



POST-BOOKER SENTENCING AND THE USE OF 18 U.S.C. §3553(a)(6)

BY

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There is an interesting new study from the United States Sentencing Commission (USSC) that is worthy of review by defense counsel, and of possible use in preparing sentencing memoranda. This publication, entitled *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, contains statistical analyses of sentences imposed for five separate offenses since the *Koon* decision in June 1996. As we all know, and frequently cite, *Booker* and its progeny have given Federal District Court Judges the discretion to impose sentences after considering all of the 18 USC §3553(a) factors, not just an individual's sentencing range according to the guidelines. While Federal Judges must still consult the guidelines for purposes of determining the appropriate advisory guideline range, they now have the discretion to consider the other statutorily enumerated factors including "the nature and circumstances of the offense and the history and characteristics of the defendant" [18 U.S.C. §3553(a)(1)] as well as disparity arguments under 18 USC §3553 (a)(6) when imposing sentence on an individual.

In its study, the USSC undertook statistical analyses of federal sentencing data for five specific offenses: drug trafficking, firearms, immigration, fraud, and child pornography.¹ This study covered a broad time span, from October 1995 through September 2011. The analyses were broken down into four distinct time periods: the *Koon* period (June 13, 1996 through April 30, 2003); the Protect Act period (May 1, 2003 through June 24, 2004); the *Booker* period (January 12, 2005 through December 10, 2007); and the *Gall* period (December 11, 2007 through September 30, 2010). The Commission selected these periods based on Supreme Court decisions and legislation that influenced Federal sentencing.

According to the report, "...in the aggregate, federal sentences have shown general stability." However, the report goes on to say that "unwarranted disparities in federal sentencing appear to be increasing" and that "...the role of the guidelines has become less pronounced." It might seem like sour grapes to the Commission, but the Supreme Court decisions that rendered the guidelines advisory and returned discretion to Federal Judges are the law of the land. Judges should have the ability to look at each case individually. Indeed, in the hundreds of sentencing hearings I have attended over the past 35 years, Federal Judges unequivocally state that sentencing is the most difficult challenge they face. Ruling on a civil liability case is one thing; depriving a defendant of their freedom is another.

The 100+ page report is worth reading.² Of particular interest is the analysis of child pornography cases. As most federal criminal defense lawyers know, child pornography cases have been an intense area of prosecution over the past decade. As the guidelines and legislation have ratcheted up the length of sentences for possession

¹In total, these offenses comprised over 80 percent of federal criminal offenses in fiscal year 2011.



of child pornography, federal judges across the country have fought back with individualized sentences that reflect the extent of a defendant's conduct, any harm that conduct may (or may not) have caused, and the background of the individual they are sentencing. In a landmark case in the Third Circuit, Judge Katherine Hayden went so far as to ask a Sentencing Commission representative to appear in Court to explain why a draconian sentence was appropriate for a first-time offender [*U.S. v. Daniel Grober*, 06-CR-880 (KJH)]. In its study, the USSC found that 44% of sentences in these cases are now non-government sponsored below guideline sentences.

Another interesting analysis in this USSC report relates to fraud cases. Like the guidelines for child pornography cases, the sentencing guidelines for fraud cases have exploded since 2001. Special offense characteristics for the number of victims, the possible derivation of more than \$1,000,000 in gross receipts from a financial institution, whether a defendant jeopardized a financial institution, and the escalation of guideline levels for loss amounts can easily translate into offense levels at the high end of the sentencing table and it is not unusual anymore to see a guideline range of life imprisonment for a first-time fraud defendant.

For fraud cases, Federal Judges are regularly granting variances under 18 USC §3553 and imposing a sentence below an individual's guideline range. According to the report, "...As a percentage below the guideline minimum, fraud offenses have had the largest reductions of all offense types, more than 50% below the guideline minimum during three out of four periods." This analysis was for non-government sponsored variance and departure. For a defense attorney representing a client in federal court, locating data that shows how similarly-situated defendants are being sentenced may be difficult. Given that 18 USC 3553(a)(6) mandates that unwarranted sentencing disparity be avoided, utilizing sentencing data is critically important.

To that end, one of the sentencing advocacy strategies NCIA has developed post-*Booker* that defense attorneys are finding integral to their sentencing arguments is a Federal Sentencing Statistical Analysis (FSSA). NCIA has obtained from the USSC their entire statistical database on the sentences imposed on individual defendants. This database currently contains sentencing information (excluding identifying information) on the over 690,000 defendants sentenced in federal courts between January 12, 2005 and September 30, 2013. Using this database, NCIA researchers examine and present statistics on aggregate sentences imposed. NCIA researchers have the ability to analyze the data by specific guideline applied or statute(s) of conviction and the factors relevant to a defendant's circumstances (for example, whether the conviction was by plea or trial, the individual's criminal history category, the application of specific enhancements, and the loss amounts in financial cases). In addition, we can provide such an analysis of sentences imposed nationally, by Circuit, as well as by District. In most cases, an FSSA report becomes a valuable disparity argument under 18 USC §3553 (a)(6), particularly when there is a draconian advisory guideline range.

Having worked with attorneys since 1977, we have experienced pre-guideline, guideline and now post-guideline sentencings in courts across this country. My recommendation for federal defense counsel is to keep developing the 18 USC §3553 argument, as it seems to be working.

²This report can be found at [http://www.ussc.gov/Legislative and Public Affairs/Congressional Testimony and Reports/Booker Reports/2012 Booker/index.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm)