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Supreme Court Gives the Defense a Boost in Plea Bargaining

By Irvin B. Nathan

The Supreme Court's Jan.12 decision in *U.S. v. Booker*, which made the federal Sentencing Guidelines advisory rather than mandatory, is likely to: 1) prove modest in its impact on sentences in the short run; 2) alter a bit the balance of power among prosecutors, defense attorneys and judges; and 3) spur Congress to make federal sentencing even more Draconian than it was for 2 decades under the mandatory Guidelines.

About the Decision

The decision, of questionable logic, is in two parts, with significantly different majorities answering the two questions presented. First, a 5-4 opinion by Justice Stevens held that disputed facts leading to enhanced sentences must be found by a jury beyond a reasonable doubt. (Under the Guidelines, such facts were found by the sentencing judge upon a preponderance of the evidence.) Second, the four dissenters to that proposition, joined by Justice Ginsberg, held in an opinion by Justice Breyer that the cure to the Constitutional defect perceived by the Stevens majority was to strike two provisions of the statute implementing the Guidelines. The excisions — 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e) — made the Guidelines advisory rather than mandatory and limited appellate review of sentences. Now, the courts of appeal no longer can substitute their own Guidelines calculation for the district courts'. Instead, they can reverse a sentence only if it's unreasonable in light of the purposes set forth in the Sentencing Reform Act of 1984.

Booker's second holding hardly follows from the first. Since the Guidelines are premised on judicial fact-finding following a jury verdict, the most logical remedy would be to strike them down in their entirety. Another approach, favored by Justice Stevens and others who joined his majority opinion, would be to have the jury find the disputed facts upon proof beyond a reasonable doubt. Instead, the Breyer majority, apparently eager to salvage the Guidelines as much as possible, concocted a wholly unconvincing rationale that was not advanced by any of the parties. Had Congress but known — Breyer's opinion speculates — that enhancement upon judge-found facts was unconstitutional, it would have made the Guidelines advisory and limited appellate review to a reasonableness standard. The paradoxical effect of *Booker* is that now district judges, in looking to the Guidelines for advice, will continue to find enhancing facts and base sentences on them without a jury finding and without proof beyond a reasonable doubt.

Likely Impact on Sentences

In the short run, most sentences in federal courts are not likely to change much. The majority of district court judges were appointed since the Guidelines went into effect in 1987. They have known no other regime and have considerable familiarity and facility with the Guidelines. By sentencing within them, they avoid any risk of reversal for lack of reasonableness. More significantly, while many judges have chafed under the shackles of mandatory guidelines that curb discretion to reduce unduly harsh sentences, most judges are likely to realize that conspicuous downward departures might incite Congress to impose even more restraints on judicial discretion than the pre-*Booker* system.

The very first district court decision after *Booker* explicitly makes this point. In imposing a long sentence fully consistent with the (now advisory) Guidelines, Judge Paul G. Cassell in Utah expressly urged fellow district courts to do the same in the interest of prudence: "The congressional view of how to structure that sentencing system will surely be informed by how judges respond to their newly granted freedom under the 'advisory' guidelines system … If that discretion is abused by sentences that thwart congressional objectives, Congress has ample power to respond with mandatory minimum sentences and the like. The preferable course today is to faithfully implement the congressional purposes underlying the Sentencing Reform Act by follow-

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ing the guidelines in all but unusual cases." *U.S. v. Wilson*, No. 2:03-CR-00882 PGC (D. Utah, Jan. 13, 2005).

The Department of Justice has issued a policy statement saying that its prosecutors will urge that sentences should coincide with the calculated Guidelines range in all but extraordinary cases. It says the Department will be keeping records of all cases where the sentence is outside of the sentencing range and where a court fails to calculate a sentencing range under the Guidelines before imposing sentence. While there have been some downward adjustments since *Booker* and undoubtedly there will be others, many judges are likely to follow the Cassell pattern in the short run.

There will be plenty of opportunities for re-sentencing. Shortly after *Booker*, the Supreme Court vacated hundreds of federal criminal sentences that were on appeal. Presumably, all defendants who were sentenced under the mandatory-guidelines system and whose direct appeals are still pending will have a right to a remand for re-sentencing. The Supreme Court did not expressly address retroactivity. While the odds are against re-sentencing after the time for appeal has expired, a prisoner whose Guideline sentence was enhanced based on disputed facts would be well advised to launch a collateral attack to seek a new sentence.

Impact on Plea Bargaining

The risk that judges might impose significantly lower sentences than called for by the Guidelines is likely to have a substantial effect on plea bargaining. This is significant because, as the Court noted in *Booker*, 97% of federal criminal cases are resolved by plea bargains. (This is a marked increase from the percentage shown in pre-Guidelines surveys.) Thus *Booker* should improve, if only marginally, the ability of defense counsel to strike a better bargain for their clients.

Prosecutors will no longer be able to determine the sentence by their charging decision. At least in districts where judges have shown a willingness to impose less severe sentences than the Guidelines required, defense counsel, instead of rushing into plea agreements, may prefer to await the filing of charges and the assignment of a judge. If the case is assigned to a judge known to consider less stringent sentences, defense counsel may be more willing to run the risk of trial in seeking improved terms in the plea agreement.

Booker appears to have weakened the prosecution's principal cudgel in bargaining for cooperation agreements under the Guidelines. Before *Booker*, virtually the only way a defendant could receive a substantial downward departure was for the prosecution to submit a letter to the court, pursuant to § 5K1.1 of the Guidelines, attesting to the significance of the defendant's cooperation. That meant the prosecutor was satisfied with the defendant's help in implicating others in criminal activity. *Booker* may mean that a defendant can now receive a substantial reduction in sentence — even for cooperation — without such a letter. A district court could "reasonably" adjust a sentence downward, and thus be upheld by a court of appeals, upon finding, even without the government's concurrence, that a defendant had cooperated significantly with prosecutors, with other authorities, or even with the victim of his crime. Indeed, the court can impose a lesser sentence for *any* articulated reason consistent with the standards in the Sentencing Reform Act of 1984. Because the defendant may no longer need the once indispensable § 5K1.1 letter, defense counsel will have more leverage to strike a better bargain.

As a matter of policy, the Department of Justice apparently will not insist that plea bargains include the defendant's agreement to be sentenced under the Guidelines and will drop its post-*Blakely*, pre-*Booker* practice of putting sentence-enhancing allegations in the indictment. Of course, prosecutors may urge defendants in plea agreements to stipulate to some sentence-enhancing facts. Defense counsel will need to insure that nothing in the plea agreement limits their ability to argue for a sentence below the Guidelines range.

Looming over all of the speculation of the impact of *Booker* is the reaction of the Congress and the Administration. Even Justice Breyer expressly conceded in *Booker* that "the ball now lies in Congress' court." If Congress seeks to cure the problems that it believes *Booker* has created, conventional wisdom is that it will do so in a manner that results in harsher penalties and less judicial discretion. One proposal would require district courts to begin with a maximum sentence in every case and then grant limited downward departures based on judicial fact-finding.

The most sensible solution would be for Congress to forbear for a reasonable period and permit the post-*Booker* system to develop. With the aid of studies by the Sentencing Commission and others — not only of sentences but also of other effects on the criminal justice system such as the nature of plea agreements, cooperation with authorities, recidivism, and deterrence generally — Congress can more rationally determine whether to permit the current post-*Booker* system to continue or to refine it in a limited manner rather than imposing a straitjacket on the federal judiciary that will result in unfair and unduly harsh penalties.