

**U.S. Sentencing Commission Public Hearing
Austin, Texas
November 19-20, 2009**

Written Statement - Texas Western

The following information is a compilation of views & suggestions from the U.S. Probation Office for the Western District of Texas. From the perspective of our presentence investigators, the federal criminal justice system continues to operate effectively and fair. While *Booker* has altered the manner our judges approach the now advisory sentencing guidelines, this new flexibility in tailoring an appropriate sentence appears to be welcomed by the courts, and to date, has had a minor affect on our sentencings. Of course, we realize this advisory system can disturb the goal of uniformity and create disparity in sentences.

If one looks at the statistics through the 3rd quarter for FY 2009, one would surmise there has been little change in the way our courts in WD/TX sentenced defendants. For example, nationally, for the 3rd quarter preliminary Fiscal Year 2009 data through June 30, 2009, 57.4% were sentenced within the guideline range. For the same period in WD/TX, 78.7% of the cases were sentenced within the advisory guideline range. As a comparison, we offer the following WD/TX statistics:

For Pre-Blakely Fiscal Year 2004 Guideline Sentences:

<i>Sentenced Within Guideline Range:</i>	83.0%
<i>Substantial Assistance Departure:</i>	10.9%
<i>Government Sponsored Downward Departure:</i>	2.4%
<i>Other Downward Departure:</i>	2.8%
<i>Upward Departure:</i>	0.9%

Post-Blakely Fiscal Year 2004 Guideline Sentences:

<i>Sentenced Within Guideline Range:</i>	81.7%
<i>Substantial Assistance Departure:</i>	9.2%
<i>Government Sponsored Downward Departure:</i>	6.9%
<i>Other Downward Departure:</i>	1.9%
<i>Upward Departure:</i>	0.3%

Pre-Booker Fiscal Year 2005 Guideline Sentences:

<i>Sentenced Within Guideline Range:</i>	83.1%
<i>Substantial Assistance Departure:</i>	8.1%
<i>Government Sponsored Downward Departure:</i>	6.3%
<i>Other Downward Departure:</i>	1.7%
<i>Upward Departure:</i>	0.7%

Post-Booker (2006):

<i>Sentenced Within Guideline Range:</i>	79.0%
<i>Upward Departure from Guideline Range:</i>	0.6%
<i>Upward Departure with Booker/18 USC § 3553:</i>	0.2%
<i>Above Guideline Range with Booker/18 USC § 3553</i>	0.7%
<i>All Remaining Cases Above Guideline Range:</i>	0.2%
<i>Substantial Assistance Departure:</i>	7.2%
<i>Early Disposition Program Departure:</i>	4.1%
<i>Other Government Sponsored Below Guideline Range:</i>	0.7%
<i>Downward Departure from Guideline Range:</i>	1.9%
<i>Downward Departure with Booker/18 USC § 3553:</i>	0.2%
<i>Below Guideline Range with Booker/18 USC § 3553:</i>	4.1%
<i>All Remaining Cases Below Guideline Range:</i>	1.0%

Post-Booker (2008):

<i>Sentenced Within Guideline Range:</i>	81.0%
<i>Upward Departure from Guideline Range:</i>	0.3%
<i>Upward Departure with Booker/18 USC § 3553:</i>	0.2%
<i>Above Guideline Range with Booker/18 USC § 3553</i>	1.2%
<i>All Remaining Cases Above Guideline Range:</i>	0.1%
<i>Substantial Assistance Departure:</i>	6.2%
<i>Early Disposition Program Departure:</i>	2.2%
<i>Other Government Sponsored Below Guideline Range:</i>	1.1%
<i>Downward Departure from Guideline Range:</i>	2.0%
<i>Downward Departure with Booker/18 USC § 3553:</i>	0.2%
<i>Below Guideline Range with Booker/18 USC § 3553:</i>	4.3%
<i>All Remaining Cases Below Guideline Range:</i>	1.1%

Third Quarter Preliminary Fiscal Year 2009 Data Through June 30, 2009:

<i>Sentenced Within Guideline Range:</i>	78.7%
<i>Upward Departure from Guideline Range:</i>	0.2%
<i>Upward Departure with Booker/18 USC § 3553:</i>	0.1%
<i>Above Guideline Range with Booker/18 USC § 3553</i>	1.6%
<i>All Remaining Cases Above Guideline Range:</i>	0.2%
<i>Substantial Assistance Departure:</i>	6.8%
<i>Early Disposition Program Departure:</i>	2.0%
<i>Other Government Sponsored Below Guideline Range:</i>	1.5%
<i>Downward Departure from Guideline Range:</i>	2.1%
<i>Downward Departure with Booker/18 USC § 3553:</i>	0.2%
<i>Below Guideline Range with Booker/18 USC § 3553:</i>	5.6%
<i>All Remaining Cases Below Guideline Range:</i>	1.2%

The mean for these six periods noted above is 81.08% and our biggest deviation is our current year representing a 2.38% deviation. Our above and below guideline range prior to Booker was constant. However, after Booker, the data shows a change in below guideline range using Booker only. The trend was noticed after the 1st full year of Booker. The data also shows a slight change as well for above the guideline range using Booker.

Other post-Booker observations include further reliance from the courts for presentence investigators to identify and articulate factors that may warrant a departure or variance from the applicable guideline range. In addition, sentencing hearings in some of our divisions are longer, with more objections and more sentencing memorandums. One of our border divisions noted: *Since the guidelines have been declared advisory, it would seem everything from determining the base offense level, to determining role reductions, and applying the respective corresponding criminal history categories is now open for challenge/argument at the time of sentencing. Presentence report addendums have become lengthier and more objections are being referred to the Court for final determination based on the guidelines "advisory" status. In essence, the presentence report is being considered a "stepping stone" in some courts and the recommendations within are fully open to argument at the time of sentencing. We are seeing more creative objections and lengthier allocution at sentencing.*

Despite the potential for sentencing disparities, the role of the federal sentencing guidelines is as it should be, not the end decision maker, but heavily weighed in the decision making process; a "starting point" and a method for beginning the analysis of every case in a uniform fashion. It would appear, based upon the above noted statistics, that Western Texas depends on the advisory guidelines to provide what the basic approach to the guidelines seeks to achieve, that is: (1) honesty in length of time served; (2) uniformity by narrowing the wide disparity in sentences imposed by like offenders committing like crimes; and (3) proportioning out sentences for differing severity. Based upon our courts decisions, it would appear this to truly be the case.

In the majority of our sentences, we believe the new advisory system strikes an appropriate balance between judicial discretion and uniformity and certainty in sentencing. Nevertheless, we have observed courts deviate from the guidelines to achieve a sentence that they feel appropriate whether based on their personal preference/opinion, a good persuading argument from counsel, or a plea from a family member. These deviations might be blanketed under 18 U.S.C. § 3553(a).

Suggestions from the field relating to guidelines changes include:

- * Consider doing away with the restrictive language in Zone B and C of the sentencing table and consider one all-inclusive zone, say below an offense level of 10, all options for sentencing can be considered. Also, the penalty enhancement sections of U.S.S.G. § 2L1.2 (Unlawfully Entering or Remaining in the United States) could be reviewed and re-worded to simplify the application of adjustments for prior convictions. Hence, clearing up the determination process of a "crime of violence," for example. Many such convictions are routinely denied for penalty enhancement purposes due to inadequacies in the charging instrument or language mentioned in the respective state statute to which the conviction pertains.

*It is felt Section 2B1.1 is too long and cumbersome and that the guidelines for economic crimes are too low. It appears the Commission has attempted to include many of the nuances of economic crimes into one guideline for ease. It has been suggested the base offense level should be much higher to reflect the harm to society given the current economic phase we are in. Our courts are frustrated with the very low guidelines and have expressed this in open court.

* Application of Section 2L1.2 is still complicated in terms of determining crimes of violence, controlled substance offenses, and aggravated felonies, etc. Said section should be revisited because the enhancements are not proportional to enhancements in other sections. For example, in §§2B and 2D, the specific offense characteristics are increased in multiples of two, whereas in §2L1.2, the increases are in multiples of four. Another concern is that the 16-level adjustment for a transporter of aliens is the same for a more heinous crime of murder of a child or child rapist. The base offense level should be adjusted for a deterrence affect. For example, if there are no prior removals, the base offense level would be 8. If there are two or more prior removals without prosecution, the base offense level would be 12.

* Other recommended changes include: a) condense/combine the different definitions (i.e. “crime of violence”). Or, simply replace/repair, in order to make things more uniform and easier, the adjustments which are applied in U.S.S.G. §§ 2L1.2 and 2K2.1, regarding crimes of violence and drug trafficking crimes. b) an additional increase in § 2B1.1(b)(2) would take into consideration the cases where there are a larger number of victims than currently reflected. For example, currently, there is a six level increase if the offense involved 250 or more victims. If the offense involved over 600 victims, more than double the amount, the defendant is not penalized. There is no notice for upward departure as there is in § 2G2.2, when the images substantially underrepresent the true scope of the offense. c) less disparity between cocaine and cocaine base.

A critical aspect of the new sentencing system is the balance between *offense* and *defendant* characteristics. Offense characteristics certainly play an important role in determining the severity of the crime. The total offense level determined on these offense characteristics are reflective of the severity and nature/circumstances of the particular crime. They are very important and need to be updated frequently to correspond to the ever changing methods of criminal behavior. Defendant characteristics are now viewed as vital in the post-*Booker* era, as they now have a bigger “voice” in determining the final sentence. However, the defendant characteristics should not carry more weight than the offense itself. The offense should remain the main focus. One of our divisions noted: *The defendant characteristics are fairly taken into consideration. The Commission cannot afford to get into the practice of allowing defendant characteristics to play a larger role because sentencing then becomes too subjective based on what factor is more important to certain judges. Perhaps a judge reared in a single parent home would be more partial to a offender who is a single parent and you don't want those type of subjective judgements. No changes should be made.*

Regarding type of analysis the courts should utilize in imposing a sentence, the Commission's 3-Step Approach to Federal Sentencing Under Booker should apply. That is: (1) apply the sentencing guidelines to establish the guideline sentencing range; (2) determine if a departure is consistent with the guidelines; (3) determine if a variance is warranted under authority of § 3553(a). Our courts closely follow the "*Gall*" model by: (1) correctly calculating applicable guideline range to secure nationwide consistency and to ensure the guidelines are the starting point and the initial benchmark; (2) the courts give serious consideration to the extent of any departure from the guidelines and explain, with great clarity, the conclusion for an unusually harsh or lenient sentence; and (3) the courts are very clear on the support relied upon for a variance. In essence, a holistic approach that looks at the whole with a view of the interdependence of the parts (offense characteristics and offender characteristics). While plea agreements may significantly influence the ultimate sentence, courts should not ignore a defendant's true offense conduct and criminal history and should sentence considering a balance of both.

Appellate review, post-*Booker*, has weighed in on sentences rendered under our new advisory guidelines system. Since 2005, the 5th Circuit in terms of procedural reasonableness held in at least nine cases that "a within guidelines sentence enjoys...a rebuttable presumption of reasonableness." This provides our judges with the confidence that application of the advisory guidelines is reasonable and that they have considered the advisory guidelines as a point of reference. In terms of substantive reasonableness, the 5th Circuit decisions post-*Booker*, in at least eight cases, have provided the district with guidance on what can be considered an appropriate sentence and have emphasized the clear inclusion of § 3553 factors.

These procedural and substantive decisions have provided us with the knowledge and guidance on how to proceed with sentencings in our courts and has given the presentence investigators and courts the confidence in sentencing outside the advisory guidelines system when applicable. Further, the *Gall*, *Kimbrough*, and *Shepard* decisions have also brought to the forefront the need to ensure our sentencing recommendations do not run afoul of the "abuse of discretion standards" and that evidence considered by the district courts in determining elements of an offense is limited to the terms of the charging document, the plea agreement or transcript of colloquy between the judge and defendant in which the defendant confirms the factual basis for the plea, or to some comparable judicial record.

The district as a whole made no recommendations pertaining to the Federal Rules of Criminal Procedure nor any statutory changes regarding federal sentencing.