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A Brief History of the Sentencing Guidelines

As you are likely aware, the sentencing guidelines were implemented on November 1, 1987, for all crimes that occurred on or after that date. The U.S. Sentencing Commission was tasked with developing sentencing guidelines which would prescribe fitting punishment for federal defendants with a goal of reducing sentencing disparity. Needless to say, this was no small undertaking and involved both practical and philosophical discussions by the members of the Sentencing Commission in an attempt to satisfy Congressional directives. The sentencing guidelines are evolutionary in nature and are amended, in part, each year. The number of amendments has grown to over 700.

For several years after November 1987, I had what would now be considered a rather unique opportunity to prepare both pre and post guideline presentence reports. From a practitioners standpoint, I must admit pre guideline presentence reports were much less cumbersome and much more straight forward. Obviously, there were no guideline calculations, which in and of themselves, require a certain amount of subjectivity and research. Because the pre guideline reports did not require any calculations or analyses of the crimes of conviction, the defendant's criminal history, or any directives regarding the type of sentence to be imposed, the court, in most instances, was free to impose any sentence they felt appropriate. In order to provide some frame of reference; pre guideline reports contained national and district statistics from the previous year for defendants sentenced for the same statutory violations. This was the only sentencing guidance provided in pre guideline reports.

Guideline presentence reports lend themselves to a whole new level of scrutiny. The guideline calculations are closely reviewed and analyzed, as are the criminal history calculations. While the content of the information concerning the defendant's personal history and characteristics did not change, its relevance, in regard to possible reasons for departure, did change. In addition, guideline reports are subject to objections filed by both counsel for the government and defense counsel. Thereafter, the probation officer is required to research the objections and provide a written response. Often, the response does not resolve the dispute and thus the controverted information requires findings by the court.

Not only has the entire sentencing process changed as a result of the guidelines, but over the past 22 years the types of crimes prosecuted have changed too. Today, immigration, drugs and firearms violations account for the majority of federal prosecutions. This is especially true in the

Ninth Circuit. These defendants often have lengthy criminal records and substance abuse histories. For many reasons, they provide more of a challenge for the presentence investigator and ultimately the supervising probation officer. Given the gravity of the offenses prosecuted today, as opposed to the pre guideline era, it is not surprising that the type of sentences available, in which probation is not an option, has resulted in many more defendants going to prison.

I remember watching the introductory video of the sentencing guidelines. The guidelines were explained and certain processes were recommended. I remember discussing with colleagues the perceived advantages and pitfalls of the new sentencing system. At that time it was the common opinion that the prosecutors had all the power and could force an outcome by the type and number of criminal charges they filed. Defense attorneys struggled with how to best represent their clients. Probation officers were now thrust into a more adversarial role and were expected to resolve conflicts prior to the sentencing hearing. Because the sentences of defendants were often challenged in appellate courts, and some eventually at the Supreme Court level, probation officers were responsible for researching case law and providing legal guidance, from a layman's perspective, to the court via the addendum to the presentence report. This was a new role for the probation officer and one that took a certain amount of training, as it was unusual for probation officers to have undergone any formal legal training. In addition, probation officers were questioned, sometimes vigorously, at sentencing hearings regarding the guideline calculations.

As the years passed, all parties involved in sentencing hearings adjusted to the new process. Probation officers became the sentencing specialists. Today they are often called upon to assist defense attorneys in determining preliminary guidelines so they can negotiate an effective plea bargain agreement on behalf of their clients. Through hard work, determination and with a distinct air of professionalism, they have become the trusted neutral party for both prosecutors and defense attorneys. It is an extremely interactive sentencing system involving all parties, including the probation officer. Obviously each Judge has their own style and manner of sentencing, but unlike before, they look to, and even rely upon, the probation officer to help settle outstanding issues and provide information on sentencing decisions as they relate to custody, probation, supervised release, fines and restitution.

In the past 22 years there have been a few Appellate and Supreme Court cases that have had a major impact on the guideline system. Early on, the Ninth Circuit had ruled that the guidelines violated the Separation of Powers Doctrine. Until that decision was vacated by the Supreme Court in *Mistretta v United States*, 488 U.S. 361 (1989), a retroactive decision, Judges in the District of Idaho imposed dual sentences. They imposed the guideline sentence that would have applied and a non-guideline sentence that would result in the defendant spending roughly the same amount of time in custody as the guideline sentence. Thus, the court took into consideration the defendant's parole eligibility (usually after serving one-third of the sentence) compared to the guideline sentence, which only afforded 54 days per year good time. Two Judgment and Conviction Orders were entered against the defendant and consequently after the *Mistretta* decision, defendants did not need to be re-sentenced.

In *Apprendi v New Jersey*, 530 U.S. 466, 489 (2000), the Supreme Court held that due process required that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond

a reasonable doubt.” The *Apprendi* decision did not have much, if any, affect on sentences previously imposed in the District of Idaho, but it did cause prosecutors to include drug type and drug amounts in charging documents, plea agreements and jury instructions.

Although case law mounted over the years and affected how guidelines were calculated, it was the common belief that the mandatory nature of the guidelines was here to stay. The guidelines had withstood legal challenge after legal challenge and they had always prevailed. There were certain important Supreme Court decisions after *Apprendi*, including *Blakely v Washington*, 542 U.S. 296 (2004), which held that the Sixth Amendment right to a jury trial was violated by the Washington state sentencing guidelines; however the landscape changed dramatically in January 2005, when the Supreme Court issued the “*Booker*” decision. In *United States v Booker*, 543 U.S. 220, 224 (2005), the Supreme Court held that *Blakely* applied to the guidelines and, therefore, sentences imposed by judges using the mandatory guidelines violated a defendant’s Sixth Amendment right to a jury trial. In a remedial portion of the *Booker* decision, a different majority of the Supreme Court held that the statute that makes the guidelines mandatory, 18 USC 3553(b), could be excised from the rest of the statute, thereby making the guidelines advisory. Id at 248 - 268. It is the advisory principles of the guidelines that are in place today. The guidelines are now referred to as pre and post *Booker* by practitioners.

Defense attorneys were excited about the *Booker* decision. They saw a system where judges could sentence using unfettered discretion, taking into account factors mentioned in 18 USC 3553(a), and sentence defendants giving little or any regard to the guidelines. However, as a result of post *Booker* appellate case law, the parties learned that although advisory, guidelines were to be considered by the court as the starting point in the sentencing process. Departures and now variances were certainly granted; taking into account factors within the guidelines as well as outside of the guidelines. In time, circuit courts provided guidance to the district courts regarding sentencing procedures. The sentencing system in place today, in reality, differs little from the system in place before the *Booker* decision.

From my perspective, the sentencing system in place today is a more fair system than the one in place prior to implementation of the guidelines. Of course there are differences regionally and even within a district, as Judges possess their own philosophies about sentencing. But, there is a starting point that looks the same for defendants with similar criminal histories and offenses of conviction. There is existing case law that provides guidance and requires reasonableness in sentencing. In the guideline manual there are stated reasons for departures and factors that should not affect departure decisions. As a result of the *Booker* decision, Judges have regained some of the discretion they were afforded prior to the implementation of the guidelines. Even so, in fiscal year 2008, as explained below, the rate of departures in the District of Idaho, that were non-government sponsored, was 12.4%. Of that percentage, 1.1% were upward departures and 11.3% were downward departures. In fiscal year 2003, prior to the *Booker* decision, the rate of non-government sponsored departures was 5.8%. Thus, while the *Booker* decision did open the door for enhanced judicial discretion, it appears such discretion was, and is, used judiciously, as mentioned above and explained in more detail below.

The information provided below is a review of sentencing statistics compiled by the U.S. Sentencing Commission, for fiscal year 2008 , as they relate to departures.

In the District of Idaho, 47.2% of cases were sentenced within the guideline range compared to 59.4% nationally. Only 1.1% of the cases in the District of Idaho were sentenced above the guideline range as compared to 1.5% nationally. In regard to departures below the guideline range, 40.4% of the cases sentenced in the District of Idaho received a government sponsored downward departure as compared to 25.6% nationally. Of that percentage, 26.4% were for 5K1.1 or substantial assistance departures, 12.5% were for 5K3.1, or early disposition departures (immigration cases) and 1.5% were for other types. It is interesting to note that the percentage of 5K1.1 departures was almost twice the national average. Although a small district, with only 267 cases sentenced in FY 08, (86 defendants were sentenced for drug crimes) several of the cases were large multi-defendant drug cases. In the District of Idaho, the government does not reserve a 5K1.1 motion for the first defendant to offer assistance, but many times for all defendants who provide additional information and agree to plead guilty. The degree of the departure is usually commensurate with the value of the information provided. A 5K1.1 departure, in conjunction with a motion in accordance with 18 USC 3553(e), is the only way for many defendants convicted of drug crimes to receive a sentence below the mandatory statutory minimum, unless they are in the small minority that qualify for sentencing pursuant to 18 USC 3553(f), also known as the safety valve. Thus, a 5K1.1 departure is a very important bargaining tool for the prosecutor.

As previously mentioned, the majority of cases sentenced in the Ninth Circuit and thereby in the District of Idaho, include drug, immigration and firearms offenses. Thus, there is greater opportunity for departures under 5K3.1, as it relates to immigration cases. In FY 08, 12.5% of immigration cases received such a departure.

In regard to non-government sponsored downward departures, 11.3% or 30 defendants in the District of Idaho and 13.4% of national cases were so sentenced. In a majority of these cases, the courts cited *U.S. v Booker*, 18 USC 3553 or related factors as one of the reasons for sentencing outside of the guideline range.

When comparing the most current statistics (FY 08) with pre-*Blakely* and pre-*Booker* statistics, using the last fiscal year they were available, or FY 03 (which does not include 5K3.1 departures as they did not become available until October 2003, or FY 04), it is noted the percentage of cases sentenced within the guideline range was only 1.6% less than FY 08. Likewise, the rate of upward departures increased from FY 03 to FY 08 by only .3%. Thus, not surprisingly, it does not appear that the *Booker* decision had a statistically significant impact on upward departures.

Perhaps somewhat surprising, in total, although categorized differently, the rate of downward departures only increased from 50.4% in FY 03 to 51.4% in FY 08 in the District of Idaho. Although the rate of 5K1.1 departures declined, the rate on non-government departures increased by 5.5%, largely as a result of the *Booker* decision. Consequently, when reviewing the impact of the *Booker* decision on sentencings in the District of Idaho, downward departures did increase, but not at a rate that is all that statistically significant.

Consequently, despite 25 years of challenges, one can conclude that the guidelines, even in the post *Booker* era are alive and well. The three primary objectives of the guidelines; honesty, proportionality and objectivity in sentencing, are still considered by the Judges when making

sentencing decisions. While these decisions look different than they did in 1987, the objectives remain the same. This is not meant to draw any conclusions regarding the perceived success or failure of the sentencing guidelines. The answer to such a question would depend to whom the question was addressed. If allowed to make a broad conclusion, probation officers, as a whole, would submit that largely the objectives are being met, with some objectives being realized at a greater rate than others. We, as probation officers, are proud of the work we perform and enjoy our interactions with the attorneys, the staff at the Sentencing Commission and the Judges whom we serve. We appreciate the recognition received and the value accorded to us by the parties.