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## Forum

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# U.S. Sentencing Guidelines Will Become True Guides, Not Mandates

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The day after the U.S. Supreme Court announced its decision in *U.S. v. Booker*, 2005 DJDAR 410 (U.S. Sct. Jan. 12, 2005), we received the 2004 edition of the federal guidelines sentencing manual. Perfect timing. Like most criminal defense lawyers, we have learned to dislike the guidelines, with their mandatory pronouncements that have straitjacketed judges and handcuffed creative advocates since 1987.

But instead of looking at it with our usual aversion, we wondered. And as we thumbed through the first few pages, we dreamed, "Maybe now we can be friends with you."

While it is still far too soon to tell with any degree of certainty how the Supreme Court's decision will change federal sentencing, this article offers some fearless predictions of the possibilities in light of *Booker*.

First some background. In *Booker*, the Supreme Court issued two opinions. The first, written by Justice John Paul Stevens and joined by Justices Antonin Scalia, Clarence Thomas, David Souter and Ruth Bader Ginsburg, established that the federal sentencing scheme was unconstitutional. Those five justices concluded that the federal sentencing guidelines were unconstitutional because they required federal judges to impose sentences based on facts that were almost never a part of the jury's verdict or of the factual basis admitted by the defendant in his plea agreement.

For instance, in *Booker*, a jury had found the defendant guilty of possessing at least 50 grams of crack cocaine after hearing evidence that 92.5 grams had been seized from his duffel bag. But on sentencing, the court received evidence and (by a preponderance of the evidence) concluded that the defendant possessed an additional 566 grams of crack.

The result was that the defendant's minimum allowable sentence went from being more than 21 years in prison to being 30 years. Accordingly, following the trail it had blazed in *Apprendi v. New Jersey* and *Blakely v. Washington*, the Supreme Court held that, under the Sixth Amendment, it is the jury's role, not the judge's, to find the facts that dictate the maximum sentence.

But the Supreme Court was not done. In a second separate opinion written by Justice Stephen Breyer and joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy and, again, Ginsburg — the only justice signing on to both majority opinions — the Supreme Court concluded that the remedy was not to invalidate the entire sentencing scheme but to strike down the two small but powerful provisions of the scheme that made application of the guidelines mandatory.

In essence, these five justices voted to put the "guide" back in guidelines. According to Breyer, the net effect of that tailoring was to render the guidelines

## 'Booker' Could Empower Attorneys, Judges in Applying Ruling to Cases

"effectively advisory" and to return discretion to judges on sentencing.

The obvious question is, Now what? Unfortunately, there are few obvious answers and many more questions for practitioners and judges.

Judges and lawyers alike have long complained that the federal guidelines are too restrictive. In fact, at least one former federal district judge, John S. Martin, cited the rigidity of the guidelines as a basis for his decision to leave the bench. One of the leading jurists in the Central District of California, Terry J. Hatter Jr., was famous for consistently referring to the "so-called sentencing guidelines," as if to call attention to the oxymoronic concept of mandatory guidelines. The court's decision in *Booker* appears to provide some relief in that regard.

A central aspect of the guidelines is uniformity of sentences. To that end, the U.S. Sentencing Commission standardized and severely limited the routes that can lead to a lower-than-usual sentence — what the guidelines refer to as a "downward departure."

If a mitigating factor did not fit squarely within one of a handful of established bases for a downward adjustment, frequently a defendant's argument for a lower sentence was rebuffed, based on the concept that the mitigating factor fell into a category of a "forbidden" ground for a lenient sentence. And, over time, this problem became more acute because the commission frequently acted to add more forbidden grounds to the list (lest the commissioners be accused of being "soft on crime").

*Booker* ensures that any type of mitigating factor present in a case can be argued before a judge. Given the rich diversity of human experience, each defendant will have unique mitigating factors associated with her. In the hands of creative defense lawyers, there will be virtually no limits to the mitigating factors that may be considered.

A related issue concerns defendants who cooperate: the "snitch," as some scornfully term them. Under the pre-*Booker* regime, only the prosecutor was permitted to seek a downward departure for cooperators, based on what Section 5K1.1 of the guidelines calls "Substantial Assistance to Authorities."

Prosecutors commonly used this carrot to entice defendants to cooperate with them and were able to be, essentially, the sole arbiters of when the assistance was "sufficient" to warrant a departure. In many cases, defendants provide information that the government, in its sole discretion, decided was not helpful, so the prosecutor would refuse to request a lower sentence. A defendant who thought the prosecutor was being unreasonable or overly stingy in this regard had almost no recourse.

But after *Booker*, a judge appears able

to consider a defendant's request for a departure based on his cooperation, even where the government understates, downplays or even disputes the significance or usefulness of the assistance. This will be a welcome change for defense lawyers, who can decide, in the face of a disagreement with a prosecutor over the usefulness of a defendant's cooperation, to go over the prosecutor's head and straight to the judge.

Early on in the representation of a criminal defendant, the client invariably asks about what type of sentence he is facing if he is found guilty at trial and what he could get if he agrees to plead guilty.

In the past, despite some wiggle room, the guidelines provided a fair amount of certainty for those discussions. That certainty appears to have been undercut as the discretion of federal judges in imposing sentences has increased.

However, this is true for both sides. As is true for defendants, the government also will lack the ability to predict with pre-*Booker* certainty what sentence the court will impose and what will be important to the court in arriving at its decision. But this unpredictability may lead the government to agree to enter into more so-called binding plea agreements than it has in the past, under Federal Rule of Criminal Procedure 11(c)(1)(C).

This type of agreement, if the court accepts it, binds the court as well as the parties to follow the plea agreement and not diverge from the agreed-on sentence. In recent years, the government has been loath to enter into such binding plea agreements. That may change now that the Supreme Court has upheld the advisory nature of the guidelines.

A central component of Breyer's remedy opinion in *Booker* is that all sentences will be subject to review in the court of appeal under a "reasonableness" standard of review. This is different from what has been occurring during the last 20 years of "mandatory guidelines," and it is also different from what occurred before the passage of the guidelines.

Before the guidelines, sentences were virtually unreviewable, so long as they conformed with the statutory maximum. That meant one bank robber could be sentenced to 20 years in one court, while another bank robber could be sentenced to one year in the court next door, and there would be no review of either sentence in the court of appeal.

After the guidelines, but before *Booker*, appeals generally focused on legal issues such as whether the sentencing judge had applied the guidelines correctly or whether, in cases where the judge granted an unusually low sentence to a defendant, the legal ground for that low sentence was "forbidden" under the guidelines. In any case, so long as these legal issues were not erroneous, the court of

appeal did not second-guess the sentencing judge's actual judgment regarding how long, if at all, a defendant should be in custody.

*Booker* has changed this. Either side may appeal any sentence on the ground that it is "unreasonable" in light of the factors a court must consider in arriving at an appropriate sentence.

But for criminal defendants (and their attorneys), this is mixed news. While such review can alleviate the effects of an overly harsh sentence meted out by an unreasonably severe judge, the opposite is equally true; defendants who receive huge breaks at the time of sentencing may find that the prosecutor will appeal.

Given the wide diversity of philosophies among appellate judges (especially in the 9th U.S. Circuit Court of Appeals), it is easy to predict that the recipient of a lenient sentence may find herself before a very skeptical three-judge panel.

Yet how this will work remains to be determined. Critical to the review process will be the need for district courts to make and set forth their findings. Absent express findings from the court, the court of appeal will have difficulty weighing in on the reasonableness of a sentence.

In determining whether a sentence is reasonable, will the court of appeal undertake a de novo review of the District Court's findings? Will the court of appeal accept the District Court's findings unless clearly erroneous and determine the reasonableness based on its findings?

Which brings us nearly full circle. There is little doubt that, in imposing an appropriate sentence, courts will need to consider evidence not presented at trial but presented by the parties and by third parties, such as probation offices, at the time of sentencing.

Setting aside the critical questions regarding the mechanics of post-*Booker* sentencing hearings — such as what type of evidence a given judge will want to consider, how district courts will evaluate that evidence, how much a particular piece of evidence will be permitted to inform a defendant's sentence — it appears that federal courts will be right back to the business of judicial fact-finding that will, as a practical matter, increase (or decrease) the sentence imposed.

As Breyer himself recognized in *Booker*, Congress too will have its say in how the guidelines change. At least in individual cases, so too will those judges and defense lawyers involved with the federal criminal justice system.

Perhaps the empowerment of those judges and lawyers will be the most notable legacy of *Booker*. At the very least, maybe they will be able to call the guidelines their friend.

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