

U.S. SENTENCING COMMISSION  
Public Hearing - October 20-21, 2009  
Denver, CO  
[from Chief Judge Fernando J. Gaitan, Jr.]

1. How has the advisory nature of the federal sentencing guidelines after the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005) affected federal sentencing?

The District Court has more discretion in sentencing decisions to which the appellate courts review must be deferential where properly articulated reasons are given for that sentence. While the appellate court might disagree with the sentencing judge, they may not substitute their collective judgment for that of the trial court when that decision is procedurally correct and substantively reasonable. This was not the case prior to Booker & Gall.

2. What should be the role of the federal sentencing guidelines in federal sentencing?

Advisory starting point, one of the factors considered by the sentencing judge. While the sentencing judge is not required to follow them, they do respect the work put forth to establish them. That work is valuable to the sentencing process. However, they need not be the sole consideration.

What, if any, changes should be made to the federal sentencing guidelines?

The Commission should review the non-guideline factors considered by the sentencing judges (post-Booker) to determine how they might be incorporated or factored into the sentencing guidelines. Collecting this empirical data to broaden the scope of the guidelines. That may eliminate a portion of the variance that occur and promote more consistency in the post- Booker environment.

3. Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?

Yes. Given the findings in *Gall v. U.S.* and its predecessors, the trial courts can now give each defendant the proper consideration assuring that the sentence is sufficient but not greater than necessary to achieve the goals of 18 U.S.C. sec. 3553(a).

There is one exception. Statutory minimums do not allow the trial judge to exercise his/her role in the sentencing process. Sentencing below the statutory minimums is permitted only upon the filing of a downward departure motion by the Government. Thereafter, the trial judge may only consider the degree of cooperation and not the sentencing factors considered in both the Guidelines and 18 U.S.C. sec. 3553(a).

4. How should offense and offender characteristics be taken into account in federal sentencing? What, if any, changes should be made with respect to accounting for offense and offender characteristics?

A. On a case-by-case review of both the defendant and the crime(s); along with other 18 U.S.C. §3553(a) sentencing factors.

B. The sentencing judge will need to strike the appropriate balance by considering those 3553(a) factors, Sentencing Guidelines and any other appropriate factor.

5. What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?

No sentence should be imposed that is greater than necessary to meet punishment required in a given case. Having said that, the analysis starts with the PSR and Guideline calculations. Next, we look at the offense and the offender as well as the U.S.C. 3553(a) factors. Followed by any other facts, the sentencing judge believes relevant to the ultimate decision not to impose a sentence that is greater than necessary.

6. How have Booker and subsequent Supreme Court decisions affected appellate review of sentences?
- A. In some cases, the appellate court has substituted their view of a reasonable sentence for that of the trial judge. This should no longer be the case.
  - B. Those circuits that treated sentences that varied from the guideline as suspect or worse, still struggle with properly articulated explanations for sentences. I have noticed a trend to use their procedural and substantive review to override a sentencing judge, rather than their review for abuse of discretion.
  - C. It is important to this process that the trial judge articulate the process used to insure the appellate court has a sense of the procedural and substantive assessment of the trial court.
7. What, if any recommendations should the Commission make regarding the Federal Rules of Criminal Procedure?
- SEX OFFENSES, SEX OFFENDERS & PORNOGRAPHY.
- Nothing at this time.
8. What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing?

Statutory minimums prevent the Court from exercising its objective of

fair sentencing. They do not allow for an objective consideration of the offense nor the offender.

Statutory minimums do not allow the Court to exercise its discretion within the realm of either 18 U.S.C. sec. 3553 or the advisory guidelines. Need to review the number of statutory minimums with the goal of the ultimate elimination of them