Mitigating Incarceration's Impacts On Foreign Nationals

By **Jillian Berman, John Siffert and Zachary Shemtob** (May 20, 2024)

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On April 4, Joe Lewis, a British national, was sentenced in the U.S. District Court for the Southern District of New York to three years' probation for insider trading, below the advisory guidelines range of 18 to 24 months' imprisonment.[1]

Lewis' sentencing memorandum highlighted the disparate impact that incarceration would have on him as compared to a similarly situated U.S. citizen.[2] Among other things, Lewis emphasized that, as a foreign national, he was ineligible to serve his sentence in a federal minimum-security prison camp and that he would be detained by U.S. Immigration and Customs Enforcement following a federal prison term.[3]

The court explicitly took these factors into account in fashioning its sentence for Lewis.

Lewis is not alone in facing these collateral consequences of his conviction and sentencing. Indeed, a number of foreign white collar defendants have raised similar concerns in connection with recent sentencing proceedings.[4]

In response, courts have imposed sentences that mitigate these concerns — at times explicitly acknowledging that if sentenced to a term of imprisonment, the defendant would not be eligible for a minimum-security prison, also known as a federal prison camp, or would face ICE detention.

Given the prevalence of cross-border prosecutions in various fraud and white collar cases, it is likely that these issues will continue to arise. Courts may be persuaded to fashion relief so that foreign defendants are not placed at a disadvantage as compared to similarly situated U.S. defendants.

The Significance of White Collar Defendants' Noncitizen Status at Sentencing

Facing sentencing on a federal felony conviction is undoubtedly difficult for any defendant. But foreign defendants prosecuted for white collar felonies face additional challenges.

Foreign defendants are typically ineligible to serve their federal prison sentence in a prison camp even if they are first-time, nonviolent offenders. This is because the Federal Bureau of Prisons, or BOP, automatically designates such defendants as having the public safety factor of "deportable alien."[5]

The 2006 program statement of the Federal Bureau of Prisons provides that defendants who are deportable must be "housed in at least a Low security level institution."[6] In contrast, a U.S. citizen who is a first-time, nonviolent offender may be eligible to serve their sentence in a minimum-security facility.[7]

There are significant differences between minimum-security prison camps and low-level security prisons. Low-level prison facilities are considerably more dangerous, housing offenders serving up to 20 years for felonies that may involve violence, guns and gang activity.[8] Such institutions also suffer from issues related to overcrowding and management.[9]

Despite the potential unfairness to foreign defendants, a recommendation from the sentencing court or federal prosecutors that a foreign defendant be designated to serve their time in a minimum-security prison camp will not ensure that the defendant will remain eligible.

In U.S. v. Tyab, for example, the U.S. District Court for the District of Columbia in 2023 specifically recommended that the defendant, a foreign national, be designated to serve his time in a federal prison camp.[10] Prosecutors assisted in trying to carry out the court's recommendation.[11] Nevertheless, the BOP assigned the defendant to a low-level security institution, as the district court's recommendation conflicted with the BOP policies regarding the housing of inmates who have a deportable status.[12]

In addition to potential unfair and disparate treatment regarding the federal prison facility in which foreign nationals must serve their sentences, foreign nationals may face the additional risk of being detained in ICE custody upon release from the BOP, pending removal proceedings and deportation. This can be true regardless of whether such defendants agree to be deported or offer to leave the U.S. voluntarily.[13]

The punishment that a foreign-national defendant receives for committing a federal offense, therefore, may be far greater than the federal sentence actually imposed by the sentencing court. A 2019 report by the U.S. Department of Homeland Security's Office of the Inspector General noted that ICE detention centers have been found to contain "egregious violations of detention standards," including "unreported security incidents" and "inadequate medical care."[14]

Time spent in ICE detention is uncertain and may also be lengthy due to the volume of immigration cases; indeed, a foreign defendant may serve more time in an ICE detention center awaiting removal proceedings and deportation than they served on a federal sentence.[15]

Foreign nationals sentenced to federal prison also are ineligible typically for certain programs that may be available to similarly situated U.S. inmates. These include, among other things, eligibility to serve a portion of a federal sentence in a federal community corrections center or halfway house,[16] and the ability to earn credits to be applied toward early release under the First Step Act.[17]

Implications for Counsel

Courts appear receptive to sentencing arguments raising the disparate treatment of white collar defendants who are foreign nationals as compared to U.S. citizens, and defense counsel may achieve more favorable sentencing outcomes by pressing such arguments.

Under Title 18 of the U.S. Code, Section 3553(a)(6), a court must consider at sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Upon being presented with this argument, some courts have acknowledged that a foreign

defendant's lack of eligibility for a prison camp upon incarceration, or the possibility that the defendant will be subjected to ICE detention following incarceration, does present an unwarranted sentencing disparity. Courts have thus fashioned a sentence to mitigate against this disparity.

For example, in U.S. v. Black, the U.S. District Court for the Southern District of New York declined in 2019 to sentence the defendant to a term of imprisonment where, "simply because he [was] a noncitizen," he was not eligible to serve his sentence "in the same way that any American citizen who stood convicted of this crime would serve," and where the defendant faced an unknown period of ICE detention upon release from federal prison.[18]

In U.S. v. Cohen, involving a French citizen convicted of insider trading, the Southern District of New York noted that other judges had given consideration to the consequences attached to the defendant's foreign status.[19] In 2019, the court imposed a sentence of time served and home confinement, which took into account that foreign "nationals, unlike similarly situated U.S. citizens, are unable to serve terms of imprisonment in a camp or minimum security facility," and, upon completion of the federal sentence, "are transferred to ICE detention where they can wait for an indefinite period to be returned to their home country."[20]

A number of other courts have recently been presented with this argument.[21] While not all the courts acknowledged that the sentence imposed took into account these considerations, several of the defendants received sentences that did not include a term of incarceration.[22]

A variant of the unwarranted-disparity argument has also been raised in connection with other sentencing factors, with some success. For example, in U.S. v. Smith, the U.S. Court of Appeals for the D.C. Circuit addressed the argument that Title 18 of the U.S. Code, Section 3553(b), requires courts to consider "mitigating circumstance not adequately taken into account by the Sentencing Commission in the promulgation of its guidelines."[23]

Based on this provision, the D.C. Circuit's 1994 decision found that "a downward departure may be appropriate where the defendant's status as [a person subject to deportation] is likely to cause a fortuitous increase in the severity of his sentence."[24]

In 2021, in U.S. v. Thomas, the D.C. Circuit indicated its continued view that this is an important consideration.[25]

In addition to sentencing advocacy by defense counsel to address these issues unique to foreign defendants, there may be opportunities earlier in a federal prosecution for defense counsel to obtain an outcome that avoids or mitigates these problems. At the threshold, not all federal felony offenses trigger the BOP classification of a defendant as a "deportable alien."[26]

Depending on the situation, counsel may be able to negotiate a disposition for the foreign national that would not trigger this classification and therefore avoid the ramifications discussed above.

Also, in a limited category of antitrust cases involving cooperating defendants, there are benefits available under a 1996 memorandum of understanding between the U.S. Department of Justice's Antitrust Division and the Immigration and Naturalization Service, ICE's predecessor.[27]

Other approaches may also counter the concern of prolonged ICE detention and deportation proceedings, or ineligibility for a prison camp. For example, in U.S. v. Da Fonseca, a D.C. district court in 2017 issued a stipulated order of judicial removal upon the defendant's sentencing.[28]

The order directed that the "defendant be removed from the U.S. promptly upon his release from confinement (if any)" and "be ordered removed to" his home country.[29] Such orders must be requested by the government, but defense counsel may seek the government's agreement to do so.[30]

Finally, while this may not necessarily meet with success, in U.S. v. Frei, involving a Swiss defendant sentenced to two months of imprisonment, the Southern District of New York issued an order in 2022 to prevent ICE from detaining the defendant following his sentence, stating that the defendant remained eligible to serve his sentence in a minimum security facility.[31]

Prior to issuing the order, federal prosecutors and agents, in coordination with defense counsel, sought ICE's agreement not to detain the defendant following his two months of imprisonment.[32] After ICE did not formally agree, [33] the district court entered an order that, among other things, directed that "upon the conclusion of [the defendant's] sentence," ICE not "detain [the defendant], initiate deportation proceedings against him, or deport him."[34]

The order also acknowledged that the relief it provided should prevent the defendant from being designated as deportable, which would allow him to remain eligible to serve his two-month sentence in a minimum security facility.[35]

Conclusion

Foreign white collar defendants may face disparate treatment as compared to similarly situated U.S. defendants during the sentencing process. But, as reviewed in this article, a number of arguments and approaches have been successfully advanced to address these concerns.

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[1] U.S. v. Lewis, 23 Cr. 370 (JGLC) (S.D.N.Y.), ECF No. 69, Apr. 4, 2024.

[2] Lewis, 23 Cr. 370 (JGLC) (S.D.N.Y.), ECF No. 60, Mar. 21, 2024, Sentencing Mem. at 11–15.

[3] Id. at 11–14.

[4] See U.S. v. Zhao, 23 cr. 179 (RAJ) (W.D. Wash.), ECF No. 82, Apr. 24, 2024, Sentencing Mem.; U.S. v. Walchli, 20 Cr. 497 (GHW) (S.D.N.Y.), ECF No. 104, Mar. 20, 2024, Sentencing Mem.; U.S. v. Scott, 20 Cr. 534 (GHW) (S.D.N.Y.), ECF No. 193, Jan. 30, 2024, Sentencing Mem.

[5] Program Statement of the U.S. Department of Justice, Federal Bureau of Prisons, Number P5100.08 Ch. 5 at 9 (Sept. 12, 2006), https://www.bop.gov/policy/progstat/5100_008.pdf.

[6] Id.

[7] Scott, 20 Cr. 534 (GHW) (S.D.N.Y.), ECF No. 193, Jan. 30, 2024, Sentencing Mem. at 36.

[8] Id. at 37; Lewis, 23 Cr. 370 (JGLC) (S.D.N.Y.), ECF No. 60, Mar. 21, 2024, Sentencing Mem. at 11.

[9] Lewis, 23 Cr. 370 (JGLC) (S.D.N.Y.), ECF No. 60, Mar. 21, 2024, Sentencing Mem. at 12.

[10] U.S. v. Tyab, 19 Cr. 38 (RJL) (D.D.C.), ECF No. 96, Jan. 11, 2023, Motion at 3.

[11] Tyab, 19 Cr. 38 (RJL) (D.D.C.), ECF No. 105, Nov. 27, 2023, Status Report at 1.

[12] Id.

[13] See 8 U.S.C § 1226(c).

[14] See Office of the Inspector General, Department of Homeland Security, Concerns About ICE Detainee Treatment and Care at Four Detention Facilities, OIG-19-47 at ii (June 3, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf.

[15] See Hanna Johnson, The Questions You Probably THINK You Know the Answer to — But Likely Don't — About ICE Detention, ACLU (Nov. 30, 2020), https://www.aclu.org/news/immigrants-rights/the-questions-you-probably-think-you-know-the-answer-to-but-likely-dont-about-ice-detention.

[16] See Change Notice to Program Statement 7310.04 of the U.S. Department of Justice, Federal Bureau of Prisons at 10, 10.b. (Dec. 16, 1998), https://www.prisonerresource.com/wp-content/uploads/2020/03/Community-Corrections-CenterCCC-Utilization-Transfer-Procedures-7310.04.pdf.

[17] See 18 U.S.C. § 3632(E).

[18] 16 Cr. 370 (CM) (S.D.N.Y.), ECF No. 451, Oct. 24, 2019, Sentencing Tr. at 91.

[19] 19 Cr. 741 (WHP) (S.D.N.Y.), ECF No. 48, June 9, 2020, Sentencing Tr. at 42.

[20] Id.

[21] See supra n. 1, 4.

[22] See Lewis, 23 Cr. 370 (JGLC) (S.D.N.Y.), ECF No. 69, Apr. 4, 2024; Walchli, 20 Cr. 497 (GHW) (S.D.N.Y.), ECF No. 110, Apr. 2, 2024; Scott, 20 Cr. 534 (GHW) (S.D.N.Y.), ECF No. 207, Feb. 14, 2024.

[23] U.S. v. Smith, 27 F.3d 649, 650 (D.C. Cir. 1994) (internal quotation marks omitted).

[24] Id. at 655.

[25] See U.S. v. Thomas, 999 F.3d 723, 736-37 (D.C. Cir. 2021) (where defense counsel made "unprofessional errors in failing to seek a downward variance due to Thomas's status as a deportable alien," known as a Smith variance, and remanding to the district court to allow the defendant to pursue this argument)).

[26] See 8 U.S.C. § 1227.

[27] See Memorandum of Understanding Between The Antitrust Division U.S. Department of Justice And The Immigration and Naturalization Service U.S. Department of Justice (last updated June 25, 2015), https://www.justice.gov/atr/memorandum-understanding-between-antitrust-division-united-states-department-justice-and. Among the benefits available per this MOU are that eligible defendants, at the request of DOJ Antitrust, not be categorized by U.S. immigration authorities in a manner that renders them ineligible for a prison camp or subjects them to deportation proceedings.

[28] 16 cr 89 (EGS) (D.D.C.), ECF No. 68, Sept. 14, 2017; see also 8 U.S.C. § 1228(5).

[29] 16 cr 89 (EGS) (D.D.C.), ECF No. 68, Sept. 14, 2017, at 2.

[30] 8 U.S.C. § 1228(5).

[31] 12 Cr. 2 (JSR) (S.D.N.Y.), ECF No. 74, Jan. 31, 2022.

[32] Id. at 1, 2.

[33] Id. at 2.

[34] Id. at 3.

[35] Id. at 4.