UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	**Case No. 2:05-cr-00040**
v.	)	
	)	
	)	**Judge Joseph R. Goodwin**
DAVID A. HICKS	)	

SENTENCING MEMORANDUM
ON BEHALF OF DAVID A. HICKS

Through counsel, David A. Hicks files the following Sentencing Memorandum setting forth all factors that the Court should consider in determining the appropriate sentencing guideline and 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).

Sentencing 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 Guideliness 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, making 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 §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)(7).

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).

Under 18 U.S.C. 3661, *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 purpose 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 defendants 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 WL 525409, *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 defendants 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 §3353(a) factors, many of which the guidelines either reject or ignore. United States v. Ranum, 353 F. Supp. 2d 984, 985-86 (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), rehg en banc granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Bookers 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 sum, 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. And where the guidelines conflict with other sentencing factors set forth in 3553(a), these statutory sentencing factors should generally trump the guidelines. See United States v. Denardi, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J, concurring in part, dissenting in part) (arguing that since 3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes violates statute and is reversible, even if within guideline range).

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:

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Offender

(a) Nature and Circumstances of Offense:

In reference to Counts I and II, it is important to recognize that the Defendant did not take the photographs for which he was convicted. Only four witnesses testified regarding these pictures. The Defendant expressly denied taking the photographs. His youngest daughter admitted that she took at least one of the photographs, but that she could not recall whether she took the other one. The Defendant's eldest daughter specifically testified that her younger sister took all of the photographs underlying Counts I and II. Finally, the minor child who was photographed testified that she could not remember who took the photographs and that the Defendant's youngest daughter may

have taken them. Therefore, while the Defendant was convicted of producing child pornography, there was no evidence at trial indicating that he actually took the photographs. This fact alone warrants a downward departure in the Defendant's sentence.

Furthermore, the Government produced numerous files on the Defendant's computer that contained child pornography. However, pursuant to the Government's own computer expert, it was verified that a large number of the files were never opened after they were downloaded to the computer. Thus, when considering the number of photographs found on the Defendant's computer, this court should consider the fact that a large number of these files, and the corresponding photographs contained inside the files, were never viewed by the Defendant after they were downloaded.

(b) History and Characteristics of Mr. Hicks:

Mr. Hick's criminal record is virtually spotless prior to the instant conviction. In addition, Mr. Hicks has had a positive influence on the lives of many family members and friends around him, including several minor children. Many of those individuals have expressed their feelings and support for Mr. Hicks, and their letters of support are attached hereto as "Exhibit A."

2. The Need for the Sentence Imposed To Promote Certain Statutory Objectives:

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

The sentencing range proposed by the Probation Department is excessive. A sentence substantially less than a life sentence will meet all of the statutory objectives and will provide just punishment for the crimes of which the Defendant has been

convicted. The Defendant will address the proper sentencing range *infra*.

(B) to afford adequate deterrence to criminal conduct:

A sentence substantially less than a life sentence will meet all of the statutory objectives and will provide adequate deterrence for the crimes of which the Defendant has been convicted. The Defendant will address the proper sentencing range *infra*.

(C) to protect the public from further crimes of the defendant:

A sentence substantially less than a life sentence will meet all of the statutory objectives and will protect the public from further crimes by the Defendant. The Defendant will address the proper sentencing range *infra*.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner:

A sentence substantially less than a life sentence will meet all of the statutory objectives and will provide the Defendant with ample opportunity for proper educational or corrective treatment. The Defendant will address the proper sentencing range *infra*.

3. The Kinds of Sentences Available

In Booker, the Supreme Court severed and excised 18 U.S.C. 3553(b), the portion of the federal sentencing statute that made it mandatory for courts to sentence within a particular sentencing guidelines range. Booker, 125 S. Ct. at 756. This renders the sentencing guidelines advisory. Id.

4. The Sentencing Range Established by the Sentencing Commission:

The Defendant does not object to the use of the November 5, 2003 edition of the United States Sentencing Guidelines to calculate his sentence in the instant case.

However, the Defendant does object to the application of §2G2.2 for Counts VI, VII, and VIII.

It is important to note that the Defendant was convicted of simple receipt and possession of child pornography pursuant to 18 USC 2252. This is important because §2G2.4 provides a lighter sentence for mere possession of child pornography compared to §2G2.2. This is because §2G2.2 provides for more severe sentencing because it pertains to the *trafficking*, not just *possession*, of child pornography. U.S. v. Farrelly, 389 F.3d 649 (6th Cir. 2004).

In Farrelly, the Defendant was convicted of receipt of child pornography in violation of 18 USC 2522(a)(2)(A), and knowingly, possessing child pornography under 18 USC (a)(5)(B). The trial court applied §2G2.2 and sentenced the Defendant to 57 months. The Defendant challenged his sentence on the basis that the court should have applied §2G2.4 instead of §2G2.2.

In ruling for the Defendant, the appellate court held that the trial court "improperly sentenced Farrelly using U.S.S.G. §2G2.2 for *receipt* of child pornography instead of §2G2.4 for *possession* of child pornography. Id. (emphasis added). The Court further held:

> The obvious intent of the Guidelines however is to punish less severely for possession than for trafficking. The activity for which Farrelly was convicted, including for relevant conduct, obviously partakes of the less culpable characteristics of possession than of the more culpable characteristics of trafficking. Every possession necessarily involves a receipt (apart from the even more culpable possibility of having created the pornography). Beyond the receipt inherent in every possession, there is no evidence of trafficking activity warranting a more severe sentence. Farrelly was an end user, and there is no indication that he ever trafficked, transported, shipped, or advertised such

> material. Only a sterile formalism could require us to apply the guideline for "receiving," clearly ensconced as it is in the context of trafficking, when there is no evidence of trafficking beyond the receipt that is inherent every time there is evidence of less culpable "possession."

The Statutory Index directs a sentencing court to both §§2G2.2 and 2G2.4 when a defendant has been convicted of 18 USC 2252.1 The Farrelly court acknowledged that if more than one guideline section is referenced, the trial court "should use the guideline most appropriate for the offense conduct being charged in the court." Id. "In the context of this case, where the evidence of 'receipt' would in every case amount as well to 'possession', the 'most appropriate' guideline for the offense conduct is §2G2.4."

The court also cited U.S. v. Davidson, 360 F.3d 1374 (11th Cir. 2004) for the ruling that "§2G2.4 is applicable to all receipt of child pornography offenses unless there is specific evidence that the defendant distributed or intended to distribute the child pornography." Finally, the court recognized that §2G2.2 should only be used to punish crimes related to trafficking in child pornography, and §2G2.4 should be left for those who "merely possess child pornography." Id. Therefore, the court held that as a "mere end user", the Defendant should not have been sentenced using the guideline for trafficking of child pornography.

In this case, there has been no evidence whatsoever that the Defendant attempted to traffic child pornography. Therefore, this court should apply §2G2.4 to Counts VI, VII, and VIII, which has a base level of 15.

There are a limited number of adjustments under §2G2.4, as compared to §2G2.2. Under §2G2.4, Mr. Hicks will receive a two point increase because the alleged victim

1 The PSI states that §2G2.2 is the appropriate section. It fails to even mention §2G2.4.

was under the age of twelve. In addition, he will receive a two point increase because a computer was used. A four point increase is given for sadistic or masochistic depictions, and a five point adjustment is given because there were more than 600 images on Mr. Hick's computer. Therefore, under Group Two, the Defendant's total offense level is 28.

Since Group One has the highest offense level, it will receive one unit pursuant to §3D1.4. Also, since the Group Two offense level is within four to eight levels of Group One's offense level, it receives one-half (1/2) unit. As a result, a one point increase to the highest group level is levied, raising the offense level for Group One from thirty-three (33) to thirty-four (34).2 Therefore, the total offense level for Mr. Hicks is thirty-four (34).

5. The Need To Avoid Unwarranted Disparities:

A life sentence will far exceed the normal sentencing guidelines for similar offenses. The total offense level of 34 equates to a sentence of 151 to 188 months. A sentence within this range is proper and warranted so as to avoid disparities in relationship to past sentences for similar offenses.

6. The need to provide restitution to any victims of the offense:

This issue was addressed in the PSI.

7. Objection to Application of the Statutory Enhancement On the Ground that the Alleged Prior Convictions do not Qualify Under 18 U.S.C. 2252.

The Government attempts to apply the prior conviction enhancement to the Defendant based upon his conviction on Counts I and II in the same indictment and trial. The convictions on counts I and II do not qualify as "prior

2 The PSI suggests that the Defendant should be assessed a two point increase for the obstruction of justice. The evidence produced by the Government does not warrant such an increase, and therefore, the offense level for Group One should be thirty-three (33), and not thirty-five (35).

convictions" under 18 U.S.C 2252.

8. Objection to Application of the Statutory Enhancement On the Ground that the Enhancement is Unconstitutional

The application of the recidivist enhancement under 18 U.S.C. 2252A based on the alleged fact of prior conviction is unconstitutional on its face and as applied in this case because it violates defendant's rights under the Fifth and Sixth Amendments of the Constitution.

Conclusion

For the foregoing reasons, David Hicks respectfully submits that a sentence of 151 to 188 months is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. 3553(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 12, 2007, I filed the foregoing document with the Court using CM/ECF which will send notification of such filing to the following CM/ECF participants:

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