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Recent Supreme Court Decision Holds Federal Sentencing Guidelines No Longer Mandatory

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On January 12th, the U.S. Supreme Court handed down the landmark decision of *U.S. v. Booker*, and the companion case, *U.S. v. Fanfan*, ___ U.S. ___, 125 S.Ct. 738, ___ L.Ed.2d ___ (2005), effectively eviscerating the "binding" nature of the Federal Sentencing Guidelines. Recent cases had foreshadowed the monumental ruling. Justice Stevens, in the first part of the opinion, expressly affirmed the Court's determination in *U.S. v. Apprendi*—that "sentence enhancing facts" that increase the penalty beyond the statutory maximum proscribed for the crime charged must be admitted or found by a jury to exist beyond reasonable doubt. The Court built upon its decision in *Blakely v. Washington*, a case which held the Washington State Sentencing Guidelines to be unconstitutional since mandatory guidelines were essentially statutory minimums. Justice Breyer authored a second section, addressing "the remedial question." The opinion held that the Sentencing Guidelines were appropriate as advisory tools and a "reasonableness" standard would be applied in appellate sentencing reviews.

Appeals from defendants sentenced under the Guidelines were received in the Western

government is understandably concerned, as are defense attorneys, all unsure of the ramifications of the decision. Defendants no longer face a relatively predictable sentence; rather, the courts may prescribe terms far lower, or higher, than those meted out during the Guidelines era. For instance, a federal judge in Wisconsin used his new found discretion to drastically lower the sentence for a white collar defendant from minimum thirty-seven month sentence to one year and a day, while a Pennsylvania judge raised a white collar repeat offender from a maximum of fifty-seven months to a seven year term.

The U.S. Sentencing Guidelines were created by Congress in 1984 to address the disparities in sentencing, e.g., a defendant getting double or triple the sentence of a similarly situated defendant in a different jurisdiction or even before a different judge in the same district. The Sentencing Guidelines, in essence, set out specific "offense levels" for the "real conduct" related to various crimes. Certain conduct in the commission of a crime—for instance the use of a weapon, the amount of contraband or money involved, the enlistment of a minor in the act—would result in an enhancement of the base offense level. Thus a defendant might be charged with insider trading, an "8," and because of

his position of trust as corporate officer, have the sentence enhanced by "2," resulting in an offense level of "10." Similarly, certain conduct, most often "acceptance of responsibility" could result in a deduction of two or three levels. The guidelines then provided a grid—the left hand column listed offense levels, the top column, criminal history. Thus, to determine a sentencing range, one simply moved down the grid to the appropriate offense level and then across the page to the correct criminal history category. For example, the corporate officer convicted of insider trading without any prior criminal history would face a six to twelve month prison term. The *Apprendi* and *Booker/Fanfan* (or, more simply, *Booker*) decisions are relevant in circumstances where the enhancement actually increased the sentence. In our example, the base level of "8" results in a zero to six-month term of incarceration, while "10" is six to twelve months. At a minimum, *Apprendi* and *Booker* require re-sentencing if the defendant was given a seven to twelve month sentence—in essence requiring one to five additional months of incarceration based on a fact not submitted to the jury for determination beyond a reasonable doubt.

The *Booker* decision resulted from two unusual majorities, as regular alliances were

Justice Stevens, joined by Justices Scalia, Souter, Thomas and Ginsburg, reaffirmed *Apprendi*, determining that "any 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." In the second part, Justice Breyer, who helped create the Guidelines and a Senate Judiciary staff member in the 1980's, wrote an opinion which salvaged the Guidelines, declaring them "advisory." He was joined by the Chief Justice and Justices O'Connor, Kennedy and Ginsburg, who "switched sides" to complete the second five-member majority. After reviewing the statutory intent, the majority determined that Congress simply could not have envisioned a system which permitted judges to increase sentences (through the use of enhancers) but not decrease terms of incarceration except in exceedingly narrow circumstances subject to *de novo* appellate review. By removing specific statutory sections making the Guidelines "more mandatory," the Court returned sentencing to a "reasonableness" standard.

Some commentators have suggested that the decision gives judges unprecedented con-

control over the fate of the defendant. Prior to the Sentencing Guidelines, terms of incarceration were imposed by judges but monitored by the U.S. Parole Commission. The Parole Commission, as an integrated national agency, acted as a leveling mechanism, keeping some prisoners for the entire length of shorter incarcerations while allowing those with excessive terms to exit early. In the wake of *Booker*, no such central agency does or will likely exist again.

It seems more likely, however, that the Guidelines, while "advisory," will continue to control sentencing in the vast majority of cases. The day after *Booker* was rendered, Judge Paul Cassell of the District of Utah issued an opinion adopting the Guidelines as advisory for his cases, *U.S. v. Wilson*, 350 F. Supp.2d 910 (D. Utah 2005). Judge Cassell explained a number of reasons he believes that the Guidelines should continue to be given great deference. Most importantly, they provided consistency, where before there had been none. Such consistency allowed defendants to understand what penalties were likely and, in theory, meant that individuals across the country received the same penalty for the same act. From a political perspective, the Guidelines were a result of democracy in action. Congress established the Sentencing Commission and

the rules by which it functioned. The Sentencing Commission drew up the Guidelines and brought them and subsequent changes to Congress for approval. Over twenty years, the Guidelines had been refined in light of growing expertise and experience. During that period, violent crime fell to half the pre-Guideline levels. Studies revealed that, with certain exceptions, the general public favored sentencing terms

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remarkably close to those found in the Guidelines. Cassell concluded, and upon motion for reconsideration in light of the Wisconsin court's more lenient approach, reaffirmed, that the Guidelines though advisory, remain the only viable benchmark for determining the appropriate sentence. In his courtroom, basic procedure, including pre-sentencing reports, party objections, and sentencing hearings, will remain essentially unaffected. Citing the Utah case, Judge Heaton of the Western District of Oklahoma has recently indicated he would follow the same course.

While Judge Cassell's opinion may be the more conservative view, the district courts are already beginning to limit *Booker's* effects by applying the now advisory Guidelines as they had before or utilizing various procedural mechanisms to deny appeals. For instance, a very busy judge from the District of Maine after recognizing the "advisory" language of *Booker*, has sentenced several defendants according to the Guidelines. The Eleventh Circuit has held that a waiver to challenge the sentence signed in conjunction with a plea agreement bars a *Booker* challenge. A New York District judge dismissed a habeas petition, holding that the *Booker* decision was inapposite where the sentence was based on specific statutory mandates rather than the Guidelines. There is simply no other choice, no other

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mechanism in place other than the Guidelines, to determine a "reasonable" sentence. In remanding a case for re-sentencing, the Eighth Circuit has offered little direction other than noting that *Booker* makes the Guidelines advisory and the sentencing should be carried out accordingly.

Chief Judge Sven Holmes of the Northern District of Oklahoma, soon to be leaving the bench, has predicted Congress will reestablish a mandatory sentencing scheme that can comport with *Booker*. He contends that the Guidelines can be salvaged by presenting defendants with the choice between a wholesale waiver of rights, including any arising from *Blakely/Booker*, as part of a guilty plea, or a trial that includes either special verdict forms or bifurcated proceedings to allow for jury determination of facts related to sentencing.

The retroactive effect of the decision is also unclear. However, for cases on direct appeal, the Tenth Circuit has already concluded that it is impossible, at least in certain circumstances, to determine whether the error resulting from mandatory application of the Guidelines is harmless; thus the district court must resentence the defendant under the "reasonableness" standard. In practice, the most viable appeals will be those where enhancers were used to raise the actual length of incarceration above the basic

Guideline range for the crime charged. *U.S. v. Labastida-Segura*, ___ F.3d ___, 2005 WL 273315 (10th Cir. Feb. 4, 2005). Further, the original sentence might very well be re-imposed based on the "reasonableness" standard. While a "reasonableness" jurisprudence will be developed over the next few years, the Guidelines will likely remain the *de facto* standard of reasonable sentencing. One byproduct of the *Booker* decision is added uncertainty in plea-bargaining. Under the Guidelines, only the government was authorized to move the court for a sentence below the range based on a defendant's cooperation with the government. Some defendants may now feel emboldened to take their chances with the judge's wider discretion and opt not to cooperate. Still others may long for the days of predictable outcomes in exchange for their assistance. This much is clear. The judiciary has regained a certain amount of independence and many future defendants will find themselves in uncertain waters.

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