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SENTENCING MITIGATION AND BEYOND *PRINCIPLES OF BOOKER THAT WORK*

- ❖ Though the Booker decision is not a panacea of relief it is nonetheless a successful tool in the arsenal of criminal defense work.
- ❖ Start with knowing what you can use to mitigate your plea or sentence.
- ❖ In the plea process it is not always good to have every issue regarding the guidelines stipulated to. If you can, leave as much open as possible especially if the issue is debatable. Of course if something is offered by the government that reduces your relevant conduct exposure stipulating to it in a plea agreement may be the right thing to do.
- ❖ The first priority is to object, object, and object, to enhancement applications under the guidelines. Since the guidelines are no longer mandatory judges are listening to old and new arguments and giving more credit to defense interpretations.
- ❖ Develop a two-prong approach to arguments in mitigation of the sentence. Work with relevant conduct issues in an attempt to reduce exposure for a particular defendants conduct versus the whole case profile. Second, argue unusual circumstances on enhancement issues while directing the courts attention to psychosocial issues that are mitigating in nature. These are particularly important when arguing for a lesser sentence. We have found judges amenable to mitigation on guideline issues where there is mitigating background information attached.

- ❖ **Combine your theory of the case on the guideline issues and other 18 U.S.C 3553 factors.** There are seven other factors to consider besides the guidelines themselves within this statute. There are also a large number of categories for departures more applicable to sentencing mitigation in the guidelines themselves. See USSG 5K2.0 et seq. and USSG 5H1.1 et seq. See also United States v. Webb, 403 F.3d 373, 385 (6th Cir. 2005) and United States v. Fuller, _F3d_ (2nd Cir. 2005).

In Webb the court determined that all factors of 3553 must be analyzed and identified in relationship to imposing the sentence. In other words, the court must make factual statements on each of the factors before imposing the sentence to identify the reasonableness of the sentence. In United States v. Fuller the defendant was sentenced after the Supreme Court's decision in Blakely but before the decision in Booker. The district court sentenced the defendant "in the alternative" stating that it would impose the same sentence regardless of whether the sentencing guidelines were binding or not. The Second Circuit held that the error was not harmless and remanded for resentencing. The alternative sentence is not necessarily the same one the judge would have imposed in compliance with the duty to consider all factors listed in 3553(a) where after being presented by the government a list of aggravating factors or by the defendant, a list of mitigating circumstances that were not available for consideration under the mandatory guideline regime.

The Fuller case is important due to the fact that many individuals were sentenced in the alternative after Blakely and may now be due for further sentence review. This issue is likely to be headed to the Supreme Court.

- ❖ **Do not be afraid to object to a PSR as incomplete without the other 3553 factors being mentioned.** It is good practice to create objections to the PSR in an individual motion and either combine the 3553 issues with that motion or file a separate motion for other background information relevant to 3553 factors in mitigation of the sentence.
- ❖ **Apply old case law that once was used, pre Booker, to create successful downward departures.** (Koon v United States, 518 U.S. 81 (1986)).
- ❖ **Use the history of the guidelines to bolster arguments in plea or trial cases to prove your point that 18 U.S.C. § 3553 was**

always there to guide the court and now should be applied more readily.

- ❖ **In trial cases use the evidence from the trial to argue for mitigation.** When preparing for trial, work in questions that will mitigate your client's exposure without admitting guilt. Takes talent and practice but it can be done.
- ❖ **In fashioning a sentence sufficient but not greater than necessary the argument regarding crack versus powder sentencing disparity is now open for review at every sentencing proceeding and has been successful.** Cases have come out dealing with this and United States v. Peterson, 143 F. Supp. 2d 569, (E.D. Virginia, 2001) is a good case discussing the history of this problem. In United States v. Ranum, 2005 U.S. Dist Lexis 1338 (E.D. Wis. Jan. 19, 2005) and United States v. Eura, E.D. Virginia, Richmond Division, Case No 3;04-CR-00151-REP-All both cases resulted in a sentence reduction based on the disparity of crack versus powder cocaine. There is even some argument that this issue should have been reviewed retroactively since 1995 when the first Sentencing Commission Study on this sentencing disparity issue was reviewed at the request of Congress. Applying this information with the fact that 18 U.S. C. 3553 was available then might open some retroactivity doors.

United States v. Hubbard, 369 F.Supp 2d, 146 (District of Massachusetts, April 25, 2005), is another crack cocaine case where the court applied the sentencing guidelines governing the forms of cocaine that were not crack. This also discussed sentencing departure for reasonableness for defendant's traumatic childhood and diminished capacity. See also United States v. Perry Cr. No. 04-089S (U.S.D.C. Rhode Island, 2005). The Perry decision discusses at length the problem with crack versus powder sentencing issues. This is a good case to follow in developing any arguments on this issue.

- ❖ **Be creative.** Ask for a pre-plea PSR to get a handle on the problems you may face if the client decides to plead out and there is uncertainty as to how the Probation Office will look at both sides of the sentencing issues.
- ❖ **Mitigating case law is more abundant than you think.** Create a theme of mitigation using evidence, background information, guideline language and case law.

- ❖ **Never give up.** There are sentencing and post conviction attorneys to help. They are creative, insightful and can help make your objections to the PSR more meaningful as well as provide good psychosocial mitigation. Look for one with a psychology or social psychology background. Team defense works.
- ❖ **SOME GOOD POST-BOOKER MITIGATION RESULTS:**
 - **United States v. Jimenez-Gutierrez**, _F.3d_ (8th Cir., Oct. 13, 2005) Case No. 04-2119. Here, the 8th Circuit determined that there was a reasonable probability that a lower sentence would have been rendered by the district court since the district court had stated "the sentencing system was unjust". In this case, in addition to imposing a sentence at the bottom of the guideline range the court also stated it believed a system that allowed for such large sentencing discrepancies was unjust. Remand was warranted.
 - **United States v. Labastida-Segura**, 396 F.3d 1140 (10th Cir. 2005) applied to United States v. Austin, _F.3d_ (10th Cir. Oct. 14, 2005). Here, the defendant argued the court erred in applying the sentencing guidelines in a mandatory fashion. Because the defendant raised this claim in the district court, the 10th Circuit reviewed for harmless error. Given the defendant was sentenced at the bottom of the guideline range, the government conceded that remand was appropriate under the Labastida-Segura case out of the 10th Circuit.
 - **United States v. Lee**, _F.3d_ (11th Cir. Oct. 5, 2005). Here the 11th Circuit stated that a Booker error was harmless where the court stated it would have imposed the same sentence if the guidelines were advisory. This case may be ripe for further review against the backdrop of Fuller, *supra*.
 - **United States v. Barnett**, 398 F.3d 516 (6th Cir. 2005) as applied to United States v. Ibarra-Hernandez, _F.3d_ (6th Cir. Oct. 14, 2005). This case was remanded when the defendant was sentenced under the mandatory guideline system receiving a 16-level enhancement because he had previously been convicted of attempted burglary which is a crime of violence under 2L1.2(b)(1)(A)(ii). The defendant argued the enhancements significantly overstated the severity of his attempted burglary conviction, but the district court ruled that it did not have the discretion to depart downward. In light of Booker, of course, this was not the case.

- **United States v. Castro-Juarez**, _F.3d_ (7th Cir. Oct. 3, 2005) No. 05-1195. Here, the 7th Circuit looked to the pre-Booker law by analogy to examine the reasonableness of the sentence above the advisory range. Here, the defendant pled guilty to being in the U.S. after deportation. The district court imposed a sentence of 48 months, well above the upper end of the advisory range of 15-21 months. To evaluate the reasonableness of the sentence, the 7th Circuit looked to pre-Booker law by analogy. If the appeal had been decided pre-Booker, the panel would have found the 48-month sentence was not adequately tied to the instruction of the guidelines. However, under post-Booker, all that is necessary to sustain a sentence above the guideline range is an adequate statement of the judge's reasons consistent with 3553(a) explaining the sentence he had selected was indeed appropriate for a particular defendant. The district court could not meet the standard. The court mentioned only the defendant's criminal history. However, the analogy to 4A1.3 did not fully explain the 48-month sentence. Because the sentence was more than double the high end of the range, the court's explanation was not sufficiently compelling.
- **United States v. O'Malley**, _F.3d_ (8th Cir. Oct. 4, 2005). Here the 8th Circuit remanded where the court misunderstood the impact of Blakely on the guidelines. The 8th Circuit found that the district court's understanding of Blakely's effect on the federal guidelines was erroneous. Under Booker, which was not available at the time of the hearing, the district court should have calculated and considered the guideline range as it would have done under the mandatory guideline system and then consider the advisory range together with other factors as applied in 18 U.S.C. § 3553. See also **United States v. Egenberger**, _F.3d_ (8th Cir. Sept. 23, 2005).
- **United States v. Bradford**, _F.3d_ (10th Cir. Sept. 14, 2005). Here the 10th Circuit ruled that finding additional drugs was plain error where there was a lack of substantial evidence to support the increase. The 10th Circuit found that the last two prongs of the plain error analysis were satisfied and remanded for resentencing. The error was prejudicial because but for the court's finding that defendant carried an additional 30 grams of cocaine on a previous trip the defendant's total offense level would have been two levels lower than the sentence that was imposed. The arresting agent in this case testified that defendant told him that she had made nine previous trips to California and Minnesota. The district court

sentenced the defendant based on 5 kilograms of cocaine finding it "highly unlikely" that the prior trips would not have involved more than 30 grams of cocaine. The court also found remand appropriate as the defendant had made numerous objections to the PSR and objected strenuously to the factual basis on which the judge found the additional 30 grams of cocaine. Citing United States v. Scott, _F.3d_ (11th Cir. Sept. 27, 2005) the 11th Circuit said the court, imposing a post-Booker sentence need not specifically address and analyze each 3553 factor. Noting Fuller, *supra*, this is again an 11th Circuit case in contradiction to that case which hopefully will be undertaken in the Supreme Court in the future.

- **United States v. Edwards**, _F.3d_ (D.C. Cir. Sept. 30, 2005). The D.C. Circuit Court remanded for a determination of whether a court would have imposed a more favorable sentence under the advisory guidelines had it been fully aware of the post-Booker sentencing regime.
- **United States v. Jose Galvez-Barrios**, 355 F. Supp. 2d 958 (E.D. Wisconsin, Feb. 2, 2005). In this case, the defendant returned to the United States to support a woman with whom defendant had a long-term relationship and there were several children. The defendant engaged in no criminal conduct after his re-entry. After noting that the U.S. Sentencing Guidelines Manual was merely advisory, the court held that an appropriate term of incarceration was substantially less than the sentence recommended under the guidelines. The defendant's re-entry to support his family, which involved a stable relationship, mitigated the seriousness of the immigration offense. The defendant was steadily employed and paid taxes, and defendant's good character was supported by his priest, neighbors, friends and employer. (Community support departure was noted before the Booker decision and is now more readily available after Booker.) The court also found that the defendant's prior conviction was a prior aggravated felony for which there were mitigating circumstances indicating the defendant was not a danger to society and that the guidelines unduly and harshly weighed defendant's prior conviction far out of proportion to any reasonable assessment of the dangerousness, and fast-tracked illegal re-entry programs in districts in border states resulted in a serious sentencing disparity.

All of the above cases are just a few of the many cases available that deal with Booker decisions that are favorable. Many of the

Booker decisions are found in district court decisions and have not been appealed to avoid setting precedent. Because there are so many jurisdictions that have so many cases it is helpful to obtain the assistance of an attorney who is well-versed in sentencing decisions to help you navigate the waters of the Federal Sentencing Guidelines and post-Booker decisions.

A GOOD 11TH CIRCUIT CASE ON LOSS CALCULATIONS
United States v. Renick, 272 F. 3d 1009 (11th Cir. 2001)

This is a case of a 38-count indictment charging defendants with conspiracy to defraud the United States by impeding the administration of health care programs by submitting false claims, to commit wire fraud, and money laundering. Sentences were vacated and remanded for resentencing consistent with the opinion limiting a loss value to \$30, 871.28 against the backdrop of the government's interest wanting a guideline range applied to the greater loss factor than the \$30,871.28. The 11th Circuit found that individuals who receive a "return" or break even on their "investments" are not victims for purposes of U.S. Sentencing Guideline Manual 2F1.1. At most, they are unwilling pawns in a Ponzi scheme. These individuals may be exposed to risk of harm

by a Ponzi scheme, but the risk of harm should not be considered in estimating the loss under 2F1.1. Under 2F1.1, the risk created enters into the determination of the offense level only insofar as it is incorporated into the base level. Unless clearly indicated by the guidelines, harm that is merely risk is not to be treated as equivalent to harm that occurred. See U.S. Sentencing Guideline Manual 1B1.3 Commentary Application Note 5. This standard of review is equally applicable to 2B1.1 elements and now, under the non-mandatory guidelines systems, is a very relevant argument to be made in loss cases and multiple victim cases.

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