

FEDERAL CRIMINAL DEFENSE SENTENCING STRATEGIES

A whole chapter in the [FCDC Legal Guide](#) is dedicated to Defense Strategies, with a significant section on Federal Sentencing Strategies. Why? Over 94 % of Federal Criminal Defendants plead guilty, and of the 69% that proceed to Trial, 75% of them are convicted. Hence, Sentencing Strategy has become an important Criminal Defense Tool, especially in White Collar Cases. The reality is 19 of 20 Federal Defendants charged in Federal Courts end up in front of a Sentencing Judge.

This article will summarize various Sentencing Strategies White Collar Criminal Defense Teams can effectively utilize to minimize the impact of a potentially harsh Federal Sentence, particularly after the stiff penalties imposed by the Sarbanes-Oxley Act. For a complete discussion on Sentencing Strategy please consult the FCDC Legal Book: [The Federal White Collar Criminal Defense Guide](#).

Calculating & Applying the Federal Sentencing Guidelines

Several Elements to consider:

- ✓ Select the appropriate Offense Guideline for every Conviction Offense.
- ✓ Determine whether Specific Offense Characteristics Apply.
- ✓ Do any Special Instructions of Cross References Apply?
- ✓ Adjustments: Victims, Obstruction of Justice, Defendant's Role in Offense, etc.
- ✓ Group the Counts
- ✓ Does Acceptance of Responsibility Adjustment apply?
- ✓ Criminal History Category
- ✓ Calculate the Sentencing Guideline Range

References: U.S.S.G. 1B1; 2B1; 3B1; 3D1; 3E1; 4A1; 5G1 and 18 U.S.C. 2247.

Federal Sentencing Guidelines are no Longer Mandatory

As a result of the [Booker] Ruling, Federal Sentencing application and calculation is subject to 18 U.S.C. 3553(a). The Sentencing Guidelines are now Advisory. A Sentencing Judge must consider the Sentencing Guidelines, in addition to, all the Relevant information from the Defendants case, and how that information relates to the six other Sentencing Factors, besides the [Sentencing Guideline Range] (Reference: 18 U.S.C. 3553(a)(4)):

- ✓ [Nature and Circumstances of the Offense], including the History and Characteristics of the Defendant (Reference: 18 U.S.C. 3553(a) (1); U.S.S.G. 5H1.1-12; 18 U.S.C. 36610).
- ✓ [The kind of Sentences Available] (Reference: 18 U.S.C. 3553 (a)(3))'
- ✓ [Sentencing Advisory Guidelines & Policy Statements] (Reference: 18 U.S.C. 3553(a) (5)).
- ✓ [Sentencing Disparities of Similar Cases & Offenses] (Reference: 18 U.S.C. 3553(a) (6)).
- ✓ [Sentencing Purposes] (Reference: 18 U.S.C. 3553 (a)(2)).

- ✓ [Restitution] (Reference: 18 U.S.C. 3553(a) (7)).

Downward Departure Factors

[Post-Booker], the Sentencing Guidelines are Advisory. This means the importance of Sentencing Factors to support a Departure is much less important because a Variance (or Outside the Guidelines Sentence) can now be utilized in a lot of instances as effectively as a Departure. However, Departures can and should still be considered. If a Sentencing Factor would contribute to a Downward Departure when the Mandatory Sentencing Guidelines were in effect, this may create a situation and opportunity to more easily justify a lower sentence to the Judge.

Departure can be appropriate when:

- ✓ A Unique Case Factor is not denoted by the Sentencing Guidelines.
- ✓ A Policy Statement encourages a Departure. Reference: U.S.S.G. 5K2
- ✓ Discouraged Factors which are present to an Extraordinary Degree.
- ✓ A Considered Factor under the Guidelines, yet present to an Extraordinary Degree, promoting a larger than usual Departure. See: Chapter Two of the Federal Sentencing Guideline Manual.
- ✓ Defendant cooperates with the Government.
- ✓ The Offense Scheme would probably not succeed.
- ✓ Defendant didn't profit personally from the Fraud.
- ✓ Defendant's Company would go out of business in his or her absence. Innocent employees will suffer.
- ✓ Defendant has a minimal role in the Offense.

Variations & Outside the Guidelines Sentences

The Advisory nature of the Sentencing Guidelines has brought about the use and importance of Variations. A Sentencing Judge can impose a Sentence below the Guideline Sentencing Range even if the Sentencing Commission's Policy Statements don't provide any basis to Depart. An old Factor for Downward Departure under the Mandatory Sentencing Guidelines can also provide opportunity to justify a lower sentence to the Judge.

- [Guidelines are No Longer Mandatory]: A Sentencing Judge can use formerly excluded factors to impose an Outside Guideline Sentence.
- [Sentence is Sufficient but not Greater than Necessary] to achieve the sentencing objectives. Reference: 18 U.S.C. 3553(a).
- [Defense Team Interview Expertise]: This is absolutely essential in determining a solid Variance / Outside Guideline Sentencing Strategy. There are many unique factors in each and every case which need to be uncovered (pertains to Sentence Mitigation Strategy as well).

Mitigation Factors

Here is a listing of Mitigating Factors, but it by no means is exhaustive. It is extremely important to have skilled Legal Consultants and Expert Attorneys who are well versed in Mitigation identification, analysis and application. Mitigation Factors are case specific so any unique aspect of a case can be a Mitigating Factor. Excellent Defendant Interviews and Case & Discovery Analysis are essential in providing the Pre-Sentence Report Probation Officer and Sentencing Judge viable options for your Sentence Imposition.

- Sentencing Guidelines Policy Statements
 - Reference: U.S.S.G. 5H & 5K
- Combine Mitigating Factors
- The Defendant's History & Characteristics
 - Reference: U.S.S.G. 5H 1.1-12; 18 U.S.C. 3662; {United States v. Ranum}, 353 F. Supp. 2d984 (E.D. Wis. 2005); [Unites States v. Myers], 353 F. Supp. 2d1026 (S.D. Iowa 2005).
- Previous Legal Punishment
 - Reference: [United States v. Gaind], 829F. Supp. 669 (S.D. N.Y. 1993) – later affirmed by the 2cnd Circuit in 1994. Note: This is [Pre-Booker].
- Ability to Make Restitution Payments
 - Reference: 18 U.S.C. 3553 (a) (7)
- Out of the Ordinary & Out of Character Conduct
- Significant & Substantial Diminished Mental Capacity
 - Reference: U.S.S.G. 5K2.13
- Depression or Mental / Physical Illness / Disease
- Drug & Alcohol Abuse / Gambling Addiction
- Rehabilitation after the Offense
 - Reference: [United States v. Sally], 116 F 3d76, 82 (3d Cir. 1997)
- Extraordinary Effect of Prison on a Defendant's Family
- Small Business Owner's Incarceration causes a Significant Loss of Jobs to Innocent Employees.
- Extraordinary Acceptance of Responsibility
 - Reference: U.S.S.G. 5K2; [United States v. Kim], 364F. 3d 1235 (11th Cir 2004); {United States v. Faulks}, 143F. 3d133 (3d Cir. 1998).
- Older Age
 - Reference: {United States v. Nellum}, 2005 WL300073 (E.D. Ind. Feb 3, 2005)
- Post Offense Counseling

For more detailed explanation of these Mitigation Factors, Departures & Variances, please consult the FCDC Legal Book: [The Federal White Collar Criminal Defense Guide](#).

Creative Sentences

He first key to obtaining a Creative Sentence is to use the time period when the first draft of the PSR is complete to about a week or ten days prior to Sentencing to advocate to the PSR PO, AUSA and Sentencing Judge. A Sentencing Motion Memorandum should effectively use the Mitigation Factors you have identified for your case along with a substantiated Creative Sentence Proposal for the Judge.

Here is a summary list of possible Creative Sentence Alternatives:

- Probation / Split Sentence / Year and a Day Sentence Combinations
 - Reference: U.S.S.G. 5B1.1 (a) and 5C1.1 (d)
- Utilizing Halfway House (RRC) and Home Confinement
- Community Service
- Lateral Departure or Variance
- Sentencing Zones are now Advisory
- Mental Illness
- Family Circumstances
- History & Characteristics of the Defendant
 - Reference: 18 U.S.C. 3553 (a) (1); 18 U.S.C. 3661; U.S.S.G. 5H1.1 to 1.12.
- [Post-Booker], Sentences can be more Individualized
 - Reference: 18 U.S.C. 3661
- Sentencing Factors can not be weighted
- Why the Defendant did what he / she did
- Sentencing Motion / Memorandum
- Object to PSR Omissions subject to 18 U.S.C. 3553 (a) Factors
- Prepare a Sentencing Justification Statement for the Judge:
 - Reference: 18 U.S.C. 3553 (c) (2)
- Argue for No Imprisonment in the Sentence by using 18 U.S.C. 3582 (a): Pure Probation Sentence
- Lock-In / Cap a Sentence with a Rule 11 (c) (1) (c) Plea Agreement
 - Note: Only to be used if a strong chance of an above Guideline Sentence.

- Substantial Sentencing Concessions for: Waiving Right to Appeal, Right to Advocate for Downward Departure and/or Obtaining a Non-Guideline Sentence.
 - Note: Only to be used as an extreme, defensive tactic if absolutely necessary.
- Advocacy Letters

Sentencing Creativity is only limited by your Defense Team's Ability to apply all your Case's Mitigation Factors, unique Case Factors, PSR Factors and the Defendant's Personal Factors to Alternative forms of Sentencing which still meet the Sentence Sufficiency Test: Show how your Alternative, Creative Sentence Proposal, while Outside the Sentencing Guidelines, is still sufficient in meeting the goals of the particular sentence. Under 18 U.S.C. 3553 (a), sentences should be "sufficient" yet not "greater than necessary" to achieve sentencing goals. This is a powerful argument which can set up an Appeal if not accepted by the Sentencing Judge.

In the [FCDC Legal Guide](#), I go into far more detail on each Creative Sentence Area so a Defendant's Defense Team can use and apply the immense utility and effectiveness.

Sentencing Factors

I have so far discussed numerous Departure, Variance and Mitigation Factors, all of which can add up to an Outside the Guidelines Sentence. It is important to keep in mind, as an overall framework from which to work, the Seven Main Sentencing Factors outlined in 18 U.S.C. 3553 (a). [Post Booker], Sentencing Judges cannot prejudice or weigh more heavily any single factor (i.e. The Guideline Sentencing Range).

All Sentencing Factors must be considered by the Sentencing Court. Using the Seven Sentencing Factors in combination with Expert Defense Team Interviews, along with excellent Case and Discovery Analysis, a well developed Sentencing Strategy, utilizing any and all applicable mitigating factors (departures and variances), will in its entirety add up to a best Defense. Moreover, this preparation can result in a solid Plea Agreement or be the fuel needed to proceed to Trial. In other words, Sentencing Strategy preparation starts very early in the Legal Process and can be the powerful driver in determining whether to Plea Guilty or proceed to Trial. This is why Post-Conviction Law Firms have grown in utility early on in the Federal Criminal Law Process.

Sentencing Strategies

At this point, it is important to have the following completed prior to putting together the Sentencing Strategy:

- Case and Discovery Review
- Defendant's Interview
- Case and Discovery Analysis & Summaries
- Case Risk Assessment
- List of Mitigation Factors, Variances & Departures

A Sentencing Strategy (or Trial Strategy for that matter) needs to be aggressive, proactive and most importantly, strategically focused. Here are some tips for building a solid Sentence Strategy:

- [Minimize the Impact of Relevant Conduct]
- [Plea Agreement Negotiation Tips]:
 - ✓ The Government should believe you are prepared to go to Trial.
 - Hem up significant aspects of the Government's Case and create doubt.
 - ✓ Extend the Trial Date and put more pressure on the Government.
 - ✓ Posture the Government into making a good initial Plea offer with well presented arguments where their case is lacking.
 - ✓ Numerous Negotiation areas to consider, including:
 - Loss Amount
 - Restitution
 - Fine
 - Forfeiture
 - Mitigating Factors
 - Guideline Range Recommendations
 - No Enhancement Clause
 - Dismissing Certain Counts
 - Does Rule 11 (c) (1) (c) Apply? (see discussion earlier in this article)
 - Do Cooperation Agreement / Substantial Assistance Apply?
 - Negotiate the accuracy and content of the Statement of Facts.
 - The Government Agrees to make certain positive recommendations to the PO and Judge.
 - Redact admission to Court any crimes committed by the Defendant previously, outside the offenses to which the Defendant is pleading guilty.
 - Does the Defendant agree to waive Right to Appeal?
 - Cognizant of any wording which prevents a Downward Departure or Adjustment, or wording to the effect that the Defendant will not challenge upward adjustments.
 - Is an Open Plea the best option?
 - Have the terms of the Plea Agreement memorialized.

- Hold the Government (AUSA) accountable for agreed to Plea Terms during discussions and negotiations with the PSR PO and advocating to the Sentencing Judge.
- [Pre Sentence Report (PSR) Tips]:
- ✓ Know the first draft date and negotiate with the PSR PO & AUSA prior to that date and finish any ongoing negotiations in the 35 days preceding the Sentencing Date.
 - ✓ Have all PSR negotiations completed one week to 10 days prior to the Sentencing Date.
 - ✓ Properly and thoroughly interview the Defendant and prepare a Mock PSR prior to the actual PSR interview with the PO.
 - ✓ Provide the PSR PO your side of the case, along with mitigating factors, to counter balance the Government's position.
 - ✓ Hold all meetings with the PO on your own turf (attorney's office) if possible and establishing a good rapport.
 - ✓ Send a completed PSR Interview Questionnaire to the PO prior to the interview.
 - ✓ Prior to the PSR Interview, your Defense Attorney should email the PO a straight forward letter, accompanied by organized references, to advocate for the Sentencing Guidelines you are negotiating toward. Therefore, during the PSR Interview, you can determine early on where the PO stands on your Sentencing Strategy.
 - ✓ Determine the PSR Dictation Date and finish initial negotiations with the PO prior.
 - ✓ Provide the PO well substantiated 18 U.S.C. 3553 (a) Sentencing Factors supporting a below Guideline Sentence.
 - ✓ Provide the PO all necessary Verification of the assertions you have made in the PSR negotiations, including:
 - Alcohol / Drug Abuse Diagnosis (see RDAP Section)
 - Mental Illness Diagnosis
 - Medical Issues & Prescribed Medications
 - Professional documentation of unfortunate childhood experiences and poor youth guidance.
 - Significant Abuse or Trauma pertinent to the case, and the effect on the Defendants decisions.
 - Recent counseling that documents a Defendant's insights into wrongful conduct.
 - Defendant's motivation to change past aberrant behavior and conduct.
 - ✓ PSR is the sole document used by the BOP to designate the Defendant. Ensure it is accurate in all areas!

- ✓ Simplify a complicated case so the PO can easily understand the case facts.
- ✓ Ensure any and all corrections agreed to during the Sentencing Hearing are completed prior to the PSR being transmitted to the BOP.
- ✓ Ensure the PSR reflects an accurate Criminal History Score.
- ✓ Be careful not to magnify or exaggerate the Defendant's Physical and/or Mental Health Problems, especially if they do not support an Outside Guideline Sentence based on:
 - U.S.S.G. 5H1.3: Mental / Emotional Conditions "not ordinarily relevant".
 - U.S.S.G. 5H1.4: Physical Condition "not ordinarily relevant".
 - Other 18 U.S.C. 3553 (a) Non-Guideline Factors.
- ✓ Ensure a Correct Address for your Release.
- ✓ Your Citizenship is properly verified.

As is evident, the PSR is a significant part of a Sentencing Strategy. Make sure you have a Sentencing Date (or Trial Date) far enough in the future so you can do a complete and adequate job on the strategy and the negotiation there of.

Summary

In this article on Federal Criminal Defense Sentencing Strategies, I discussed the following:

- Calculating & Applying the Federal Sentencing Guidelines
- Federal Sentencing Guidelines are No Longer Mandatory
- Downward Departure Factors
- Variances & Outside the Guidelines Sentences
- Mitigation Factors
- Creative Sentences
- Sentencing Factors
- Sentencing Strategies

For many more details on these and other Sentencing Strategies, please consult the FCDC Legal Book: [The Federal White Collar Criminal Defense Guide](#).

A good Sentencing Strategy is predicated on a solid Defense Team. Please refer to the FCDC article, [Criminal Defense Team Formation](#), to ensure you have the right Defense Team in place to secure an Outside the Guideline Sentence.

This Article is written by the FCDC Chief Legal Consultant, who is a White Collar Felon, himself, and he draws from personal experience with the Federal Criminal Legal System. Please see [My Story](#) for more details on the author and his legal saga.

We appreciate your [Comments & Feedback](#) on this Article and the FCDC Website!

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