



## COMMUNITY SERVICE ORDERS IN FEDERAL COURTS: PAST, PRESENT AND FUTURE — LESSONS LEARNED FROM THE SENTENCING OF TY WARNER

BY

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**H**aving toiled in the sentencing of federal defendants for over 37 years, to paraphrase Dickens, I have seen the best of times and the worst of times. The recent sentencing of Ty Warner gives hope that we are returning to the best of times.

From 1977 through the implementation of the Federal Sentencing Guidelines in 1987, our organization (NCIA), worked hard in providing defense attorneys and federal judges tailored, client-specific sentencing alternatives that we believed made more sense than having a talented, first-time, nonviolent defendant mow lawns or work in the kitchen at a federal prison camp. In many cases, we were incredibly successful.

During those times, we developed programs that allowed convicted doctors to work in AIDS clinics, that placed contractors in building summer camps for children with spina bifida and that allowed first time drug offenders the opportunities to impart their experience to at-risk students. Judges were often receptive to this type of alternative.

Then came the federal sentencing guidelines, which directed federal judges to impose incarceration in most cases, eliminated parole, and required federal defendants to serve 85% of their sentence in prison. Although we worked diligently to help attorneys develop innovative arguments for departure, alternatives became a sideline helping to mitigate lengthy prison terms.

Then, beginning in 2005, through *US v. Booker* and its progeny, the Supreme Court began making decisions that returned sentencing discretion to federal judges, and required them to review the statutory sentencing goals under 18 U.S.C. §3553 before imposing sentence. The federal sentencing guidelines became advisory only, and suddenly the landscape of federal sentencing changed. Judges now were required to impose a sentence that considered, among other things, the “nature and circumstances of the offense, as well as the history and characteristics of the defendant.” Almost overnight, a judge was allowed to consider the body of work of a defendant’s life, not just a grid that calculated a prison term. In addition, sentencing alternatives came back into vogue.

Nowhere was this more apparent than in the recent sentencing of Ty Warner, a defendant who pled guilty to not paying taxes on an offshore UBS account. Having been privileged to be part of his defense team, we assisted in developing a specific community service proposal that would use his incredible talents to assist vocational students in inner city schools in Chicago. The Court, in sentencing him to two years of probation with a condition of 500 hours of community service, recognized his substantial history of public service and determined that society would be better served by allowing him to serve his community rather than be incarcerated. In another recent NCIA case in California, a major fish importer was ordered to provide food and kitchen supplies to the largest homeless shelter in Los Angeles over a one year period of probation.

This type of sentence bodes well on a number of fronts. First, it recognizes that past good works do count and cannot be discounted by government lawyers who routinely denigrate a defendant's prior community service activities, and that really good people can make bad decisions. Second, it encourages Courts to look seriously at the good a defendant can provide in the community, rather than impose a rote sentence of incarceration to a federal prison system that is overcrowded and costly. Finally, it recognizes the collateral consequences faced by many white-collar defendants. In imposing sentence on Mr. Warner, the Honorable James Kocoras told a repentant defendant that "...the public humiliation and reproachment Mr. Warner has experienced is manifest. Only he knows the private torment he has suffered by the public condemnation directed at him."

Based on recent studies and commentary by the United States Sentencing Commission<sup>1</sup> and the volume of judges imposing sentences using variances under 18 U.S.C. §3553 across the country, the future for sentencing alternatives is brightened. I encourage defense attorneys to be emboldened by decisions such as the Ty Warner case.



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<sup>1</sup>See *Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary* (April 30, 2010) which can be found at [http://www.usc.gov/Legal/Amendments/Official\\_Text/20100430\\_Amendments.pdf](http://www.usc.gov/Legal/Amendments/Official_Text/20100430_Amendments.pdf)