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BEFORE THE
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
FEBRUARY 15 – 16, 2005

I. Introduction

Judge Hinojosa and members of the United States Sentencing Commission, thank you for inviting the Federal Defender Sentencing Guidelines Committee to testify on the present and future impact of the Supreme Court's decision in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005) on federal sentencing.

It is important not to forget that *Booker* is the latest in a series of Supreme Court decisions that have given greater protection to the constitutional rights of criminal defendants in sentencing. With that in mind, *Booker* presents an opportunity for the Commission to make sentencing more fair and rational. As recognized by the Supreme Court in its sentencing cases, by the Commission in its own Fifteen Year Study, and by practitioners, commentators, and academics, the federal sentencing system could be made better. This is the challenge.

We know that the Commission, in holding these and previous hearings, is striving to meet this challenge. The Commission, more than any other governmental body, is ideally situated to provide information and analysis on federal sentencing pursuant to its statutory obligations under 28 U. S.C. § 994. The Commission's analysis and projections are critical in determining whether the *Booker* remedial sentencing scheme, with advisory guidelines, will "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Booker*, 125 S. Ct. at 767.

We join the Practitioners' Advisory Group in urging the Commission to study and analyze sentencing information over the next year to see if any change is required, and if so, what kind. Meanwhile, no legislative change is warranted. The system is apparently working, sentences are being imposed in accordance with the statutory purposes of sentencing, and the broader goals of the Sentencing Reform Act are being met.

II. Responses to the Commission's Questions

The Federal Defenders respond to the Commission's questions as follows.

A. Standards and Procedures for Imposing Sentence (Questions 1 and 3)

We believe that statutory modification is unnecessary at this time. The transformation

from mandatory to advisory guidelines as a result of *Booker* presently appears to work. *Booker*'s remedial opinion made the legislative changes that were necessary, excising the statutory sections that made the guidelines mandatory and directing sentencing courts to consider the guideline range together with the sentencing goals and other factors set forth in 18 U.S.C. § 3553(a).

Under this framework, courts will find the facts relevant to the guideline range and calculate the guideline range based on those facts. If a ground for departure is raised, the court will determine the relevant facts and consider whether a departure is warranted under existing departure jurisprudence. Once the guideline sentence is reached, courts will then determine whether it is "sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, and achieve just punishment, general and specific deterrence, and needed treatment and training in the most effective manner. *See* 18 U.S.C. § 3553(a)(2). The court will then examine the other factors set forth in section 3553(a) to determine whether the Guideline sentence is sufficient but not greater than necessary to meet those goals. The facts relevant to the statutory goals and other factors also will be found by the court. Courts will continue to state the reasons for the sentence in open court, and to state the reasons for a sentence outside the guideline range "with specificity" in the judgment and commitment. *See* 18 U.S.C. § 3553(c).

The courts are employing this basic framework in the wake of *Booker*. *See United States v. Hughes*, 2005 WL 147059, at *3, __ F.3d __ (4th Cir. Jan. 24, 2005); *United States v. Crosby*, 2005 WL 240916, at **5-7, __ F.3d __ (2d Cir. Feb. 2, 2005); *United States v. Ameline*, No. 02-30326, at 17-19 (Feb. 9, 2005); *United States v. Wilson*, __ F.Supp.2d __, 2005 WL 273168, at *2 (Feb. 2, 2005); *United States v. Ranum*, __ F. Supp.2d __, 2005 WL 161223, at *2 (Jan. 19, 2005). Thus, there is no reason for legislative clarification.

B. Extent of Consideration of the Guidelines (Question 2)

We do not believe that the extent to which the Guidelines must be considered or taken into account needs to be clarified. *Booker* made clear that courts "must consult the Guidelines and take them into account when sentencing." *Booker*, 125 S. Ct. at 745. To consult and take account of the Guidelines means that it is necessary to arrive at a Guidelines sentence. That was the intent of the *Booker* remedial majority, its pragmatic logic is apparent, and that is what the courts are doing.

Moreover, we believe that any attempt to impose legislative requirements as to the weight to be accorded the Guidelines in relation to the goals and other factors set forth in section 3553(a) would run the risk of being interpreted as mandatory and thus unconstitutional.

C. Appellate Review (Question 4 and 5)

Booker made clear that the "numerous factors" set forth in 3553(a) that will guide sentencing will also guide the courts of appeal in determining whether a sentence is "unreasonable." *Booker*, 125 S. Ct. at 766. The Second Circuit has developed the standard of review in more detail, holding that errors of law, clearly erroneous findings of fact, and procedural errors in the method of selecting the sentence, as well as the length of the sentence in view of section 3553(a), are bases upon which a sentence may be deemed to have been unreasonable. *See Crosby*, 2005 WL 240916 at **8-9.

Section 3553(a) provides a framework according to which the reasonableness of a sentence can be assessed. According to *Booker*, all sentences outside the guideline range should be reviewed "to determine whether the sentence 'is unreasonable' with regard to § 3553(a)," 125 S. Ct. at 765-66, which for departures would include reference to the Commission's policy statements regarding departures. *See* § 3553(a)(4).

We do not believe that a sentence within the guideline range should be deemed "presumptively reasonable." To do so would make the guideline range impermissibly mandatory, and thus violate the Sixth Amendment if based on judicial factfinding. The same is true of re-instituting *de novo* review. The Supreme Court excised *de novo* review because it would have made the newly advisory Guidelines mandatory. *See Booker*, 125 S. Ct. at 765.

D. Substantial Assistance, Fast Track, Acceptance of Responsibility (Question 6A)

We do not believe that there will be an adverse effect on the ability of prosecutors to reach plea agreements or obtain cooperation, and that the concerns of the Department of Justice in this regard are unrealistic.

With regard to substantial assistance, first, U.S.S.G. § 5K1.1 requires a government motion, and we expect the court, in considering this guideline, to follow it as written. Second, suppose the government declined to move for a substantial assistance departure and the defendant requested that the court sentence outside the guideline range on that basis nonetheless. Even if the court were inclined not to require a government motion, if the government asserted that the defendant did not provide such assistance, the government's position would carry the day in virtually every case. It would be the egregious case involving governmental "bad faith" that would be the exception, and that remedy already is available. Third, *Booker* did not touch mandatory minimum sentences or the requirement of a government motion to sentence below a mandatory minimum.

Defendants in districts with early disposition programs obviously will continue to enter into plea agreements with the government in order to obtain its motion to substantially reduce their sentences. The change, if at all, would be in the districts where early disposition programs have not been established. In the appropriate case, a court could consider reducing a sentence to

further the goal of reducing unwarranted regional disparity. *See* 18 U.S.C. § 3553(a)(6). The Commission itself has had concerns about the wisdom of the early disposition program.

Finally, we assume that courts will continue to require the government's motion for the third acceptance of responsibility point since that is what U.S.S.G. § 3E1.1 requires. Defendants will still have the incentive to comply with its requirements to ensure the government's motion.

E. Prohibited Factors (Question 6B)

Congress has prohibited unconstitutional factors such as race, gender and national origin from being used for any purpose in sentencing, and we believe this is appropriate, if not required. We do not believe that any other factor should be prohibited from consideration for any purpose in sentencing. What makes the Guidelines "advisory" is that they do not necessarily control the sentence.

After *Booker*, courts may consider factors that are currently prohibited from consideration under the Guidelines, if such factors are relevant in the context of § 3553(a) under the particular facts of the case. The statute, of course, trumps the Guidelines.

At the same time, courts must consider the guidelines and policy statements that prohibit consideration of certain factors. Our view is that courts will take account of the Commission's reasons for doing so and give them appropriate weight.

F. Advisory Guidelines in the States (Questions 7 and 8)

Our information is that states with advisory guidelines have a high rate of within-guidelines sentencing. We believe that federal judges, too, will impose Guidelines sentences in the vast majority of cases.

G. Recommendation for the Short and Long Term

As a result of *Booker*, the Commission has an opportunity to continue its mission of ensuring fairness and justice, and reducing unwarranted disparity, in federal sentencing. *Booker* is a chance to test how advisory guidelines work, and to what extent the federal courts will rely on the expertise of the Commission in fashioning their own sentences. The Commission should not support or propose legislative solutions for problems that may not exist.

This is also an opportunity for the Commission to act on the recommendations of the Fifteen Year Study, and to revisit the concept of "relevant conduct," which has been the source of such unfairness and inequity and the subject of strong and widespread criticism. The Commission should also determine how best to simplify the guidelines.

In closing, we thank the Commission again for allowing us to testify. We look forward to working with the Commission, as is our statutory mandate, in setting sentencing policy.