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## SENTENCING

A criminal defense attorney discusses how the U.S. Code denies bail to certain defendants and offers a solution to grant judges more discretion in these instances.

### INSIGHT: Congress Should Amend 18 USC § 3143



BY MARK I. COHEN

With the enactment of the Mandatory Detention for Offenders Convicted of Serious Crimes Act, the 101<sup>st</sup> Congressional session (1989-1990) amended the Bail Reform Act to require the detention, pending sentence or appeal, of any person found guilty of a crime of violence, an offense for which the maximum sentence is life imprisonment or death, or a drug offense for which a maximum term of imprisonment of 10 years or more is prescribed, unless there is a substantial likelihood of acquittal or a new trial or the government is not recommending imprisonment and the person is not likely to flee or pose a danger to the community. Pub. L. 101-647. Since the U.S. Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, U.S. district court judges have had greater flexibility when sentencing persons convicted of federal criminal offenses. Judges are no longer required to impose a sentence within the range set forth in the U.S. Sentencing Guidelines (USSG). Instead, those ranges are now considered recommendations which must be considered when imposing sentence. Judicial sentencing discretion is still strictly curtailed, however, by U.S. Code (USC) statutes which impose mandatory terms of incarceration in certain circumstances.

This article addresses one exceptionally unjust result of the USC statutory framework: the intersection of 18

USC § 3553(a) and 18 USC § 3143(a)(2) requires that defendants convicted of narcotics and violent offenses must be incarcerated between conviction and sentencing, even if they had been deemed suitable to be at liberty while the prosecution was pending and even if they might not be sentenced to a term of incarceration. In this article, I will discuss how this result is created, describe two hypothetical examples of how it may occur, and provide a simple solution to this curtailed judicial discretion, which restores to sentencing district court judges the power and discretion to release some currently ineligible defendants awaiting imposition of sentence but only if there are indicia that the public and the integrity of the criminal justice system would be protected.

#### Section 3143

18 USC § 3143(a)(2) delineates the eligibility of a post-conviction/pre-sentence defendant to remain at liberty, either on bail or recognizance, pending sentencing. Specifically, 18 USC § 3143(a)(2) provides that:

The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of § 3142 and is awaiting imposition or execution of sentence be detained unless— (A) (i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

This statute operates in a particularly restrictive manner once a guilty plea is accepted by a U.S. district court judge or a guilty verdict is returned by a trial jury in cases involving certain narcotics offenses (21 USC §§ 841(a) and (b)(1)(A), (b)(1)(B) and (b)(1)(C)) and crimes of violence (18 USC § 16). While mandatory detention is arguably appropriate in a majority of these

cases, some offenders are found to have only limited participation in an offense and are therefore eligible for non-custodial sentences. As a result, they are in the unfortunate, and perhaps prejudicial, position of being incarcerated for the time between conviction and sentence, no matter how compliant they have been with the conditions of the terms of their release pending prosecution and no matter how likely it is that they will not be sentenced to a term of incarceration. This anomaly became more evident to criminal defense practitioners after the ruling in *Booker*, *supra*, in which the Supreme Court held that the mandatory application of the USSG was unconstitutional.

Before the decisions rendered in *Booker*, 18 USC § 3553(b)(1) required a court to sentence defendants within the delineated USSG ranges of various types of sentences, unless a rare downward or upward departure was available and appropriate. *United States v. Crosby*, 397 F. 3<sup>rd</sup> 103, 111 (2d Cir. 2005). In *Gall v. United States*, 552 U.S. 38, 49-50 (2007), the U.S. Supreme Court held that after correctly calculating the applicable range, a “district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party” and “[i]f he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Gall* at pp. 49-50.

Since *Booker*, *Crosby*, *Gall*, et al., a sentencing court is required to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, provide the defendant with needed training or treatment; the kinds of sentences available; the sentencing ranges established by the USSG for the crime(s) of conviction; pertinent policy statements of the USSG Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims (18 USC § 3553 (a) and (b)).

For more than a decade, federal courts have considered all of the 18 USC § 3553(a) factors, including the USSG, in order to arrive at a sentence. See *Crosby*, 397 F. 3<sup>rd</sup> at 113; USSG §§ 1B1.1(c). Before *Booker*, *Crosby* and *Gall*, in high-quantity narcotics cases charged under a statute which included a mandatory minimum term of imprisonment, certain Criminal History Category I offenders were entitled to apply for relief from a sentence at or above the mandatory minimum by making a proffer to the government. This form of relief, known as a “safety valve,” enables certain offenders to receive a USSG sentence below the mandatory term of incarceration, if credited by the government. Since *Booker*, *Crosby* and *Gall*, eligible offenders enjoy an additional benefit that permits them to seek a non-incarceratory sentence variance for low-level participation in trafficking crimes. Similarly, in certain violent offense cases, though no safety valve consideration exists, e.g. 18 USC § 1951, Hobbs Act Robbery, a defendant whose role in the offense was limited, minor or minimal can receive a variance from a USSG range of incarceration to a non-incarceratory sentence.

## Pre-Sentencing Problems Created By the Bail Statute

In the vast majority of cases, 18 USC § 3143(2) empowers only the government to prevent the mandatory detention of a person convicted of a crime delineated in 18 USC § 3142(f)(1)(A-C) while that person is awaiting sentencing. Such a person may remain at liberty only if “there is a substantial likelihood that a motion for an acquittal or new trial will be granted” or “an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person” and if the presiding judge determines “by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.” Sentencing judges are permitted to allow an individual awaiting sentence to remain at liberty on bail or on their own recognizance while pending sentencing only if the crime of conviction is not delineated in 18 USC § 3142(f)(1)(A-C) and if the defendant is not a flight risk or a danger to the community. Setting aside those circumstances relating to a motion for an acquittal or a new trial because convictions after trial represent a very small minority of cases, the requirement of a recommendation from the government is problematic for defendants in many jurisdictions.

In the U.S. Attorney’s Office for the Southern District of New York, for example, local defense practitioners know that office policy prohibits prosecutors from making specific sentencing recommendations. Typically, the government will make only a general recommendation that the court impose a sentence within the USSG range or, at best, not object to a variance therefrom or concede that a variance would be appropriate. Thus, at least by custom and practice, defendants in this jurisdiction (and many others) cannot avoid mandatory pre-sentence detention, sometimes for months, while the pre-sentencing process proceeds toward the sentencing date.

Consider the following hypothetical illustrations of individuals convicted by guilty pleas to a narcotics conspiracy and a Hobbs Act Robbery conspiracy, respectively.

### Narcotics Conspiracy

Ms. X is a 50-year-old naturalized U.S. citizen. She has lived at the same residence in New York City for more than 20 years and has been employed and filing tax returns for the same length of time. She is also a single mother of three teenaged children, whom she solely supports. She has no prior criminal record.

Mr. Y is a family friend from Ms. X’s native country. Unbeknownst to Ms. X, Mr. Y has recently established a thriving narcotics trafficking business by sending narcotics from his location overseas to the United States. Mr. Y contacted Ms. X after obtaining her telephone number from a mutual acquaintance. Although he was initially merely social, over the course of the next year, Mr. Y applied significant pressure on Ms. X to become involved in his narcotics trafficking activities, which she resisted. Finally, she relented and agreed to participate in a single narcotics transaction. Mr. Y notified Ms. X that he was sending an unknown individual, Mr. Z, to meet with and leave narcotics with Ms. X. She was not informed of the type of drug or the quantity she would

receive, she had no pecuniary interest in the transaction, she had no idea how much compensation she would earn for accepting the package and delivering it to Mr. Y, and she had no understanding of the size or scope of Mr. Y's narcotics business overseas or in the United States. Ms. X's activity was limited to a series of telephone calls with unknown individuals at the explicit direction of Mr. Y over the course of a couple of days to arrange receipt of the narcotics package from Mr. Z. The scope of her agreement was to accept the package, which she knew only would contain an unknown quantity of narcotics of an unknown type, from Mr. Z and to deliver it to Mr. Y.

Federal agents arrested Ms. X when she accepted the package from Mr. Z. The package was revealed to contain just under a kilogram of heroin although Ms. X did not know the quantity and type until she was so advised by law enforcement officials. She immediately confessed to her involvement in the crime in a post-arrest, post-Miranda statement. Ms. X was presented for arraignment on a complaint before a U.S. magistrate judge in the Southern District of New York. She was charged with a narcotics offense for which, if convicted, she would receive a mandatory minimum sentence of five years incarceration (21 USC §§ 841(a), 841(b)(1)(B)) and was released from custody on a personal recognizance bond the same day. For many months after her release on bail, Ms. X was supervised by the U.S. Pre-Trial Services Agency (Pre-Trial Services). She was in full compliance with all of the conditions set by the court and the Pre-Trial Services officer who supervised her pre-conviction bail status.

Pursuant to 18 USC § 3553(f)(1-5) and USSG § 5C1.2(a)(1-5), Ms. X applied for and attended a "safety valve" proffer session with her attorney, the prosecutor, and the federal agent who arrested her in order to seek relief from the mandatory five-year minimum term of incarceration. During the proffer, Ms. X fully accepted responsibility for her conduct and demonstrated true remorse.

The prosecution notified the defense of its intention to credit Ms. X's safety valve proffer and recommend to the sentencing court that she be sentenced without regard to the statutory five-year minimum term of incarceration. Moreover, during plea negotiations, the prosecutor agreed to designate Ms. X a "minimal participant" pursuant to USSG § 3B1.2(a), the lowest level participant in the case. The calculation of her Offense Level pursuant to the USSG was driven by the quantity of the heroin in the package (between 700-999 grams), over which she had no control (USSG § 2D1.1(6)). Her Offense Level was reduced because of her minimal participation (USSG § 3B1.2(a)), safety valve eligibility (USSG § 2D1.1(17)), and acceptance of responsibility (USSG § 3E1.1). The combination of Ms. X's adjusted Offense Level and the fact that she had no other criminal history resulted in a USSG recommendation of 30-37 months of incarceration.

Based upon Ms. X's personal history and characteristics and her minimal role in the offense, she appears to be a good candidate for a non-incarceratory sentence. However, despite the equities in her favor and her strict compliance with the requirements of Pre-Trial Services, 18 USC § 3143(a)(2) and § 3142(f)(1)(A-C) require Ms. X to be incarcerated upon the district court judge's acceptance of her guilty plea pursuant to Fed. R. Crim. P. 11(b). Because Ms. X has accepted responsibility for

her commission of the offense, thereby demonstrating remorse for her conduct, preserving government and judicial resources and earning a reduction of her USSG Offense Level, she cannot, of course, make a motion for acquittal or a new trial. 18 USC § 3143(a)(2)(A)(i). Similarly, if her case were pending in a jurisdiction such as the Southern District of New York, the government's office policy would prohibit the prosecutor from making a recommendation, at any time, to the judge that she not receive a sentence of imprisonment. 18 USC § 3143(a)(2)(A)(ii). Therefore, no matter how clear and convincing the judicial officer may find that she is "not likely to flee or pose a danger to any other person of the community," (18 USC § 3143(a)(2)(B)) and no matter how likely the possibility that she will receive a sentence of imprisonment, she must be jailed until her sentencing hearing, leaving her three children to be cared for by family members and hoping that she will be able to return to work in order to support them when she is released from custody.

## Hobbs Act Robbery

In 2009, co-conspirators B and C planned to intercept an individual inside the lobby of an apartment building and rob him, at gunpoint, of narcotics trafficking proceeds. The defendant, Mr. A, did not participate in planning the robbery. He did not know of its object until after the plan was made and never knew the intended victim. Mr. A joined the conspiracy to act as an unarmed lookout while sitting in his motor vehicle outside the planned robbery location. He was unaware of the amount of compensation he would receive for his assistance.

On the day of the robbery, after receiving instructions from his co-conspirators, Mr. A drove alone to the location and parked across the street from the building. He did not meet them at the location. During the robbery, Mr. A remained alone in his vehicle, unarmed and in cellphone contact with B and C. He was unable to see the events occurring inside the building and merely watched the building entrance to warn his co-conspirators of potential police activity nearby. His compensation for his participation in the robbery was \$2,000.00 of the \$30,000.00 stolen by his co-conspirators. Mr. A was not arrested and charged with the offense until nearly five years after the robbery occurred. He had lived a law-abiding life in the area under his true name for the entire post-robbery period.

Mr. A had no prior or subsequent criminal record. He was a naturalized U.S. citizen in his late 20's at the time of his arrest. He is the father of four children, one of whom suffers from a mental disability. At the time of his arrest, and for a number of years prior, he was supporting his family with full-time, lawful employment. The magistrate judge presiding over his initial appearance released Mr. A on a bond despite the violent nature of the crime. During the course of his supervision by Pre-Trial Services, Mr. A was in compliance with his release conditions and continued to work to support his family.

Mr. A pleaded guilty to a violation of 18 USC § 1951, Hobbs Act Robbery. His USSG Offense Level (USSG § 2B3.1(a)) was adjusted upward as a result of factors over which he had no control: his co-conspirator's use of a firearm (USSG § 2B3.1(b)(2)(C)) and the amount of money stolen (USSG § 2B3.1(b)(7)(B)). After receiving

a reduction for his acceptance of responsibility (USSG § 3E1.1(a) and (b)), and considering his criminal history, the USSG recommended a range of imprisonment of 46-57 months.

Mr. A demonstrated an admirable level of acceptance of responsibility and contrition for his participation in the crime. By all accounts, in the nearly five years since the robbery, he had matured and moved on. He had resisted further illegal conduct, remaining arrest-free. When he was interviewed by the U.S. Probation Department during its pre-sentence investigation, he demonstrated remorse and regret for his participation in the single robbery.

Based upon Mr. A's personal history and characteristics, the limited nature of his participation as an aider and abettor in the crime and his years of self-rehabilitation, the defense would likely request a non-incarceratory sentence. Pursuant to 18 USC § 3143(a)(2), despite the equities in Mr. A's case, he would be in the same position as Ms. X in the previous example. The law requires that he be remanded into custody until his sentencing date. He must leave his common-law wife with the entire burden to care for their four children, without his emotional and financial support, for the time between his guilty plea and sentencing hearing, even if he is ultimately not sentenced to a term of incarceration.

## Potential Remedies

Why not allow judicial officers the discretion to permit a low-level participant guilty of an offense described in 18 USC § 3142(f)(1)(A-C) to be released on bail or recognizance upon a finding that a defendant is not a flight risk or a danger to others or to the community? As with the same decision to be made at other stages of the prosecution, and to the extent that the statute may imply that the government has greater knowledge of the facts and circumstances of the case than the defendant, the government would have the opportunity to make any relevant arguments before the court against continued release, including that the guilty plea or conviction after trial represents a changed circumstance in favor of incarcerating the defendant pending sentence. Defense counsel would presumably focus on the defendant's personal background, including work and education history and his/her role in the offense as well as the defendant's behavior while on bail or recognizance pending prosecution and compliance with the terms of Pre-Trial Services supervision.

District court judges have enjoyed greater sentencing discretion since *Booker* and its progeny. Judges are no longer strictly controlled by mandatory sentencing guidelines which are often driven by factors outside the control of low-level offenders (e.g. quantity or type of narcotics, presence of a weapon or amount of money stolen in the commission of a robbery). Judicial officers are empowered to rule that imprisonment is not necessary under the circumstances of a particular case. Therefore, it is illogical that they are obligated to incarcerate a defendant for the period of time between conviction and sentence who was released on bail or recognizance for the duration of the prosecution and who will not receive a sentence of imprisonment.

Experience in the Southern District of New York demonstrates that a procedural loophole exists that enables some offenders implicated by 18 USC

§§ 3142(f)(1)(A-C) to remain at liberty until sentencing. Defendants whose cases are assigned to a district judge whose practice is to refer guilty pleas to a magistrate judge have been permitted to remain at liberty until their sentencing date. 28 USC § 636(b)(3) permits a magistrate judge delegated by a district judge in a felony prosecution to administer—but not accept—a Fed. R. Crim. P. 11 guilty plea allocution, provided that a defendant consents to this delegation. (See *U.S. v. Williams*, 23 F.3d 629 (2<sup>nd</sup> Cir. 1994) and Article III of the U.S. Constitution). Thus, the time between a magistrate judge's hearing of the guilty plea and the time of the district judge's acceptance of it operates as an unofficial reprieve for those whose cases would otherwise fall within the mandatory detention dictates of 18 USC § 3143(a)(2). To the extent that defense counsel can use that time to perform the work that is typically conducted between conviction and sentence, i.e. preparation of a sentencing memorandum, work with the Department of Probation toward completion of its investigation and preparation of its report, this will minimize the number of occurrences of low-level defendants' mandatory incarceration pursuant to 18 USC § 3143(a)(2).

Unfortunately, those defendants whose cases have been assigned to district judges who hear and immediately accept their own guilty pleas are destined to be incarcerated immediately despite their eligibility for no sentence of imprisonment, and even the likelihood that such a sentence will be imposed. Some practitioners have become adept at working to steer their client's cases toward guilty plea hearings by magistrate judges when the assigned district judge has no strict policy of hearing his/her own guilty pleas.

Another possible unofficial reprieve from pre-sentence incarceration from post-conviction/pre-sentence incarceration might be to request that a district court judge not immediately accept the client's guilty plea, thereby avoiding an immediate conviction (see Fed. R. Crim. P. 11(b)(3)) and the mandatory detention provision. This would require district judges to engage in the unseemly task of circumventing 18 USC § 3143(a)(2). One final possibility is to hope that the U.S. Attorney's Office would start to make sentencing recommendations in this limited number of cases.

In the hypothetical cases of Ms. X and Mr. A, absent the employment of a "loophole," both would have been required to argue for non-incarceratory sentences while in custody. Experienced defense attorneys believe it is arguably more of a challenge to convince a district court judge to sentence someone returned to custody to a period of time-served than to do the same for a similarly-situated defendant who has avoided mandatory pre-sentence detention to receive a non-incarceratory sentence. Based upon the sentencing judge's discretion found in 18 USC § 3553(a), equity dictates that the sentencing judge should enjoy the same discretion to act when determining someone's post-conviction bail status as their ultimate sentence, regardless of whether they have committed a 18 USC § 3142(f)(1)(A-C) offense.

## Conclusion

I urge Congressional action to ameliorate this anomaly in the statutory scheme at the intersection of 18 USC § 3553(a) and 18 USC § 3143(a)(2) that has be-

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come more evident during the post-*Booker* sentencing era.

In my view, the solution is simple in both its principle and its implementation. Power and discretion should be restored to the district court judges who can hear the arguments of the government and the defense as to the particular defendant they will shortly sentence and make an informed and specific decision regarding whether that individual, under the specific circumstances which exist, should either be freed or remain free pending sentence. The amendment of 18 USC § 3143(a)(2)(A)(ii) to change the final word “and” to “or” and the amendment of 18 USC § 3143(a)(2)(B) to simply use the same language to create a new subsection 18 USC § 3143(a)(2)(A)(iii) would accomplish this goal. The new statute would require judicial officers to detain defendants pending sentence unless “there is a substantial likelihood that a motion for acquittal or new trial will be granted” or the Government “has recommended that no sentence of imprisonment be imposed on the person” or there is “clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.”

In the limited number of cases in which defendants have committed admitted serious crimes under unam-

biguously mitigating circumstances, I submit that their freedom between guilty plea and sentence should not be forced to rely upon upon the happenstance of the procedures of the district judge to whom their prosecution is assigned or the policies of the U.S. Attorney’s Office in the jurisdiction of which they committed the crime. Instead, as with all other stages of the proceeding, and more consistently with the principles of the criminal justice system, every defendant’s liberty should depend upon an assessment of the risk that the defendant will inflict harm on the public or will not return to court.

Stated more simply, every defendant’s liberty must depend upon due process.

### **Author Information**

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