jr., *Wherefore Art Thou Guidelines? An Empirical Study of White Collar Criminal Sentencing and How the Gall Decision Effectively Eliminated the Sentencing Guidelines*, 7 Pierce L. Rev. 151, 153, 156-157, 167-168 (2008); Harry Sandick, *Gall and Kimbrough and Their Relevance to Sentencing in White Collar Cases*, 20 Fed. Sent. R. 159 (2008).

6. The percentage of below-Guidelines, "non-government sponsored" sentences that relied entirely on consideration of § 3553(a) factors (i.e., a downward variance, where no downward departure was given) increased from 7.3 percent in 2006 to 8.1 percent in 2007, to 10.1 percent in 2008, and to a high of 12.2 percent through the first two quarters of 2009. U.S. Sentencing Commission, Preliminary Quarterly Data Report, 2d Quarter Release 2009, at Table 1 and Figure A; U.S. Sentencing Commission, Quarterly Sentencing Updates, Final Reports Years FY06, FY07, FY08, at Table 1, *all available at* http://www.ussc.gov/linktojp.htm. *See also* Morin, *supra* at 156-157.

7. *Tomko*, 562 F.3d at 560.

8. *United States v. Thurston*, 544 F.3d 22 (1st Cir. 2008).

9. In violation of 26 U.S.C. § 7201.

10. *Tomko*, 562 F.3d at 563.

11. *Id.* at 572.

12. *Id.* at 571-572 (citing *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006)).

13. *Id.* at 572.

14. The other reason cited for the court's downward departure was the need to avoid disparity with Thurston's co-defendant, the company's president, who received a sentence of three years' probation following his *nolo contendere* plea. *United States v. Thurston*, 358 F.3d 51, 54 (1st Cir. 2004).

15. *Id.* at 77, n.25.

16. *Id.* at 79.

17. *Id.* at 79-80.

18. *United States v. Thurston*, 456 F.3d 211, 219 (1st Cir. 2006).

19. *Id.* at 220.

20. *Thurston*, 544 F.3d at 25-26 (although the First Circuit still had "concerns" about the district court's "dramatic" variance, "upon considering the sentence in light of *Gall*, we conclude that a remand here would serve little purpose.").

21. Of course, neither *Thurston*, *Tomko*, nor any of the cases highlighted in this article compel a district judge to give consideration to a particular subjective § 3553(a) factor such as charitable works or remorse at sentencing. Rather, these decisions stand for the proposition that a district court's decision to base an outside-the-Guidelines sentence on these factors is not substantively unreasonable, and will withstand the deferential standard of appellate review. It remains critically important for the defense practitioner to "know the judge" and the types of arguments and factors that the judge finds persuasive.

22. *United States v. Howe*, 543 F.3d 128 (3d Cir. 2008).

23. *Id.* at 130-131.

24. *Id.* at 130-132, 137.

25. *Id.* at 133.

26. *Id.* at 134.

27. *Id.* at 138. The Third Circuit cited the following string of cases to support its finding that not all white collar defendants are remorseful at sentencing: *United States v. Lim*, 235 F.3d 382, 385 (8th Cir. 2000) (in mail fraud case, defendant at sentencing "acts as if he ought to be given a medal for what he's done here. He has absolutely no remorse for what he's done, none."); *United States v. Brown*, 147 F.3d 477, 486 (6th Cir. 1998), *cert. denied*, 525 U.S. 918 (1998) (in mail and wire fraud case, defendant "showed no remorse and did not think he did anything wrong"); *United States v. Young*, 132 F.3d 44 (10th Cir. 1997) (in mail of threats case, "although [defendant] admitted committing the crimes and pled guilty, she showed no remorse"); *United States v. Castner*, 50 F.3d 1267, 1280 (4th Cir. 1995) (in mail fraud case, defendants showed no remorse whatsoever for blatantly cheating the U.S. government out of in excess of $50,000).

28. *Howe*, 543 F.3d. at 138 (*citing Gall*, 128 S. Ct. at 595 ("We reject … an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range.")).

29. *Id.* at 137.

30. *Tomko*, 562 F.3d at 561-562.

31. *Id.*

32. *Howe*, 543 F.3d at 139.

33. *Id.*

34. *United States v. Ruff*, 535 F.3d 999 (9th Cir. 2008).

35. *Id.* at 1001.

36. *Id.* at 1003-1004 (*citing Gall*, 128 S. Ct. at 595).

37. *Id.* at 1004.

38. *Tomko*, 562 F.3d at 573 (citing *Gall*, 128 S. Ct. at 595).

39. *Id.* at 569 (citing U.S.S.G. § 5F1.2 cmt. 3 (1997)).

40. 18 U.S.C. § 3553(a)(2)(B).

41. It bears repeating here that it is critically important to "know the sentencing

judge" and the judge's predisposition and receptiveness to this type of argument. Presenting this particular argument to a hard-nosed, prosecutor-friendly district judge might, to put it mildly, have somewhat less than the intended effect.

42. *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), *affirmed*, 301 Fed. Appx. 93 (2d Cir. 2008).

43. *Id.* at 512.

44. *Id.* at 514.

45. *Id.* (*citing* Richard Frase, *Punishment Purposes*, 58 Stanford L. Rev. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 S. Ill. U. L.J. 485, 492 (1998); United States Sentencing Commission, Fifteen Years of Guidelines Sentencing 56 (2004) (noting 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.")).

46. *Id.* at 514.

47. *Id.* at 514-515.

48. *Adelson*, 301 Fed. Appx. at 94-95.

49. *Thurston*, 456 F.3d at 218.

50. *Id.* at 215.

51. *Id.* at 218.

52. *Id.*

53. *Kimbrough v. United States*, 552 U.S. 85 (2007).

54. *Gardellini*, 545 F.3d at 1091.

55. *Id.*

56. *Id.*

57. *Id.* at 1095.

58. *Id.*

59. *See infra*, note 6.

About the Author

Matthew Newcomer is a senior associate in Post & Schell's national White Collar Defense, Compliance & Risk Management Practice Group, which advises and defends corporations, directors, officers and employees in a broad spectrum of industries including health care, pharmaceutical, insurance, financial services, securities, communications, defense, and transportation.

Matthew T. Newcomer
Post & Schell
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103
215-587-1076
Fax 215-320-4160
E-MAIL mnewcomer@postschell.com