



## WHITE COLLAR SENTENCING: CHALLENGES AND OPPORTUNITES

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In September 2013, the United States Sentencing Commission held a Symposium on Economic Crime, in which it sought answers to the increasing number of variances in the sentencing of offenders scored under USSG §2B1.1 and other economic fraud and tax guidelines. The Symposium was comprised of many Federal judges with significant experience in sentencing of these defendants.

The Honorable Loretta Preska, Chief Judge of the Southern District of New York, was one of the first speakers at the Symposium. She used her time to highlight some specific examples of variances she granted in a number of economic crime cases and her rationale for doing so. Her first case example was a defendant named Joseph Collins, who was the outside lawyer for an infamous case involving the Refco companies, which provided execution and clearing services for financial instruments such as derivatives, and covered up trading losses in an effort to enhance the price of an LBO. When the fraud was uncovered, the loss was in the neighborhood of \$2.4 billion, and the principals received double digit sentences.

Mr. Collins went to trial, was convicted and had a guideline calculation of a Level 49, calling for a term of life imprisonment. Judge Preska, echoing another Judge in the Southern District of New York, Jed Rakoff, found this calculation “simply absurd.” In imposing a sentence of a year and a day, Judge Preska cited that Mr. Collins did not financially benefit from the scheme, and that he had been a “certifiable saint...for his entire life.” She also felt, as did Judge Rakoff, that a short sentence for a white collar offender does have a deterrent effect and that a longer sentence was not necessary for this purpose.

For those of us who have worked on white collar sentencing over the past three decades, these sentences and many others like them are encouraging. In the early 1980’s, pre-guidelines, NCIA was fortunate to be involved in many major insider trading, fraud and tax cases in which the Courts relied on traditional sentencing factors and imposed what we felt were reasonable sentences based on the individual sentencing factors associated with both the offender and the offense. Fortunately, with the guidelines now “advisory only” many Courts have turned to variances under 18 USC §3553(a) where it can impose a sentence based upon “...the nature and circumstances of the offense and the history and characteristics of the offender” among other statutory factors.

The American Bar Association has also jumped on board. In an Associated Press article, following the Sentencing Commission’s decision to reduce drug sentences, a 2013 proposal from an ABA task force encourages Judges to place less emphasis on how much money was lost and more on a defendant’s culpability. It also encourages Judges to look at role, culpability and motive. In a recent case in Connecticut, Judge Janet Hall imposed a two year sentence on a former Wall Street trader in a case in which the guidelines again called for a double digit prison sentence. She called the guidelines “unhelpful, because the loss aspect of the crime, in effect, overwhelms all the other aspects.”

Most recently, in August 2014, the USSG approved its list of priorities for the coming year. A major focus will be on economic crimes. Judge Patti Harris, Chair of the Commission, stated that “For the past several years, we have been reviewing data and listening to key stakeholders to try to determine whether changes are needed in the way fraud offenders are sentenced in the federal system.”

There are a variety of sentencing strategies and tactics that seem to be making a comeback in Federal sentencing. One is the increasing use of the “old-school” split sentence, where a Court can impose a lesser prison sentence and use home confinement and/or community service to fulfill the goals of sentencing. Just in the past three months NCIA has assisted attorneys in developing significant community service programs which the Court has endorsed. Two involved major tax cases. One of the defendants was sentenced to perform community service teaching students in inner city high schools; another involved a defendant who has built a summer camp for children with disabilities. In a major fraud case the defendant is now tutoring and mentoring youth through an afterschool program. In one of the tax cases, the Court determined that the society would be better served by allowing him to serve his community rather than be incarcerated.

Additionally, disparity is becoming particularly useful in developing sentencing arguments in economic crime cases. 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 report we developed entitled a Federal Sentencing Statistical Analysis (FSSA).

NCIA has obtained from the USSC their entire statistical database on sentences imposed on individual defendants. This database currently contains sentencing information (excluding identifying information) on the over 925,000 defendants sentenced in federal courts between October 1, 1998 and September 30, 2013 and presents statistics on 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.

The challenge for defense attorneys is to continue to “push the envelope” and provide Judges with as much offender background information, sentencing alternatives and mitigating factors as possible in every case. In the words of Federal Judge Fredric Block of the Eastern District of New York, the guidelines should not be a “black stain on common sense.” Let’s not let them be.



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