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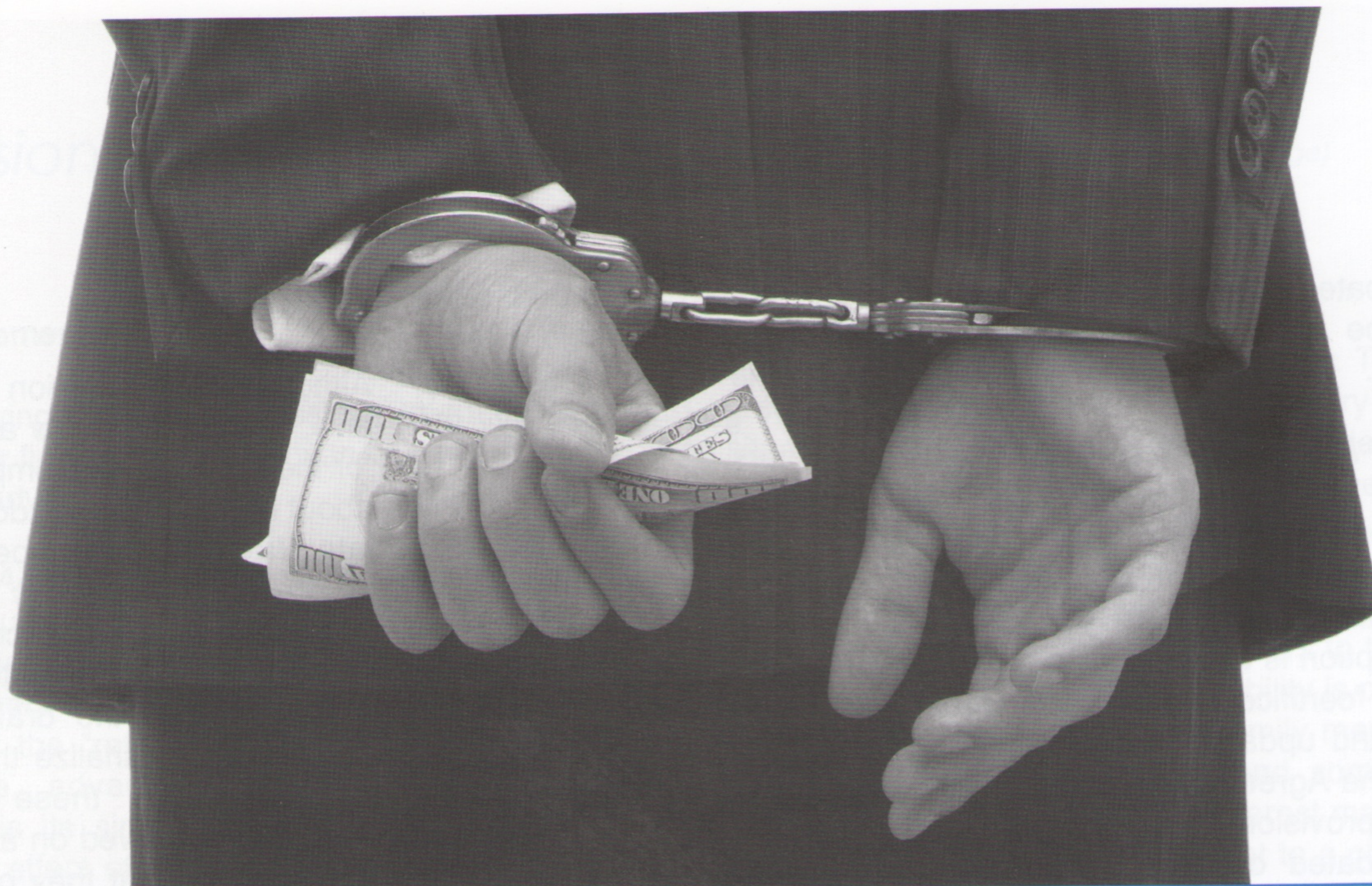
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Sentencing in Federal Tax Crimes

String of Recent Supreme Court Cases Sharply Reduces Impact of Federal Sentencing Guidelines

By Eric L. Green, Esq.

In the March/April 2008 edition of this magazine, Richard Convicer and I discussed the pitfalls of representing taxpayers before the IRS when tax fraud was an issue.¹ In that article, we reviewed the Federal Sentencing Guidelines and two recent United States Supreme Court decisions: *United States v. Booker*² and *Gall v. United States*.³ In that article, we stated that:

*The Federal Sentencing Guidelines are not mandatory but merely serve as guidelines from which the court may depart based upon a consideration of specific factors present. Nevertheless, the guideline sentence will be the presumptive starting point in the vast majority of cases.*⁴

Recent Supreme Court cases have further eroded the weight to be accorded the Federal Sentencing Guidelines.

Background: Federal Sentencing Under Title 18 U.S.C. 3553

Title 18 of the United States Code, Section 3553(a) lists the factors a court is to consider when imposing a sentence on a criminal defendant (tax or otherwise). These factors include the following:

- The nature and circumstances of the offense and the history and characteristics of the defendant;
- The need for the sentence imposed:
 1. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

2. To afford adequate deterrence to criminal conduct;
3. To protect the public from further crimes of the defendant; and
4. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- The kinds of sentences available;
- The kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant issued by the Sentencing Commission [the Federal Sentencing Guidelines];
- Any pertinent policy statement issued by the Sentencing Commission;
- The need to avoid unwarranted sentence disparities among defendants with similar records who have been

¹ "Tax Fraud: Pitfalls Representing Taxpayers Before the IRS," *Connecticut CPA*, March/April 2008.

² 543 US 220 (2005)

³ 552 US ____ (2007)

⁴ "Tax Fraud: Pitfalls Representing Taxpayers Before the IRS," *Connecticut CPA*, March/April 2008, page 28.

found guilty of similar conduct; and

- The need to provide restitution to any victims of the offense.

In addition, under 18 U.S.C. 3553(b), courts have generally provided a sentence within the Sentencing Guidelines or else, under 18 U.S.C. 3553(c)(2), have explained in open court the specific reasons for its departure from the Guidelines stated with specificity in its written order of judgment.

Due to the mandate that courts follow the Guidelines or else justify its departure from them, the Sentencing Guidelines were considered mandatory except for extreme cases, where aggravating or mitigating factors were present to justify any departure.

Brian Michael Gall v. United States

Brian Michael Gall was involved in an enterprise to distribute the drug "ecstasy" while in college, but withdrew from the conspiracy after seven months. Since withdrawing on his own from the group, Gall had sold no illegal drugs and had used no illegal drugs. In addition, Gall worked steadily since graduation. Three and half years after withdrawing from the conspiracy, Gall pleaded guilty to his participation in the conspiracy.

A pre-sentence report recommended a sentence of 30 to 37 months in prison, but the District Court sentenced Gall to 36 months' probation, finding that probation reflected the seriousness of his offense and that imprisonment was

unnecessary because his voluntary withdrawal from the conspiracy and post-offense conduct showed that he would not return to criminal behavior and was not a danger to society.

The Eighth Circuit reversed on the ground that a sentence outside the Federal Sentencing Guidelines range must be supported by extraordinary circumstances.

In its review of Gall's case, the United States Supreme Court, noting its earlier decision in *United States v. Booker*, stated the Guidelines, though advisory and a good place to start, were not the only consideration. The court, in reversing the Eighth Circuit Court of Appeals, stated that the judge "may not presume that the Guidelines' range is



Wayne Schulz

wayne@s-consult.com
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Sentencing in Federal Tax Crimes (continued from previous page)

reasonable but must make an individualized assessment based on the facts presented.”

The United States Supreme Court’s decision in the Gall case in 2007 gave attorneys much greater latitude to advocate for departures from the Federal Sentencing Guidelines.

Lawrence Nelson v. United States⁵

In 2009, the United States Supreme Court was again faced with an issue regarding the Sentencing Guidelines. The District Court, later affirmed by the Fourth Circuit Court of Appeals, sentenced Nelson based on the Sentencing Guidelines, stating “the Guidelines are considered presumptively reasonable.”

Reversing the Fourth Circuit, the Supreme Court stated in a very brief opinion that:

*The Guidelines are not only **not mandatory** on sentencing courts; they are also **not to be presumed reasonable** [Emphasis added].*

The United States Supreme Court’s complete shift from the Sentencing Guidelines creates both opportunities and hazards for attorneys representing taxpayers in criminal matters. As discussed below in *United States v. Nutkis*,⁶ the door has been opened to allowing counsel to work on all the Section 3553 factors to help reduce a convicted taxpayer’s sentence and to help fashion alternative sentences to prison or probation.

However, the door swings both ways and is now open for judges to depart from the Sentencing Guidelines upward and impose a harsher sentence on tax defendants based on the taxpayer’s character and/or prior conduct.

United States v. Nutkis

Nutkis suffered from a severe emotional disorder. This disorder, which went untreated, led the taxpayer to fail to file tax returns for six years. Nutkis had previously settled a civil case with the Internal Revenue Service for failing to file returns for earlier years. When Nutkis again failed to file his tax returns, he was charged criminally under IRC § 7203 for failing to file tax returns. The estimated tax loss by the government was \$1.4 million.

Under the Federal Sentencing Guidelines, Nutkis would have faced a sentence of 41 to 51 months, requiring him to serve at least 41 months of his sentence in prison.⁷

The judge, viewing all the factors, sentenced Nutkis to:

- Three years probation;
- 12 months in a community corrections center;
- Continued employment so he could make restitution;
- All of his income and expenses would be paid through a court-appointed receiver;
- A tax repayment schedule; and
- Mandatory counseling two times per week.

The Nutkis case is an example of how dramatically different a result may be achieved with good advocacy when the Guidelines are no longer mandatory. Attorneys representing tax defendants should not only seek to bring in evidence of their clients’ good character and values, but seek to offer alternatives to incarceration or probation for the sentencing court to consider.

⁵ *Nelson v. United States*, No. 08-5657 (2009)

⁶ Unreported opinion.

⁷ The tax loss of \$1.4 million on the Federal Sentencing Guidelines is in the range of 41 to 51 months, and falls in Zone D, which requires the defendant to serve the minimum sentence in incarceration.

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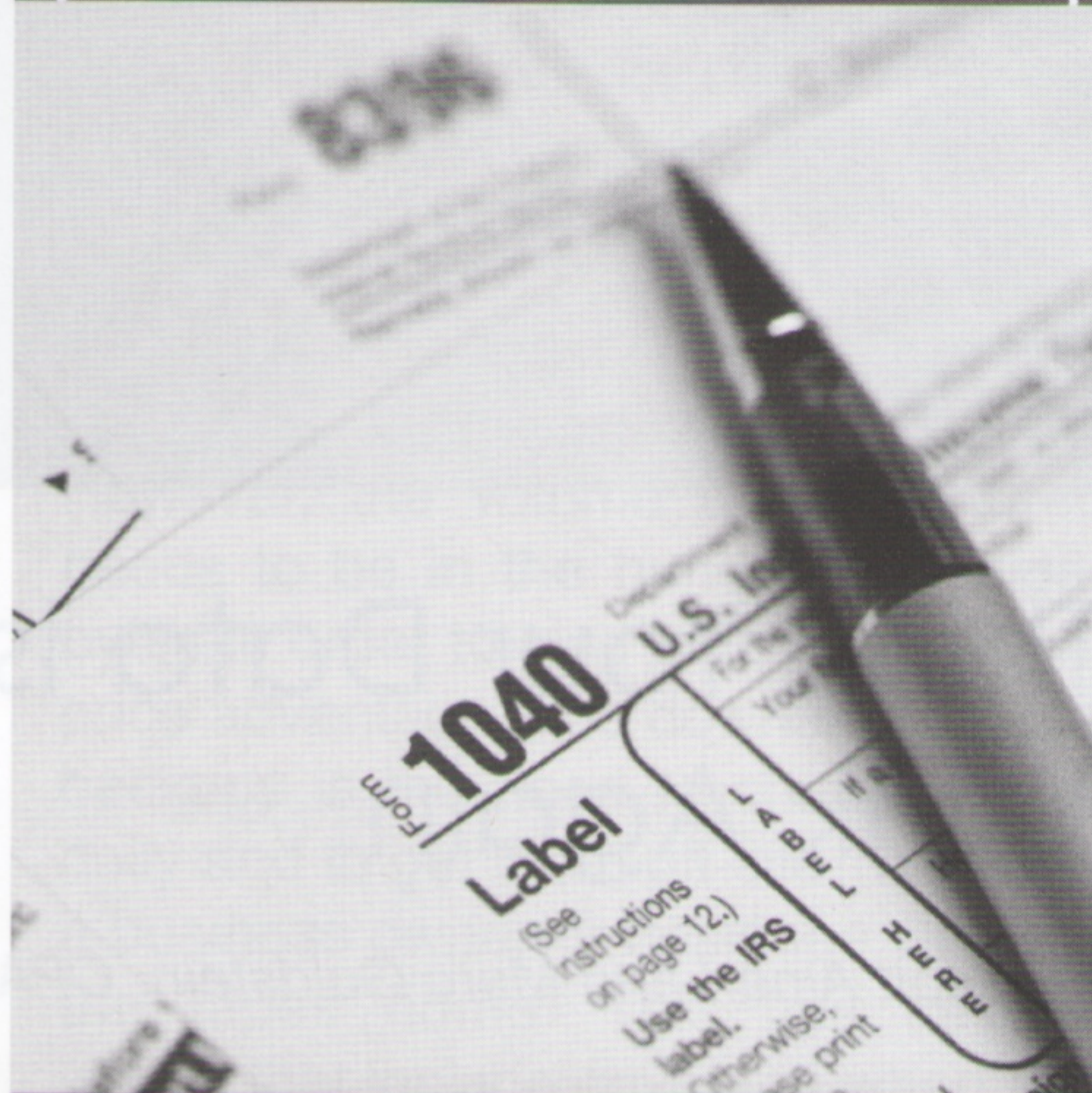
Conclusion

Based on the Supreme Court's recent decisions, the Federal Sentencing Guidelines are no longer mandatory and may very well be only useful as a guide for ascertaining a sentence range. Attorneys should view the break from the Guidelines as an opportunity to present positive facts and backgrounds for taxpayers and attempt to fashion more flexible sentencing alternatives for criminal tax defendants. However, counsel must keep in mind that failing to provide evidence about a taxpayer's virtues could allow the court to depart upward from the Guidelines and provide an even tougher sentence.

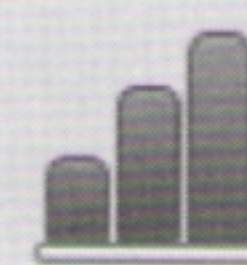


Eric L. Green, Esq. is Of Counsel to Convicer & Percy, LLP in Glastonbury, Connecticut, which represents individuals and businesses in criminal and civil tax proceedings before the Internal Revenue Service, the Department of Justice, and the Connecticut Department of Revenue Services, and advises in the areas of business tax planning and estate planning for individuals and closely-held businesses. He is currently the vice chair of the Closely-Held Business Tax Committee of the American Bar Association, and has been quoted in several national publications, including USA Today, Consumer Reports Financial, the National Underwriter, CCH Tax Practice & Procedure, and CreditCard.com. Green is an honors graduate of the New England School of Law and received his Master of Laws degree in Taxation from the Boston University School of Law. He can be reached at egreen@convicerpercy.com.

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