

Jaffee v. Redmond, 518 U.S. 1 (1996), effective psychotherapy “depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears” (*Redmond*, p 10). Even the smallest chance of disclosure could be detrimental to the treatment relationship and, therefore, to the patient’s benefit from treatment.

Destroying records as soon as statutorily permissible is one potential solution for providers seeking to protect patient privacy and thereby preserve the integrity of the therapeutic relationship. A patient’s records, however, have the potential to improve the quality of care the patient receives in the future by providing important information that could remain unknown to a provider if records are destroyed. For example, a patient could have had an adverse reaction to a medication in the past but be unable to recall the name of the medication when seeking treatment in the future. Having the patient’s records could spare the patient unnecessary harm.

Given the stigma associated with mental illness and psychiatric treatment, another factor that must be considered is the introduction of implicit bias when an individual’s mental health records are disclosed, particularly when they are ultimately introduced into evidence. Having a mental illness, or even receiving psychotherapy, can influence how individuals are perceived. Such records often contain psychiatric jargon that lay people may misinterpret or perceive as negative. It is unclear if the court’s balancing test would effectively take this into account when deciding on whether such records should be disclosed. Based on the decision in this case, in order for records to be excluded, the court would have to determine that they have “no possible relevance to the case” (*St. Luke Inst.*, p 903). While such a broad standard for disclosure seems to possess face validity in serving the public interest in its search for truth and justice, it may underestimate the impact implicit biases have on overall court proceedings. In addition to considering the relevance of the records, courts may want to consider the potential for stigma to be introduced. While courts may be accustomed to reading about illness, lay people and juries may not and may draw conclusions from the mere existence of mental health records. Thus, going forward it will be important for psychiatrists to continue to describe this phenomenon, and work to further understand and characterize its impact on the legal system.

Psychiatric History as a Factor in Sentencing

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Courts Must Consider Evidence of Psychiatric History in Sentencing, but Have Broad Discretion in Determining the Value of Such Evidence

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In *United States v. Lopez-Delgado*, 974 F.3d 1 (1st Cir. 2020), Humberto Lopez-Delgado challenged his sentence for possession of a machine gun, arguing that the U.S. District Court for Puerto Rico abused its discretion in deviating from the sentencing guidelines by, *inter alia*, failing to adequately consider his difficult childhood and mischaracterizing his mental health history. The First Circuit Court of Appeals affirmed the sentence because, although the deviation from the guidelines was significant, it was defensible based on the lower court’s balancing of mitigating and aggravating factors, including the risk of danger to the community.

Facts of the Case

On June 7, 2016, police arrested Humberto Lopez-Delgado (Mr. Lopez) outside of the Luis Llorens Torres Public Housing Project in San Juan, Puerto Rico, on suspicion of involvement in a homicide. In a search incident to the arrest, police found a loaded Glock pistol that had been modified to shoot automatically. In police interviews subsequent to the arrest, Mr. Lopez reported using the Glock for protection, allegedly adding that he had killed a man named Sica. Police verified that a man named Sica had in fact been shot at the Luis Llorens Housing Project, although he had survived the shooting.

After a federal grand jury indicted Mr. Lopez, his counsel raised the question of competence to stand trial. After two evaluations by a psychologist for the

defense and a separate competency evaluation by the federal Bureau of Prisons, the court found Mr. Lopez competent to proceed. In 2018, Mr. Lopez pleaded guilty to possession of a machine gun before the U.S. District Court for Puerto Rico. The probation officer preparing the presentencing investigation report recommended further evaluation of Mr. Lopez's mental health to obtain a "fresh diagnosis" given the inconsistencies between prior evaluations. Mr. Lopez submitted to a psychological evaluation by Dr. Jose Mendez-Villarrubia, who provided diagnoses of antisocial personality disorder and substance use disorders, and described Mr. Lopez as "inherently dangerous." Mr. Lopez submitted his own sentencing memorandum detailing his "hellish youth," a compelling history of abuse, incest, poverty, homelessness, and inadequately treated dual-diagnosis mental illness. The final presentencing investigation report calculated a range under the Federal Sentencing Guidelines of 37 to 46 months of imprisonment for the possession charge. The government did not dispute the details of Mr. Lopez's traumatic childhood but recommended an upward variance for a sentence of 84 months on the basis of aggravating factors, including the character of the weapon, the alleged murder confession, and Dr. Mendez-Villarrubia's assessment of the risk Mr. Lopez posed to the community.

The district court imposed a sentence of 96 months, more than twice the maximum advised in the guidelines, based largely on the report and testimony of Dr. Mendez-Villarrubia regarding Mr. Lopez's risk for recidivism and danger to society. The district court found that such a sentence "reflects the seriousness of the offense, promotes respect for the law, protects the public from further crimes by Mr. Lopez, and addresses the issues of deterrence and punishment" (*Lopez-Delgado*, p 8). Mr. Lopez filed an appeal challenging the procedural and substantive reasonableness of the sentence under 18 U.S.C. § 3553 (2018).

Ruling and Reasoning

The First Circuit Court of Appeals upheld the decision of the district court, giving great deference to the lower court's discretion in the complicated "calculus" of sentencing. The court was reluctant to set a precedent of scrutinizing the balancing of factors by trial courts.

The circuit court began with an examination of the procedural reasonableness of the sentence, looking at how the district court followed the formula

outlined in 18 U.S.C. § 3553 (2018). This section lists the factors courts should consider in sentencing, including the ranges provided in the sentencing guidelines, the nature and circumstances of the offense, criminal history of the defendant, and the need to avoid unwarranted disparities in sentencing. Section 3553 also requires consideration of how the sentence will serve the major interests of criminal justice: deterrence, retribution, incapacitation, and rehabilitation. In its review for abuse of discretion, the circuit court reviewed whether the trial court failed to consider any of these factors, miscalculated the guidelines range, relied on clearly erroneous facts, or failed to provide adequate justification for its deviation from the guideline range.

Mr. Lopez contended that the trial court relied on clearly erroneous facts in several of its conclusions regarding his mental health, including attributing his psychiatric burden to substance use, rejecting a diagnosis of bipolar disorder, accepting a diagnosis of antisocial personality disorder, and finding Mr. Lopez to be more dangerous than a "typical prisoner." Mr. Lopez also contended that the district court failed to justify the extent of variance from the range provided in the guidelines. In response, the circuit court repeatedly referenced the psychological evaluation performed by Dr. Mendez-Villarrubia as evidence in support of the lower court's conclusions. Dr. Mendez-Villarrubia acknowledged Mr. Lopez's childhood full of unfortunate life events that likely affected his overall development, but concluded that Mr. Lopez had "a minimal understanding of society's mores" and was "dangerous to society" (*Lopez-Delgado*, p 7). The circuit court found no clear error in the district court's fact finding or adherence to the sentencing guidelines, including the procedures required for deviation from the range advised.

The circuit court concluded with a discussion of the substantive reasonableness of the sentence, reviewing "whether the sentence is the product of a plausible rationale and a defensible result" (*Lopez-Delgado*, p 8). Mr. Lopez contended that the sentencing court did not adequately consider his personal circumstances, including his traumatic childhood. The circuit court found that the lower court had considered the potentially mitigating factor of his childhood trauma, but found any mitigation therefrom was outweighed by many aggravating factors, including the modifications made to the pistol, his alleged murder confession, membership in a gang, and his "unusual difficulty

conforming to society's rules" (*Lopez-Delgado*, p 9). The circuit court noted that the district court was "ultimately more concerned with the unique danger it believes Lopez poses to the public," and found this to be a plausible rationale for sentence enhancement (*Lopez-Delgado*, p 9). The circuit court concluded that, while the variance from the range provided in the guidelines was "substantial," it was not outside of the "universe of reasonable sentences," and therefore not an abuse of the district court's discretion.

Discussion

For over two centuries, federal judges in the United States wielded nearly unlimited discretion in sentencing, leading to "unjustifiably wide" ranges of sentences for similarly situated offenders (*Federal Sentencing: The Basics*, United States Sentencing Commission (2020)). The Sentencing Reform Act of 1984 passed with bipartisan support as a measure to reduce inequitable sentencing. The act created the United States Sentencing Commission and provided ranges for sentencing in federal cases, with a goal of limiting judicial subjectivity. In *United States v. Booker*, 543 U.S. 22 (2005), a divided Supreme Court invalidated the portions of the federal sentencing guidelines that made them mandatory on the basis of the Sixth Amendment right to a trial by jury. The ranges provided in the guidelines became advisory as a result, and federal judges regained wide discretion in sentencing. In the years since *Booker*, with the mandate of the sentencing guidelines removed, the rates of sentencing outside of provided ranges increased; in recent years, only about half of federal sentences fall within the guideline ranges (U.S. Sentencing Commission: Quarterly Data Report, 2020; Tonry M. Federal sentencing "reform" since 1984: The awful as enemy of the good. *Crime & Just.* 2015: 44:99–164).

Although the extent of variation from the guidelines in *Lopez-Delgado* may seem extreme, the deference of the appellate court is not entirely surprising. In *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court reinforced the concept of deference to sentencing courts that was introduced in *Booker*. *Gall* set the high standard of abuse of discretion for review of federal sentences, even when "significantly outside" the guidelines range. Although *Gall* involved a sentence below the recommended range, the Court held that, under the now-advisory sentencing guidelines, federal judges can apply any "reasonable" sentence, as long as they explain their reasoning.

Psychiatric history enters the sentencing calculus based on the belief long held by society that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse" (*Penry v. Lynaugh*, 492 U.S. 302 (1989), p 319). As evidenced in *Lopez-Delgado*, however, elements of psychiatric history are not always interpreted as mitigating, but may also be aggravating. Given the broad discretion trial courts have in sentencing, the direction and extent of sentence adjustment for a given finding of psychiatric history may vary significantly from judge to judge. This is concerning for forensic psychiatrists, as judges may find assessments of future risk more persuasive than opinions intended to suggest decreased culpability, such as those involving addiction or childhood trauma. In sentencing testimony, making broad statements regarding the future risk of a defendant may overstate the ability of the forensic psychiatrist to predict future behavior and lead to longer sentences when evidence to support such far-reaching conclusions is limited.

Appellate Court Clarifies That Immigration Judges Cannot Disregard Mental Health Professional Guidelines

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Immigration Judges Are Not Permitted to Dismiss the Diagnostic Conclusions of Mental Health Professionals

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In *Granados v. Garland*, 992 F.3d 755 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit clarified that immigration judges cannot