

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

Case No.: 08-_____

JOHN DOE,

Defendant

_____ /

DEFENDANT John Doe'S SENTENCING MEMORANDUM

Through counsel, C. CRAIG STELLA, the defendant, John Doe files his Sentencing Memorandum setting forth many, if not all factors that the Court should consider in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a).

The defendant's advisory Guideline sentence is too harsh based upon this particular set of facts and circumstances surrounding the offense. The defendant is requesting this Court to sentence him to a term of ten years (10) of incarceration; to run concurrent with the defendant's sentence in case number 06-60243-CR-MARRA. This reflects a term of imprisonment which is below what the *advisory* guidelines recommend.

From the outset, the undersigned as well as the defendant would opine to this Court that given the recent direction of the United States Supreme Court discussed more artfully and specifically below, the Federal Sentencing Guidelines are not only advisory in nature but constitute just one of the many factors that the trial court should take into consideration when contemplating the appropriate punishment for a federal criminal defendant.

It is the defendant's contention that all too often the federal trial courts consider the sentencing guidelines as a mandate that may only be departed from in certain compelling and very special circumstances ("outside of the heartland of cases"). The defendant respectfully suggests that this is faulty reasoning given the content of recent Supreme Court decisions discussing the

subject.

Sentencing Reform Begins Under Booker

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S. Ct. 738, 756 (2005). Given the mandatory nature of the Sentencing Guidelines, the Court found “no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines” in the cases before the Court. *Id.* at 751. Accordingly, reaffirming its holding in *Apprendi*, the Court concluded that

[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* At 756.

Based on this conclusion, the Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U. S. C. § 3553 (b)(1) or which rely upon the Guidelines’ mandatory nature, 18 U. S. C. § 3742(e), incompatible with its Sixth Amendment holding. *Booker*, 125 S. Ct. at 756. Accordingly, the Court severed and excised those provisions, “mak[ing] the Guidelines effectively advisory.” *Id.* at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by *Booker*, requires a sentencing court to consider Guidelines ranges, see 18 U. S. C. A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a). *Booker*, 125 S. Ct. At 757. Thus, under *Booker*, sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U. S. C. § 3553(a).

The primary directive in Section 3553(a) is for sentencing courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” Section 3553(a)(2) states that such purposes are:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

1) “the nature and circumstances of the offense and the history and characteristics of the defendant” (§ 3553(a)(1); 2) “the kinds of sentences available” (§ 3553(a)(3); 3) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6); and, 4) “the need to provide restitution to any victims of the offense.” (§ 3553(a)(17).

Other statutory sections also give the district court direction in sentencing. Under 18 U. S. C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation” (emphasis added).

18 U. S. C. § 3661 states that, “no limitation shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence” (emphasis added).

This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as “not ordinarily relevant” to sentencing a variety of factors such as the defendant’s age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. See U. S. S. G. § 5H1. See also *United States v. Nellum*, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, May 2004); *United States v. Naylor*, F. Supp. 2d, 2005 WL525409, *2, 2005 U.S. Dist. LEXIS 3418 (W.D. Va. Mar. 7,

2005) (Jones, J.) (concluding that sentence below career offender guideline range was reasonable in part because of defendant's youth when he committed his predicate offenses - he was 17 - and noting that in Roper v. Simmons, 125 S. Ct. 1183, 1194-96 (2005), the Supreme Court found significant differences in moral responsibility for crime between adults and juveniles).

The directives of Booker and § 3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be “inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore.” United States v. Ranum, 353 F. Supp. 2d 984, 985-96 (E.D. Wisc. Jan 19, 2005) (Adelman, J.). As another district court judge has correctly observed, any approach which automatically gives “heavy” weight to the guideline range “comes perilously close to the mandatory regime found to be constitutionally infirm in Booker.” United States v. Jaber, ___ F. Supp. 2d ___, 2005 WL 605787 *4 (D. Mass. March 16, 2005) (Gertner, J.). See also United States v. Ameline, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is “only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence”), reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker's remedial holding:

Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise - if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed - its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part).

Likewise, if the remedial majority thought the guidelines had to be given “heavy weight,” its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In every case, a sentencing court must now consider all of the § 3553(a) factors, not just

the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing.

Accordingly, and to reemphasize, the Federal Sentencing Statute, as modified by Booker, requires a court to give respectful consideration to the Guidelines, but permits the court to tailor the sentence in light of other concerns as well—specifically Section 3553(a) of the Sentencing Guidelines. 543 U.S. 245-246.

Along that same vein, the Booker decision¹ rendered the Sentencing Guidelines advisory – not mandatory – while at the same time preserving a key role for the Sentencing Commission. That is, in the ordinary case, the Commission’s recommendation of a sentencing range will reflect **a rough approximation** of sentences that **might** achieve Section § 3553(a)’s objectives. Kimbrough v. United States, 2007 WL 4292040 (2007); Rita v. United States, 127 S.Ct. 2456 (2007). The sentencing judge, on other hand, is in a superior position to find facts and judge their import under Section § 3553(a) in each particular case. Gall v. United States, 2007 WL 4292116 (2007).

As set forth above and reiterated for emphasis, the defendant maintains that Section § 3553(s) lists seven (7) factors that a sentencing court must consider.

The first factor is a broad command to consider the nature and circumstances of the offense and the history and characteristics of the defendant.

The second factor requires the court to consider the general purposes of sentencing, including the need for the sentence imposed to: (A) reflect the seriousness of the offense, to promote respect of the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct, (C) to protect the public from further crimes of the defendant; (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Section § 3553(a)(2), Kimbrough v. United States, 2007 WL 4292040 (2007); Gall v. United States, 2007 WL 4292116 (2007).

The third factor pertains to the kinds of sentences available, as Section § 3553(a)(3) directs the Court to consider sentences other than imprisonment.

The fourth factor is the Sentencing Guidelines; the fifth factor to any relevant policy

¹ The Booker decision further instructed that ‘reasonableness’ is the standard controlling appellate review of the sentences district court’s impose. Booker, 543 U.S. 220, 244, 125 S.Ct.

statement issued by the Sentencing Commission; the sixth factor to the need to avoid unwarranted sentence disparities, Section § 3553(a)(6); and the seventh factor to the need to provide restitution to any victim, Section § 3553(a)(7). Kimbrough v. United States, 2007 WL 4292040 (2007); Gall v. United States, 2007 WL 4292116 (2007). Preceding this list is a general directive to the court instructing same to impose a sentence **sufficient, but not greater than necessary to comply with the purposes of sentencing described in the second factor.** Id.

In light of the above-described discrete institutional strengths, as well as the seven (7) factors set forth above, the defendant requests that this sentencing court consider these factors, as a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply. Rita, 127 S.Ct. at 2456. Hence as the Supreme Court recently emphasized in Kimbrough v. United States, 2007 WL 4292040 (2007)², a District Judge must include the Guidelines range in the array of factors warranting consideration, but the Judge may determine that, in the particular case, a within-guidelines sentence is greater than necessary to serve the objectives of sentencing. That is, in Kimbrough the Supreme Court made it abundantly clear the Guidelines are, in essence, a starting point and the initial benchmark, but they are by no means the be all, end all to fashioning an appropriate sentence, 2007 WL 4292040 (2007). See also, Gall v. United States, 2007 WL 4292116 (2007)³ (Supreme Court determined that a court

738, 160 L.Ed.2d 621 (2005).

² The defendant in Kimbrough was convicted by way of a guilty plea to conspiracy to distribute crack or powder cocaine, possession with intent to distribute more than fifty (50) grams of cocaine, possession with intent to distribute powder cocaine, and possession of a firearm in furtherance of a drug trafficking crime. The District Court sentenced the defendant in Kimbrough below the Guidelines term of imprisonment, thereby imposing a sentence of one-hundred and eighty (180) months imprisonment, rather than the two-hundred and twenty-eight (228) month term of imprisonment called for by the Guidelines. In imposing the latter sentence, the District Court considered the defendant's background, his pristine criminal history – which was absent – as well as the disparity occasioned by the 100 to 1 ratio for crack cocaine versus powder cocaine. The government in Kimbrough appealed the District Court's finding that the sentence within the recommended sentencing range was greater than necessary to accomplish the purpose of sentencing set forth in Section § 3553(a), and the Court of Appeals agreed with the government and remanded the case for sentencing. The Supreme Court granted Certiorari and overturned the Court of Appeals.

³ In Gall, 2007 WL 4292116 (2007), the defendant was convicted, on his guilty plea, of conspiracy to distribute ecstasy and was sentenced to thirty-six (36) months of probation, rather

of appeals may not require sentences that deviate substantially from the Guidelines range to be justified by extraordinary circumstances. Additionally, the Supreme Court emphasized a district court is not free to presume that a Guidelines range is reasonable, **but must instead made an individualized assessment based upon the particular facts presented.**)

Based upon the foregoing facts, it is respectfully requested that this Honorable Court grant the instant PSI Objections and motion for variance based upon the factors discussed below as well as other factors set forth in Section § 3553.

Application of the Statutory Sentencing Factors to the Facts of this Case

In the present case, the following factors must be considered when determining what type and length of sentence is sufficient, but not greater than necessary, to satisfy the purposes of sentencing:

(b) Nature and Circumstances of Offense

As stated in the PSI, the defendant is guilty of conspiracy to possess with the intent to distribute cocaine in the 2006 case and in the case sub judice of possessing firearms as a convicted felon. The defendant's role in the 2006 case conspiracy was limited and by comparison to the other participants he made very little money for his conduct. There was no real violence associated with this offense. At the time the defendant plead guilty to this offense, the government indicated to this Court that the defendant has been cooperative with authorities and will prove to be a valuable witness for the government in future prosecutions. It is unfortunate that Mr. Hudson was one of the last defendant's to enter his guilty plea in this case but it should be noted that the defendant was provided a "proffer/immunity letter" by the government and was debriefed by agents on a number of occasions shortly after his arrest.

than the thirty (30) months of imprisonment called for by the recommended advisory Guidelines range, as well as the pre-sentence investigation report. When sentencing the defendant in Gall, **the District Court placed great weight on the defendant's history and personal characteristics**, including the fact the defendant voluntarily withdrew from the conspiracy years before his indictment, as well as the defendant's consistent employment record since his withdrawal from the narcotics distribution conspiracy. Moreover, the Gall Court also reasoned the defendant's self-imposed withdrawal from the conspiracy gave strong support to the District Court's conclusion that the defendant was not going to repeat any criminal behavior and was therefore not likely to be a danger to the community. The government however appealed the District Court's findings of fact and conclusions of law, and the appellate court remanded the case for re-sentencing. The Supreme Court thereafter granted Certiorari and overturned the Court of

(c) History and Characteristics of the Defendant

A review of the PSI prepared in this case by Ms. Tracey L. Webb of the United States Probation Office would indicate that the defendant is a career criminal and should be judged accordingly. However, the defendant would opine to this Court that much of the defendant's criminal past is explained in Part "C" located on page 26 of the PSI, which provides this Court with Mr. Hudson's dysfunctional youth.

More specifically, the defendant was born to a woman who neither wanted the defendant nor did she have the skills to raise him. As a direct result, the defendant and his brother were sent to live with various relatives who likewise cared little for Mr. Hudson. He was raised in an environment where beatings and severe corporal punishment were common place; where he never knew where he would be living or with whom on a daily basis. This dysfunction resulted in the defendant being sent to a number of foster homes and finally being on his own at age fourteen (14).

Mr. Hudson, as a youth with a substandard education and limited social skills, was left to live by his wits. By way of example, the defendant would point out to the Court that many of the burglaries that are denoted under his Criminal History, were perpetrated on when no one was home and so that the defendant could obtain something to eat. Several of those same burglary offenses appear on the defendant's criminal history because the defendant assisted law enforcement in clearing a number of previously unsolved burglaries. This does not necessarily connote that the defendant actually perpetrated the offenses but was provided lenient treatment in exchange for his cooperation.

For these reasons, the defendant prays that the Court will take these important factors into consideration when deciding upon a proper sentence for the defendant, John Doe.

The defendant would likewise advise the Court that prior to his arrest and subsequent to his involvement in these matters, John Doe accepted Christianity and was actively involved with his church and his fellow parishioners.

Mr Hudson became a licensed roofing contractor and earned his living asa a gainfully employed and respectable member of society. John Doe was not perpetrating further crimes with the firearms found in his home.

Appeals.

John Esposito is deserving of a variance from the guideline range compiled by the US Probation office and should this Court agree, it might just be the first break John Doe has received in his life.

SECTION 3553 (a)(6)
SENTENCE DISPARITY

In Booker, the Court stated that “in determination the minimally sufficient sentence, § 3553 (a) directs sentencing courts to consider the following factors:

- 3) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” § 3553 (a)(6).

According to the PSI, as well as other documents filed in the instant case, several of the other defendants have already been sentenced and have received sentences which vary considerably in length. Some defendants received sentences of probation while others were sentenced to lengthy periods of incarceration.

Based upon the sentences of defendants in the above stated related cases, the defendant maintains that in keeping with the spirit and holding, as set forth in Booker, regarding sentence disparity, he should receive a sentence of ten years of incarceration for his part in this conspiracy.

PROTECTING THE PUBLIC FROM FURTHER CRIMES

In accordance with § 3553 (a)(2), an advisory guidelines sentence is not necessary to protect the public from further crimes of John Doe. The Court should feel comfortable sentencing John Doe to the requested term of incarceration. John Doe is fifty three years of age and suffers from a painful and progressive condition in his back and legs, which he received as a result of a near fatal automobile accident when he was a youngster. The defendant would further advise this Court that prior to his arrest in this case, the defendant had been arrest free for several years. John Doe attributes this life change to his conversion to Christianity. As the Court knows, John Doe has received a letter in support of the defendant authored by his pastor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF.

By: C. Craig Stella

C. Craig Stella