Criminal Defense Updates

Arguing Terms and Conditions of Supervised Release: A Sentencing Responsibility
September 2016

How Federal Judges Can Help Our Communities — and How Defense Attorneys Can Assist
August 2015

White Collar Criminal Registry — Piling on by Politicians and Prosecutors
April 2015

Why Community Service Works
February 2015

Sentencing Videos — A Brave New World
February 2015

White Collar Sentencing: Challenges and Opportunities
September 2014

Community Service Orders in Federal Courts: Past, Present and Future — Lessons Learned from the Sentencing of Ty Warner
January 2014

Federal Bureau of Prisons: Tips for Compassionate Release Requests
October 2013

On Death and Dying in the Federal Bureau of Prisons — The Recent Report from the Office of the Inspector General
May 2013

Post-Booker Sentencing and the Use of 18 U.S.C. § 3553(a)(6)
April 2013

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Criminal Defense Update

Arguing Terms and Conditions of Supervised Release: A Sentencing Responsibility

BY
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September 2016

In this post-*Booker* sentencing era, where Federal judges are empowered to use their discretion and grant variances under 18 U.S.C. §3353(a), there have been an increasing number of defendants who receive below guideline sentences. In many of our recent experiences, community service, home confinement and split sentences have again become increasingly popular alternatives. However, there still are many imprisonment sentences, even if the terms of incarceration are below the advisory guidelines calculations. As required by 18 U.S.C. §3583, the vast majority of cases must also include a term of supervised release, following the prison sentence.

The purpose of this *Criminal Defense Update* is to suggest that defense attorneys be prepared to argue both the length and terms of supervised release, and not just accept the terms suggested in the PreSentence Report. The length, terms and conditions of supervised release are critical to a client's post-incarceration personal and professional life, and should not be simply accepted as a "throw-in" to a sentence.

Having worked with defense attorneys over the past 39 years, and having attended hundreds of client sentencing hearings, the actual day of sentencing is filled with anxiety, hopefulness, avid preparation and a cacophony of emotions. Documents had been filed and read, and, in most cases, the Judge takes the bench with an opinion as to whether a defendant is going to prison. Following arguments from both sides, the Court imposes what it feels is the most appropriate sentence to meet the statutory sentencing goals, then continues its sentence by reciting terms of supervised release. Most defendants, and some defense attorneys, fail to appreciate the impact these terms can have on their future.

A 7th Circuit opinion lays out the responsibility of sentencing Judges to detail the rationale for special conditions of supervised release. In *U.S. v. Thompson*, 777 F.3d 368 (2015), the 7th Circuit ruled that the sentencing Judge is required to detail the reasons behind the length of the supervised release, as well as any "optional" special conditions. And, they must justify any restriction using the language of 18 U.S.C. §3553 (a).

Why is this important?

There is a common misperception among federal inmates that their sentence ends when they leave the prison and/or the halfway house. They believe themselves to be "free" citizens, having paid their dues to society. They then report to the probation office and recognize the conditions they must live under for the next period of their lives. Some are more punitive than others, but many can be more easily addressed at the time of sentencing, rather than the time of release.

By way of background, Federal Courts can authorize a term of supervised release of up to five years for a Class A or Class B felony, not more than three years for a Class C or Class D felony, and not more than one year for a Class E felony or misdemeanor. In addition, there are "standard" conditions of supervised release on every Judgement, and the Court can then add "special" conditions dependent on the case.

Most of the problems we have assisted white collar defendants and their attorneys with have to do with the length of the term of supervised release and the "special" conditions. For example, often a Court imposes a term of imprisonment on a first offender and routinely adds two or three years supervised release. There is little or no chance this person will ever reoffend, yet that same person will have monthly reporting requirements, monthly financial forms to fill out and, in many cases, travel restrictions. What if the defense attorney had argued for a one year term of supervised release at the sentencing hearing? Would it have mattered to the Court or the government?

Other "special" conditions can become problematic upon release. Examples include restrictions on using the Internet, travel restrictions on leaving the federal judicial district in which the defendant was sentenced, notification to the defendant's workplace that he/she is on federal probation, visitations to work by the probation officer, employment constraints and many others.

The critical point is that defense attorneys and defendants must listen carefully to the entire terms of the sentence, not just the incarceration section. Post-release, there are legal avenues to terminate supervised release earlier, but it is qualitatively easier to get a more favorable outcome for the terms of supervised release at the time of sentencing than when the defendant is released from the Federal Bureau of Prisons.

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Criminal Defense Update

How Federal Judges Can Help Our Communities — And How Defense Attorneys Can Assist

BY
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August 2015

In February 2014, on Valentine's Day, a Federal Judge in Rochester, New York gave a program in that community the best present possible. At a sentencing hearing that morning, the Judge granted probation and home confinement to a 64-year-old defendant with the expectation that he would continue a community service commitment to a camp for disabled and autistic children in the area. This defendant had pled guilty to a $2.5 million tax evasion charge and had an advisory sentencing guideline range of 30-37 months. He made full restitution to the Internal Revenue Service and recognized the significant obligation and responsibility with which the Court had entrusted him. Rather than mowing lawns or doing laundry at a Federal Prison Camp, he had the opportunity to make a difference for a group of children with disabilities who could benefit from his skills. With a background in construction and knowledge of the building trade industry in the area, he set out to fulfill the vision of the Executive Director of the camp — to build a sensory room for the children with special needs.

Fifteen months later, I had the privilege of attending the grand opening of not just a sensory room, but a 7,000 square foot sensory building. This defendant personally worked over 1,000 hours, raised over $150,000 dollars, and solicited more than 40 local businesses to make this agency's dream become a reality. This defendant, who 17 months earlier was facing a prison sentence, was given a commendation by the local State Representative. I believe the Judge should also have been given an award for his courage and foresight which allowed this to happen.

And this is not an isolated case. In the past 18 months, NCIA has developed numerous community service proposals for defense attorneys and their clients which have been endorsed by various Federal Courts. These include:

- A major UBS tax case in the Northern District of Illinois, where the defendant is working in an inner-city high school teaching manufacturing, sales and distribution to business students;

- A fraud case in the Middle District of New Jersey, where the defendant is working to secure employment for adults with disabilities in the recycling industry;

- A securities case in the Southern District of New York, where the defendant is working at an agency to assist ex-offenders with job placement;

- A federal election campaign act case in the Eastern District of New York, in which the defendant is training and employing youthful offenders in the restaurant and hospitality industry.

These examples, and numerous others, support the objectives of the United States Sentencing Commission's initiatives on alternatives, and federal legislation now being introduced with bi-partisan support.

In 1997, the National Institute of Justice issued a report entitled "Intermediate Sanctions in Sentencing Guidelines." In that report, they determined that community service "…is a burdensome penalty that meets with widespread public approval, is inexpensive to administer…produces public value…and to a significant extent, be scaled to the seriousness of crimes."

As sentencing advocacy continues to develop, defense lawyers should look to how they can assist the Federal Judges in their Districts better their communities. It is a win-win proposition.

To help determine if your client is a candidate for community service, or to develop a specific alternative sentence, please call or write.

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White Collar Criminal Registry — Piling on by Politicians and Prosecutors

April 2015

As if the collateral consequences of a white collar felony conviction and possible imprisonment were not enough, the State of Utah has taken matters a step further. Recent legislation passed by Utah legislators approved a measure that will require an online registry of individuals convicted of a white collar crime. This legislation, the first of its kind in the country, would be replete with "a recent photograph, their date of birth, height, weight and eye and hair color."

Sean Reyes, Utah's Attorney General who formulated the idea, proclaimed that "white collar crime is an epidemic in Utah." Reyes, the legislative sponsor, is the president-elect of the National Conference of State Legislatures and stated that the registry could become "a best practices for other states."

Really?

Having spent 38 years with white collar defendants and their families, the collateral consequences of their plea or conviction are all too painful. Ranging from estrangement in their communities, loss of licensure and related bans on working in their respective profession, lifetime loss of reputation, financial devastation and other permanent penalties, the idea of a registry is simply a political reaction that may garner some votes, but at what expense? I have seen careers ended and families destroyed because of the rampant publicity surrounding a white collar arrest.

There is no real need, other than political pandering, for such a registry. In addition to extended local coverage, Google and other search engines do a remarkable job at providing information about arrests and convictions. Websites like Fraud Digest and others spend their weeks putting out information on arrests of white collar defendants — and they don't issue retractions when there are acquittals.

Supporters of the legislation state it would help investors in vetting their financial advisors. It never mentions the "greed factor" to which many investors succumb. When an investment advisor is promising and sending returns of 15-20% — and the checks are being cashed without question — why is one surprised when the Ponzi scheme comes undone? Government regulators and prosecutors are notorious for changing and enforcing rules and regulations without much notice and criminalizing what heretofore were civil sanctions. Look no farther than the FDIC and the savings and loan banks in the late 1980s, or the current controversy on insider trading.

The registry in Utah is being advanced to further the political ambition of Utah attorney general Sean Reyes, a former disc jockey whom Michael Bloomberg called the "Rapping Republican Rising Star." It began in Utah and it should end there.

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Criminal Defense Update

Why Community Service Works

BY
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February 2015

In 2011, NCIA published a *Criminal Defense Update* highlighting the re-emergence of community service as a viable alternative sentence. We detailed cases where the Courts decided to impose a non-incarcerative sentence and relied on community service as the appropriate sanction. These cases were examples of a growing trend of Courts to apply 18 U.S.C. §3553(a) factors to individualize sentences and, consistent with the then recent Sentencing Commission initiatives, reflected a growing trend in the use of alternatives to incarceration.

Since that time, widespread support for community service has continued. With NCIA's assistance in helping defense attorneys prepare and submit client background information, including substantial community service recommendations, we are witnessing an ever-increasing support of sentences that include court-ordered community service sanctions.

Title 18 U.S.C. §3553(a)(4) mandates the Court to consider "the kinds of sentences available." This statute allows a community service order to satisfy the goals of sentencing. In fact, there has been a long-time endorsement of community service by both federal and state courts because the individual judges recognize that it "…is a burdensome penalty that meets with widespread public approval, is inexpensive to administer…produces public value…and can to a significant extent be scaled to the seriousness of crimes."[1] This acknowledgment is illustrated by three recent examples of how community service has not only served the goals of sentencing, but has been an incredible benefit to the community.

In the first case, on January 14, 2014 the Honorable Judge Charles Kocoras, U.S. District Judge for the Northern Division of Illinois, sentenced a defendant in an off-shore tax case to a two-year term of probation conditioned upon 500 hours of community service. Despite an advisory sentencing range of 46-57 months imprisonment, Judge Kocoras found that imprisonment simply was not a just and proper sentence for this defendant. Recognizing that incarceration would do more harm to society than good, Judge Kocoras sentenced this defendant to community service where he would use his expertise to benefit the community. His community service program was tailored to his background and he has assisted an inner-city Chicago high school in supervising, teaching, and mentoring the students and staff in developing a curriculum that addresses careers in business.

In the second case, a defendant who pled guilty to a $2.5 million tax evasion charge was sentenced to a term of probation and home confinement whereby he was able to volunteer a significant amount of his time to give back to a worthy organization. Specifically, he began volunteering at the Sunshine Camp in Rochester, New York, assisting in the building of a sensory room for autistic students. His background in construction and property development was used to address a major need at this camp.

[1] *Intermediate Sanctions in Sentencing Guidelines,* National Institute of Justice, May 1997.

In the third case, a defendant was charged with Conspiracy to Violate the Federal Election Campaign Act and was facing a sentencing advisory range of 57 to 71 months imprisonment. The Honorable I. Leo Glasser, Senior U.S. District Judge for the Eastern District of New York, described the case as an extraordinary one, in which the defendant's conduct was an isolated event in an otherwise flawless life dedicated to serving others and with added challenging family circumstances. Judge Glasser granted the defendant a variance, sentencing him to 36 months probation and 1,000 hours of community service with Friends of Island Academy, an organization that provides support and programs for young men and women who have been caught up in the criminal justice system. Judge Glasser justified his decision, stating that he was "not cheating justice by being merciful, but was trying to be, and hopefully am, as objective and fair and reasonable as this case requires."

The imposition of community service as a sanction allowed the communities served by these three defendants to benefit from their time and expertise. Community service works because our clients' professional skills are paired with community organizations that benefit from these skills but are not in a financial position to secure the services of these talented individuals.

Community service as an alternative sentence can sufficiently recognize the grave seriousness of white-collar crimes and involve a punitive restriction, but moreover it can utilize the time, skills and expertise of individuals who can be a substantial benefit to communities in need. Alternatives to incarceration exist that can carry both the community and the court's condemnation of their conduct, but channel it in a way that is more constructive and beneficial. As an executive director of one of the organizations NCIA has worked with said: "We could never pay a salary that someone of [his] business caliber and expertise could earn. Our organization just doesn't have those resources, but the work we do helps so many individuals and families; that is worth something so much more than money." Community service placements give those organizations the resources that they could not otherwise afford to significantly and substantially change the lives of the people they serve.

To help determine if your client is an appropriate candidate for community service, please call or write.

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Criminal Defense Update

SENTENCING VIDEOS — A BRAVE NEW WORLD

BY
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FEBRUARY 2015

In the face of the *Booker* and other Supreme Court decisions, a client's personal history and characteristics have obtained a new relevance in the sentencing world. Since that decision, the courts can now consider an offender's lifetime of good deeds, service to the community, positive contributions to society, and their overall background. Therefore, as a focus of our work, we regularly assist defense attorneys in coordinating and providing the Court with reference letters from the client's family, friends, business associates, and charitable works organizations. While these reference letters provide the judge with quality information relevant to the client's personal history and characteristics, we've developed a new and innovative method for illustrating the emotion and passion that these references feel for the client.

The submission of a sentencing video to the judge is a powerful tool that can convey the emotion and sentiments of a client's reference that cannot be felt in a letter. A video allows those who wrote inspiring letters for the defendant's good works and values to vocalize their thoughts and emotions and allow the judge to really get a glimpse at the impact the client has had on people and communities. A video captures the most meaningful stories, anecdotes, and representations of the client's true character. The court doesn't just get a written synopsis, but gets to hear, feel, and bear witness to the client's character. A video, combined with the submission of letters, creates a powerful reflection of the client's personality and character that the judge can observe through firsthand accounts.

The video submission is a collaborative effort between NCIA, the defense attorney, the videographer, the client, and those whose stories best illustrate the message we want to deliver to the judge. Family members, professional contacts, personal friends, volunteer contacts and employees are often the best sources to interview. These references can best highlight intimate narratives about the client's personality and acts of humanity that may be unknown to others. A video can emphasize the raw emotion that these references exude when conveying their degree of gratitude or appreciation towards the client or the impact that the client has had on their life. Questions to be asked in the video vary case by case. The questions

may want to highlight the client's otherwise harmonious and law-abiding life to demonstrate that this offense was aberrant behavior; questions may need to underscore underlying issues that led to the offense, such as mental health, childhood problems, or extraordinary family circumstances. The video is an opportunity to not only portray the exemplary character of the client, but to bring forth other mitigating factors that may have an effect on sentencing.

We have experienced great success in recent cases where we have submitted a character video to the court. In a recent case involving a violation of the Federal Election Campaign Act, we submitted a video that contributed to the client receiving a sentence of probation where his guidelines were 57-71 months of incarceration. Our client led a long, accomplished and, apart from these offenses, exemplary life — a life filled not just with hard work and outsized personal achievement but also with extraordinary dedication and service to others. Although he received hundreds of character letters detailing his exemplary good works and values, it was the video submission that was able to portray the pure gratitude and emotion felt by the people whose lives he changed. The family, friends, and acquaintances were able to give voice to the gratitude they felt toward a man who touched and changed their lives in immeasurable ways. We have seen success with video submissions in numerous other cases. Judges have remarked that they viewed the video several times and it allowed them to really understand the life of the defendant. Videos can humanize a client and capture their life through the testimony and stories of those whose lives they have touched.

If you would like more information regarding sentencing videos, please feel free to contact me. Remember, "A picture is worth a thousand words."

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Criminal Defense Update

White Collar Sentencing: Challenges and Opportunites

BY
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(September 2014)

In September 2013, the United States Sentencing Commission held a Symposium on Economic Crime, in which it sought answers to the increasing number of variances in the sentencing of offenders scored under USSG §2B1.1 and other economic fraud and tax guidelines. The Symposium was comprised of many Federal judges with significant experience in sentencing of these defendants.

The Honorable Loretta Preska, Chief Judge of the Southern District of New York, was one of the first speakers at the Symposium. She used her time to highlight some specific examples of variances she granted in a number of economic crime cases and her rationale for doing so. Her first case example was a defendant named Joseph Collins, who was the outside lawyer for an infamous case involving the Refco companies, which provided execution and clearing services for financial instruments such as derivatives, and covered up trading losses in an effort to enhance the price of an LBO. When the fraud was uncovered, the loss was in the neighborhood of $2.4 billion, and the principals received double digit sentences.

Mr. Collins went to trial, was convicted and had a guideline calculation of a Level 49, calling for a term of life imprisonment. Judge Preska, echoing another Judge in the Southern District of New York, Jed Rakoff, found this calculation "simply absurd." In imposing a sentence of a year and a day, Judge Preska cited that Mr. Collins did not financially benefit from the scheme, and that he had been a "certifiable saint….for his entire life." She also felt, as did Judge Rakoff, that a short sentence for a white collar offender does have a deterrent effect and that a longer sentence was not necessary for this purpose.

For those of us who have worked on white collar sentencing over the past three decades, these sentences and many others like them are encouraging. In the early 1980's, pre-guidelines, NCIA was fortunate to be involved in many major insider trading, fraud and tax cases in which the Courts relied on traditional sentencing factors and imposed what we felt were reasonable sentences based on the individual sentencing factors associated with both the offender and the offense. Fortunately, with the guidelines now "advisory only" many Courts have turned to variances under 18 USC §3553(a) where it can impose a sentence based upon "…the nature and circumstances of the offense and the history and characteristics of the offender" among other statutory factors.

The American Bar Association has also jumped on board. In an Associated Press article, following the Sentencing Commission's decision to reduce drug sentences, a 2013 proposal from an ABA task force encourages Judges to place less emphasis on how much money was lost and more on a defendant's culpability. It also encourages Judges to look at role, culpability and motive. In a recent case in Connecticut, Judge Janet Hall imposed a two year sentence on a former Wall Street trader in a case in which the guidelines again called for a double digit prison sentence. She called the guidelines "unhelpful, because the loss aspect of the crime, in effect, overwhelms all the other aspects."

Most recently, in August 2014, the USSG approved its list of priorities for the coming year. A major focus will be on economic crimes. Judge Patti Harris, Chair of the Commission, stated that "For the past several years, we have been reviewing data and listening to key stakeholders to try to determine whether changes are needed in the way fraud offenders are sentenced in the federal system."

There are a variety of sentencing strategies and tactics that seem to be making a comeback in Federal sentencing. One is the increasing use of the "old-school" split sentence, where a Court can impose a lesser prison sentence and use home confinement and/or community service to fulfill the goals of sentencing. Just in the past three months NCIA has assisted attorneys in developing significant community service programs which the Court has endorsed. Two involved major tax cases. One of the defendants was sentenced to perform community service teaching students in inner city high schools; another involved a defendant who has built a summer camp for children with disabilities. In a major fraud case the defendant is now tutoring and mentoring youth through an afterschool program. In one of the tax cases, the Court determined that the society would be better served by allowing him to serve his community rather than be incarcerated.

Additionally, disparity is becoming particularly useful in developing sentencing arguments in economic crime cases. To that end, one of the sentencing advocacy strategies NCIA has developed post-*Booker* that defense attorneys are finding integral to their sentencing arguments is a report we developed entitled a Federal Sentencing Statistical Analysis (FSSA).

NCIA has obtained from the USSC their entire statistical database on sentences imposed on individual defendants. This database currently contains sentencing information (excluding identifying information) on the over 925,000 defendants sentenced in federal courts between October 1, 1998 and September 30, 2013 and presents statistics on sentences imposed. NCIA researchers have the ability to analyze the data by specific guideline applied or statute(s) of conviction and the factors relevant to a defendant's circumstances (for example, whether the conviction was by plea or trial, the individual's criminal history category, the application of specific enhancements, and the loss amounts in financial cases). In addition, we can provide such an analysis of sentences imposed nationally, by Circuit, as well as by District. In most cases, an FSSA report becomes a valuable disparity argument under 18 USC §3553(a)(6), particularly when there is a draconian advisory guideline range.

The challenge for defense attorneys is to continue to "push the envelope" and provide Judges with as much offender background information, sentencing alternatives and mitigating factors as possible in every case. In the words of Federal Judge Fredric Block of the Eastern District of New York, the guidelines should not be a "black stain on common sense." Let's not let them be.

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Criminal Defense Update

Community Service Orders in Federal Courts: Past, Present and Future — Lessons Learned From the Sentencing of Ty Warner

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(January 2014)

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

Federal Bureau of Prisons: Tips for Compassionate Release Requests

BY
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(October 2013)

As many of you are aware from my recent *Criminal Defense Updates*, following a speech by the Attorney General at the American Bar Association in August, the Federal Bureau of Prisons issued new guidelines and policies for its Compassionate Release program. These guidelines significantly expanded the criteria for compassionate release, and even included the potential for release if a spouse has a significant illness. The report can be found at: http://www.justice.gov/oig/reports/2013/e1306.pdf.

NCIA is now assisting some inmates in preparing petitions for Compassionate Release. In that process, we have identified certain requirements issued by various institutions. A review of these criteria can assist you and your clients in preparing your requests.

First, it is obviously important to have the medical issues of your client fully documented. This often requires contacting his outside physicians and getting the medical records to support your position. Additionally, if your client has had any medical treatment while incarcerated, you should provide the necessary documentation. If your client was transferred to an outside facility for treatment, you should also get those records. (Note: Your client may have to complete a Release of Information form for you to get access. This form is available from his case manager or counselor at the institution.)

The next item is submitting a release plan. The BOP wants to know where you will be residing upon release and how you will be supporting yourself (e.g., Social Security, pension, spouse's employment, savings, etc.). If you are too ill to be in prison, they will assume you will be too ill to work.

Next, they will want to know your plan for fulfilling any outstanding monetary payments to the government such as fines and restitution. Your client should have a proposed payment schedule (this is one reason why one should attempt to get a payment schedule approved by the Court at sentencing and put into the Judgment order).

Finally, they will want to know how your medical care will be taken care of when you are released. Whether your client has private insurance or will go on Medicaid, the BOP wants assurance that you will be receiving medical care in your community.

These are some of the practical issues that may help your client's application. If you have any questions or need assistance please feel free to call me directly at 443.780.1353.

Criminal Defense Update

On Death and Dying in the Federal Bureau of Prisons — The Recent Report from the Office of the Inspector General

BY
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(May 2013)

Over the past three decades, NCIA, along with a plethora of defense lawyers, prisoner advocates, former Federal Bureau of Prisons (BOP) officials and some lawmakers have been calling for major policy changes in how the BOP manages its elderly, infirm and dying inmates. To date, the BOP response has ranged from bureaucratic malaise to outright resistance. As one example, in 1999, NCIA and the Heritage Foundation cosponsored two forums on elderly and ailing inmates, with the outcome being legislation introducing a pilot program for the release of federal nonviolent, elderly inmates. A draft bill was prepared with and sponsored by Senators Kennedy and Hatch. When former Attorney General Ed Meese and I presented it to the Director and General Counsel of the BOP, we were abruptly informed that the BOP already had that authority in place, and "was exercising its authority appropriately." When that news got back to the Senate, the draft legislation died on the spot.

The recent report from the Office of the Inspector General (OIG) in the Department of Justice may be the turning point in our three-decade long battle to force the BOP to change its ways. In a scathing April 2013 report on the BOP's Compassionate Release Program,[1] the OIG found that ***"…the existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."*** And that is only the beginning.

The report cites data heretofore unavailable from the BOP. These include:

- The process to appeal a Warden's or Regional Director's denial of a compassionate release request can take up to more than 5 months to complete;

- Only 8 of the 111 inmate handbooks at the BOP institutions had information regarding compassionate release;

[1]U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons' Compassionate Release Program*, 1-2013-006. The report can be found at: http://www.justice.gov/oig/reports/2013/e1306.pdf.

- From 2006 through 2011 the BOP Director considered 211 compassionate release requests that had been approved by a Warden and Regional Director. Of the 208 reviewed by the OIG, 206 were for medical reasons and 2 were for non-medical reasons. The BOP Director approved 142 (68%) of the requests and denied 38 (18%). In 28 cases (14%) the inmates died before a decision was made.

- Significantly, these 211 requests represent only a sampling of requests that made it to the BOP Director level. The total number of requests cannot be determined because the BOP has no tracking program in place for all requests. Based on a Wardens' questionnaire, in the two-year time period 2010-2011, there were approximately 618 requests, and only 64 (10.3%) were considered by the BOP Director.

- In considering the impact of the compassionate release program on public safety, the OIG found a recidivism rate of 3.5% for inmates released through the program, and these were for minor probation violations or drug sales. By comparison, the general recidivism rate for federal prisoners has been estimated to be as high as 41%.

These findings, and the recommendations in the 85-page report, cannot come soon enough for me. Three years ago, NCIA assisted in the sentencing proceedings of a 75-year-old physician in Philadelphia who pled guilty to a tax offense and had no prior criminal history. Sentenced to imprisonment for a year and a day, he reported as ordered to a Federal Prison Camp (FPC) in the Northeast region. Five months into his sentence he had difficulty seeing. Along with his defense attorney, NCIA petitioned the BOP for a medical furlough to have his eyesight repaired. While the request was "under consideration," the inmate fell in the shower and injured his back. Unable to leave his bunk, the inmate was transferred to the local medical center where he underwent back surgery which left him paralyzed from the waist down.

Following this operation, his defense attorney and NCIA began petitioning the BOP for a compassionate release, soliciting the Court's support and asking for the AUSA's position. The AUSA was informed by the BOP that the *"defendant is receiving appropriate medical care at this time"* and the *"BOP is planning on transferring the defendant to FMC Devens, Massachusetts (when medically appropriate) for six months of intensive physical therapy treatment."* (For the record, the defendant had only four months left on his sentence.)

Following his release from the hospital, our client returned to the FPC. Two days later he was put on a prison van and driven for seven hours to the Federal Medical Center (FMC) at Devens. He died the next morning. All this happened while we were petitioning for compassionate release and/or a

medical furlough. If implemented by the BOP, the recommendations made by the OIG could have saved my client's life, and many others. These recommendations include:

- Expanding the use of the compassionate release program to cover both medical and non-medical conditions for inmates who do not present a risk to the community;

- Update written policies to accurately reflect the BOP's criteria for determining eligible requests;

- Establish timeframes for processing requests at each step of the review process and for handling inmate appeals;

- Require that all inmates be informed about the compassionate release program, including how to initiate a request and circumstances that may qualify as "extraordinary and compelling;"

- Track each compassionate release request, its status, and final disposition; and

- Require that Wardens document the specific reasons for denying an inmate's request for compassionate release.

These changes, and others recommended in the OIG report, will hopefully force the BOP to take its responsibility seriously, and establish a protocol for release of its elderly, infirm and dying inmates. We will be a better society if they do.

Criminal Defense Update

Post-Booker Sentencing and the Use of 18 U.S.C. §3553(a)(6)

BY
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(April 2013)

There is an interesting new study from the United States Sentencing Commission (USSC) that is worthy of review by defense counsel, and of possible use in preparing sentencing memoranda. This publication, entitled *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, contains statistical analyses of sentences imposed for five separate offenses since the *Koon* decision in June 1996. As we all know, and frequently cite, *Booker* and its progeny have given Federal District Court Judges the discretion to impose sentences after considering all of the 18 USC §3553(a) factors, not just an individual's sentencing range according to the guidelines. While Federal Judges must still consult the guidelines for purposes of determining the appropriate advisory guideline range, they now have the discretion to consider the other statutorily enumerated factors including "the nature and circumstances of the offense and the history and characteristics of the defendant" [18 U.S.C. §3553(a)(1)] as well as disparity arguments under 18 USC §3553 (a)(6) when imposing sentence on an individual.

In its study, the USSC undertook statistical analyses of federal sentencing data for five specific offenses: drug trafficking, firearms, immigration, fraud, and child pornography.[1] This study covered a broad time span, from October 1995 through September 2011. The analyses were broken down into four distinct time periods: the *Koon* period (June 13, 1996 through April 30, 2003); the Protect Act period (May 1, 2003 through June 24, 2004); the *Booker* period (January 12, 2005 through December 10, 2007); and the *Gall* period (December 11, 2007 through September 30, 2010). The Commission selected these periods based on Supreme Court decisions and legislation that influenced Federal sentencing.

According to the report, "…in the aggregate, federal sentences have shown general stability." However, the report goes on to say that "unwarranted disparities in federal sentencing appear to be increasing" and that "…the role of the guidelines has become less pronounced." It might seem like sour grapes to the Commission, but the Supreme Court decisions that rendered the guidelines advisory and returned discretion to Federal Judges are the law of the land. Judges should have the ability to look at each case individually. Indeed, in the hundreds of sentencing hearings I have attended over the past 35 years, Federal Judges unequivocally state that sentencing is the most difficult challenge they face. Ruling on a civil liability case is one thing; depriving a defendant of their freedom is another.

The 100+ page report is worth reading.[2] Of particular interest is the analysis of child pornography cases. As most federal criminal defense lawyers know, child pornography cases have been an intense area of prosecution over the past decade. As the guidelines and legislation have ratcheted up the length of sentences for possession

[1]In total, these offenses comprised over 80 percent of federal criminal offenses in fiscal year 2011.

of child pornography, federal judges across the country have fought back with individualized sentences that reflect the extent of a defendant's conduct, any harm that conduct may (or may not) have caused, and the background of the individual they are sentencing. In a landmark case in the Third Circuit, Judge Katherine Hayden went so far as to ask a Sentencing Commission representative to appear in Court to explain why a draconian sentence was appropriate for a first-time offender [*U.S. v. Daniel Grober,* 06-CR-880 (KJH)]. In its study, the USSC found that 44% of sentences in these cases are now non-government sponsored below guideline sentences.

Another interesting analysis in this USSC report relates to fraud cases. Like the guidelines for child pornography cases, the sentencing guidelines for fraud cases have exploded since 2001. Special offense characteristics for the number of victims, the possible derivation of more than $1,000,000 in gross receipts from a financial institution, whether a defendant jeopardized a financial institution, and the escalation of guideline levels for loss amounts can easily translate into offense levels at the high end of the sentencing table and it is not unusual anymore to see a guideline range of life imprisonment for a first-time fraud defendant.

For fraud cases, Federal Judges are regularly granting variances under 18 USC §3553 and imposing a sentence below an individual's guideline range. According to the report, "…As a percentage below the guideline minimum, fraud offenses have had the largest reductions of all offense types, more than 50% below the guideline minimum during three out of four periods." This analysis was for non-government sponsored variance and departure. For a defense attorney representing a client in federal court, locating data that shows how similarly-situated defendants are being sentenced may be difficult. Given that 18 USC 3553(a)(6) mandates that unwarranted sentencing disparity be avoided, utilizing sentencing data is critically important.

To that end, one of the sentencing advocacy strategies NCIA has developed post-*Booker* that defense attorneys are finding integral to their sentencing arguments is a Federal Sentencing Statistical Analysis (FSSA). NCIA has obtained from the USSC their entire statistical database on the sentences imposed on individual defendants. This database currently contains sentencing information (excluding identifying information) on the over 690,000 defendants sentenced in federal courts between January 12, 2005 and September 30, 2013. Using this database, NCIA researchers examine and present statistics on aggregate sentences imposed. NCIA researchers have the ability to analyze the data by specific guideline applied or statute(s) of conviction and the factors relevant to a defendant's circumstances (for example, whether the conviction was by plea or trial, the individual's criminal history category, the application of specific enhancements, and the loss amounts in financial cases). In addition, we can provide such an analysis of sentences imposed nationally, by Circuit, as well as by District. In most cases, an FSSA report becomes a valuable disparity argument under 18 USC §3553 (a)(6), particularly when there is a draconian advisory guideline range.

Having worked with attorneys since 1977, we have experienced pre-guideline, guideline and now post-guideline sentencings in courts across this country. My recommendation for federal defense counsel is to keep developing the 18 USC §3553 argument, as it seems to be working.

[2]This report can be found at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm