FEDERAL SENTENCING AND POST-CONVICTION News

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PRACTICE TIPS FOR POST-*BOOKER* CASES

By *Alan Ellis and James H. Feldman, Jr.*

- Answer the "why" questions. The most important two questions you can answer for the sentencing judge is "why your client did what he did" and, if the judge is willing to take a chance on him, "why he won't do it again."

- At the beginning of your sentencing memorandum, propose a sentence that you believe is "sufficient, but not greater than necessary," and then explain why.

- The Sentencing Commission has prepared a "post-*Booker*" manual for judges, probation officers, and attorneys. The Commission advises judges to give "substantial weight" to the advisory guidelines.

- If the judge indicates that he is giving "substantial weight" to the sentencing guidelines, defense counsel should object on the ground that such a sentencing practice would make the guidelines as binding as they were before *Booker,* thus violating the Sixth Amendment and the interpretation of Section 3553 adopted by the remedial majority in *Booker.* In the alternative, defense counsel can argue that since the "*weighted*" approach in effect makes the guidelines binding, thereby triggering the Sixth Amendment, a court may use this approach to enhance a sentence only if it relies solely on facts proven to a jury beyond a reasonable doubt, or admitted by the defendant. Even in cases in which a court has not indicated it will give "substantial weight" to the guidelines, defense counsel should argue that the judge must base all guideline adjustments on facts proven beyond a reasonable doubt or, in the alternative, by clear and convincing evidence.

- Object to the Presentence Investigation Report, if it does not include all information relevant to Section 3553(a) purposes and factors.

- Use 18 U.S.C. § 3553(a) as a guide to structure your sentencing memorandum, but keep in mind you are no longer bound by the Sentencing Guidelines. Where the facts support a traditional guidelines departure, argue for it. But when they don't, use the factors listed in 18 U.S.C. § 3553(a) to argue for a non-guideline sentence below the range. Remind the court that the guidelines are only one of seven equally important factors it must consider in determining a sentence that is "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in § 3553(a)(2).

- After *Booker,* district courts still must state reasons for the sentences they impose. 18 U.S.C. § 3553(c). See *United States v. Webb*, 403 F.3d 373, 385 n. 8 (6th Cir. 2005). When that sentence is outside the guideline range, Section 3553(c)(2) still requires the court to provide a written explanation in the Judgment and Commitment Order of why the sentence is outside the guideline range. When you argue for a sentence below the guideline range, prepare a written statement of reasons the judge can adopt. Should the government appeal, a well-reasoned justification for the sentence can help ensure that it will meet the new test for "reasonableness."

- *Booker* has almost returned sentencing to pre-guideline days in which arguments that humanize a defendant and mitigate guilt can produce a sentence as low as probation (unless probation is precluded by law, or unless a mandatory minimum applies). An important difference between

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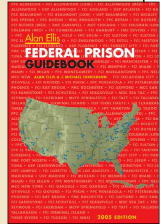

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pre-guideline sentencing and post-*Booker* sentencing is that a judge now must "consider" a list of seven factors (only one of which is the advisory guideline range) before imposing a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. Section 3553(a)(2).

● Section 3553(a) requires a court to fashion a sentence which is "sufficient, but not greater than necessary" to achieve the goals of sentencing—one of which is to provide a defendant with the rehabilitation he needs. § 3553(a)(2)(D). At the same time, 18 U.S.C. § 3582(a) requires the court to "recognize [that] imprisonment is *not* an appropriate means of promoting correction or rehabilitation." (Emphasis added.) After *Booker,* it will therefore be possible in some cases to argue that these two requirements support a sentence without any term of imprisonment so as to meet a defendant's need for educational, vocational, or medical services as part of his rehabilitation.

● Before *Booker,* the Guidelines prohibited a court from relying on certain offender characteristics for downward departures. *See* USSG §§ 5H1.4 (drug and alcohol abuse), and 5H1.12 (lack of youthful guidance or a disadvantaged upbringing). Courts were prohibited from relying on other factors, except in extraordinary circumstances. *See* USSG §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition and appearance), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), and 5H1.11 (charitable acts). Now that the guidelines are no longer mandatory, these limitations no longer restrict a court from imposing a sentence below the guideline range. Remember, not only does 18 U.S.C. § 3553(a)(1) *require* a court to "consider … the history and circumstances of the defendant," but § 3661 provides that "no limitation shall be placed on the information concerning the background, character, and conduct of the defendant which a court may receive and consider for the purposes of imposing an appropriate sentence."

● *Booker* offers new opportunities to defendants who entered into pre-*Booker* plea agreements that preclude seeking downward departures. Such defendants can seek non-guideline sentences or "variances" based on factors that would not previously have justified departures. In some cases, they may even be able to argue for lower sentences based on factors that previously may have justified departures.

● After *Booker,* a non-binding plea agreement which stipulates to the guideline calculation may still be helpful with a judge who has a strong inclination to follow the now-advisory guidelines. Plea agreements under Rule 11(c)(1) (C), which lock in a particular sentence or cap a sentence, may now become more common as a way to restore some of the certainty to sentencing that was taken away by *Booker.*

● After *Booker,* the government has less leverage to force a defendant to waive the right to appeal or the right to seek a downward departure or a non-guideline sentence. The defense should now agree to such waivers only when the government gives it something substantial in exchange.

● After *Booker,* cooperation will remain an important way for defendants to earn lower sentences, but in cases without mandatory minimums, it will not be as critical for plea agreements to include a government promise to file a § 5K1.1 motion. A court may now impose a below-the-guidelines sentence based on a defendant's cooperation, even without a government motion. In a case with a mandatory minimum, it will still be important to lock in a government's obligation to file a motion pursuant to 18 U.S.C. § 3553(e).

● In appropriate circumstances, considering that the Zones in the guidelines are now also advisory, consider urging the court to impose a higher split sentence than previously allowable under Zone C of the guidelines. For example, if the guidelines call for a 15-21 month range and you believe that a non-guideline sentence is appropriate, ask the sentencing judge to impose a sentence of eight months followed by supervised release with a special condition thereof of seven months of home confinement. Moreover, if the opportunity presents itself, argue for probation or time served followed by supervised release with a special condition of eight months in a CCC (halfway house) followed by seven months of home confinement. Add some community service and your client might end up with a very agreeable sentence.

● If you think your client is crazy, guess what? He may be. Consider having him evaluated by a mental health professional, such as a psychiatrist, psychologist, or social worker. If there is evidence of head trauma, particularly head trauma which left your client unconscious, have him evaluated by a neuropsychologist, a mental health professional who specializes in brain injury. While a mental disorder may not rise to the level that would justify a diminished capacity downward departure under U.S.S.G. § 5K2.13, the mental disorder still may be grounds for a lower sentence, either through a departure for extraordinary mental or emotional problems as suggested by U.S.S.G. 5H1.3, or after taking into account the factors listed in 18 U.S.C. § 3553(a).

● Consider hiring a mitigation specialist. We have two in our firm, both of whom are forensic licensed clinical social workers. They are available to outside counsel. You can also contact the National Association of Sentencing Advocates, 514 Tenth Street, NW, Suite 1000, Washington, DC 20004, phone 202-628-0871, fax 202-628-1091, www.sentencingproject.org/nasa. Mitigations specialists, or sentencing advocates as they are often called, develop individualized sentencing plans for attorneys whose clients face conviction and the prospect of incarceration. The individualized sentencing plans are used by defense attorneys to offer alternatives to lengthy incarceration to prosecutors during plea negotiations, to probation officers during the presentence phase, and to courts at sentencing. Typically, the focus of their sentencing proposals is on substance abuse and/or mental health treatment, victim restitution, community service, and avoidance of future misconduct. By helping judges understand the clients' life story, they help the attorney argue, often successfully, for alternatives to lengthy incarceration.

READ THE FOLLOWING ARTICLES ON SENTENCING AT OUR WEBSITE:

"Representing the White Collar Client in a post-*Booker* World"

[**NOTE:** Please check the above link again in September 2005 when this article is scheduled to be published in *The Champion*.]

"Baker's Dozen: Federal Sentencing Tips for the Experienced Advocate, Part I"

"Baker's Dozen: Federal Sentencing Tips for the Exeprienced Advocate, Part II"

"Answering the 'Why' Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation."

READ THE FOLLOWING ARTICLES ON SENTENCING:

Michael R. Levine, "108 Mitigating Factors," (May 1, 2005 ed.) (latest monthly update available from the author at 503-546-3927).

Booker Litigation Strategies Manual: A Reference for Criminal Defense Attorneys, Federal Defender Office, Eastern District of Pennsylvania, (April 20, 2005)

Visit Sentencing Law and Policy blog, http://sentencing.typepad.com.

Join the NACDL and BOPWATCH list serves. Nacdl.list-serv@nacdl.org; http://groups.yahoo.com/group/BOPWatch/.

FAVORABLE NEW CASES

FAVORABLE POST-*BOOKER* CASES INCLUDE:

United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005) (sentence imposed below advisory guideline range based on consideration of lack of personal gain as motive for the offense, defendant's responsibility for providing care for his elderly parents, and fact that his character was exemplary prior to the offense conduct).

United States v. Jones, 352 F.Supp.2d 22 (D. Me. 2005) (defendant sentenced below advisory guideline range to a split sentence in Zone C based on lengthy history of mental illness and need for treatment).

United States v. Smith, 359 F.Supp.2d (E.D.Wis. 2005) (sentence below advisory guidelines justified by unfairness of 100:1 crack-powder cocaine ratio). See, also *Simon v. United States*, 361 F.Supp.2d 35 (E.D.N.Y. 2005).

United States v. Galvez-Barrios, 355 F.Supp.2d 958 (E.D. Wis. 2005) (sentence below advisory guideline range based on unwarranted sentencing disparity among districts in reentry after deportation cases, as well as on history of USSG § 2L1.2, which shows that the Commission did not consider that the 16-level increase called for by § 2L1.2(b)(1)(A) was unjustifiably harsh in some cases).

United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (sentence below advisory guideline range justified "given the particular circumstances of this case defendant's advanced age, the likelihood of recidivism, his status as a veteran, his strong family ties, his medical condition, and his serious drug dependency").

United States v. Hubbard, 2005 WL 258257 (D.Mass. 4/25/05) (below the advisory guideline sentence because cooperation does not require a U.S.S.C. § 5K1.1 motion)

NEWS

FROM THE BUREAU OF PRISONS

The Bureau of Prisons (BOP) had a longstanding policy of designating eligible short-term (generally up to a year and a day) offenders, upon a judicial recommendation, to a community confinement center (CCC) or halfway houses for the service of the sentence. They also had a policy of placing eligible offenders in CCCs for up to the last six months of their sentences. In May 2002, the Office of Legal Counsel of the Department of Justice determined that the BOP did not have statutory authority to do either. The BOP then adopted a new policy, announcing that CCC designations would no longer be made and that inmates would be limited to transfer to a CCC for the last six months of a sentence or ten percent, whichever is less. Substantial litigation resulted, with many courts holding this new rule to be erroneous insofar as the ten percent limitation is concerned. See, *e.g., Elwood v. Jeter*, 386 F.3d 845 (8th Cir. 2004); *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004). On February 14, 2005, the BOP enacted and codified an almost identical version of this law at C.F.R. § 570.21. This, too, has been struck down by at least one district court. *Drew v. Menifee,* 2005 WL 525449 (S.D.N.Y. March 4,. 2005) (Pitman, U.S.M.J.).

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2255 Motions

Q. Is there a time limit within which a Section 2255 motion must be filed?

A. Prior to Congress enacting the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, there was no specific limit on the time within which a prisoner was required to file a § 2255 motion. The AEDPA's amendment of 28 U.S.C. § 2255 imposed a one year statute of limitations which is triggered by the latest of four events:

- the date on which the judgment of conviction becomes final;
- the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

All defendants, thus, have one year from the date on which their judgments of conviction become final within which to file § 2255 motions. Occasionally, a particular defendant will be able to file a § 2255 motion beyond that date when a new year-long limitation period is triggered by one of the other events listed above.

When a defendant petitions the Supreme Court for a writ of certiorari as part of the direct appeal, the judgment of conviction becomes final on the date the Supreme Court denies the writ. If the Supreme Court grants the writ, then the judgment of conviction becomes final either on the date the Supreme Court rules (if there is no remand), or on the date that the conviction and sentence are ultimately affirmed on remand. When a defendant fails to appeal, or when he or she appeals, but fails to petition for writ of certiorari, the Supreme Court has held that "§ 2255's one-year limitation period starts to run when the time for seeking such review expires." *Clay v. United States*, 537 U.S. 522 (2003).

If a defendant wins a new trial or a resentencing on appeal (or even as a result of a § 2255 motion), then the new judgment of conviction and sentence which is entered after the new trial or resentencing would begin a new year-long statute of limitations.

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Alan Ellis' Four Rules
of Federal Criminal Practice

RULE 1: Be prompt. At the end of a long day and a protracted trial, the judge told the assembled in his courtroom that the next morning he wanted to start promptly at 8:30 am. He stated that at 8:30 am, he wanted the jurors in the jury box, the deputy clerk and court reporter at their stations, the U.S. Marshals present with the defendant, and counsel at the counsel table. Then he added "And if I'm not here, it's not 8:30."

RULE 2: Know your limitations. It is better to refuse representation in an area of practice with which you are unfamiliar, and be thought ignorant, than to accept representation and remove all doubt. As inmates say, "Ninety-nine percent of lawyers don't know what they are doing in post-conviction law, and the ones who do, are all doing time."

RULE 3: Charge a reasonable fee. A young lawyer called a plumber to come to fix a leak in his house. The plumber put in two hours work and gave the lawyer a bill for $400. "$400!" exclaimed the lawyer. "That's $200 per hour. I'm a lawyer and I don't charge $200 per hour." The plumber responded, "Neither did I when I was a lawyer."

RULE 4: Be practical. If the law is against you, argue the facts. If the facts are against you, argue the law. If both the law and the facts are against you, take the probation officer out to lunch.

For 35 years, The Law Offices of Alan Ellis has worked with federal defendants and inmates, and consulted with many of the nation's leading criminal defense attorneys, to develop strategies that obtain the lowest possible sentence for clients, to be served at the best facility possible, with the greatest opportunity for early release.

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