

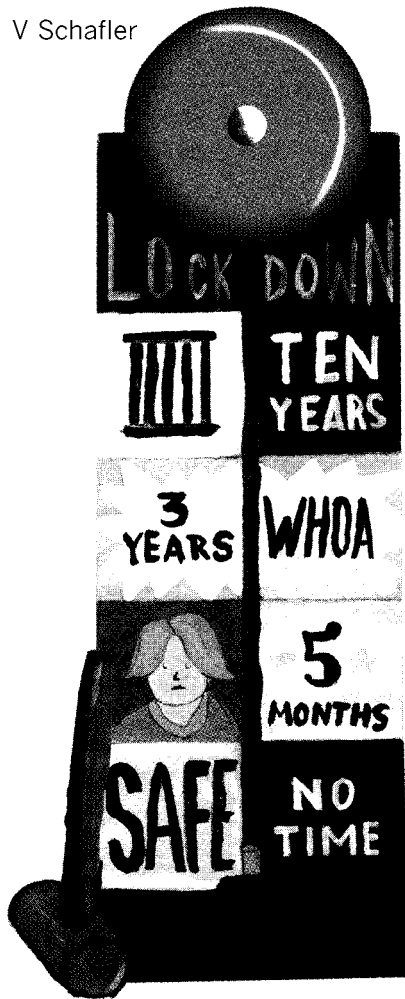
# Supreme Court Unmandates White Collar Sentencing

## Putting the Guide Back in Guidelines

By Michael J. Proctor and Michael V. Schafner

**S**entencing guidelines have been a difficult challenge for attorneys who represent corporate executives in criminal matters since their introduction in 1987. With their mandatory pronouncements regarding sentencing, guidelines made it difficult to secure sentences of probation or other alternatives to prison for first time offenders convicted of fraud, securities violations, environmental offenses, and other crimes arising in the corporate context.

On January 12, 2005, the U.S. Supreme Court changed all that in a case entitled *United States v. Booker*. The case will affect sentencing for virtually



every person and entity convicted of a crime. It will have a greater effect for white collar defendants, whose traditional pleas for leniency – based on such factors as first time offender status, community service, or susceptibility to mistreatment in prison – were often precluded by the mandatory guidelines, no matter how creative their lawyers were.

Booker is brand new law. As a result, it is far too soon to predict exactly how the Supreme Court's decision will change federal sentencing. There is, however, one certainty:

Sometime in the not-too-distant future a corporate executive charged with a white collar crime, most likely one related to corporate governance, will find himself

standing before a judge with his fingers crossed, hoping for the kind of leniency that wouldn't have been possible before the Booker decision. That executive's defense lawyer will be better armed and equipped to argue for leniency, based upon the weapons that Booker provides the defense.

But what Booker giveth, it also taketh away: A few feet away will be a federal prosecutor arguing for the opposite result. That prosecutor will comfort himself with the knowledge that under Booker he enjoys a wider right to appeal any sentence that he considers unreasonably lenient.

**JURY IS THE FACT FINDER**

In Booker, the Supreme Court issued two opinions. The first, written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg, established that the federal sentencing scheme was unconstitutional. Those five justices concluded that the 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, 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 Breyer and joined by Chief Justice Rehnquist and Justices O'Connor, 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 Justice Breyer, the net effect of that tailoring was to render the guidelines "effectively advisory" and to return discretion to judges on sentencing.

Now what? Unfortunately, there are few obvious

answers and many more questions. Here are some predictions:

**ANY MITIGATING FACTOR MAY NOW BE ARGUED FOR A REDUCED SENTENCE**

Judges and lawyers 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

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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. Over time this problem became more acute, especially for corporate defendants, because the trend has been to increase the guideline sentences for fraud and related offenses, while simultaneously adding more "forbidden" grounds to the list of categories that would support a lenient sentence — lest the sentencing 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. In the hands of creative defense lawyers, there will be virtually no limits to the mitigating factors that may be considered.

This is particularly important to white collar

defendants. Defendants from the corporate world look very different from the typical defendant. Corporate defendants are usually strong members of their community with no history of criminal acts. Often they have a long list of influential supporters, willing to testify at sentencing on behalf of the defendant. They suffer numerous collateral consequences, such as the loss of a securities license, the loss of social status, and the loss of a career. They are also frequently able to pay large fines and restitution amounts. Factors such as these, carefully framed by a good defense attorney, can motivate a judge to give a lighter sentence.

Perhaps the most compelling factor corporate defendants have is their similarity in background, life experience and community ties, with the judge that is sentencing them. In a very real sense, the sentencing judge can relate to corporate defendants in a way that he cannot relate to other defendants. The judge and the corporate defendant may live in similar communities, belong to similar social clubs, have attended similar schools. These factors, which have been forbidden from consideration under the guidelines, can help a corporate defendant who is trying to avoid or reduce a term of imprisonment.

A related issue concerns defendants who cooperate: the "snitches," as some scornfully term them. Under the pre-Booker regime, only the prosecutor was permitted to seek a downward departure for cooperation, based on what the guidelines call "Substantial Assistance to Authorities."

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

But after Booker, a judge appears able to consider a defendant's request for a lower sentence based on his

cooperation, even where the government understates, downplays or even disputes its usefulness. 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 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 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. 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. This unpredictability may lead the government to agree to enter into more so-called binding plea agreements than it has in the past.

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 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 an executive convicted of accounting fraud could be sentenced to 20 years in one court, while another executive convicted of the same offense could be sentenced to one month in the court next door, and there would be no review of either sentence in the court of appeal. This could be true even where the amount of money involved in the two fraud cases was substantially the same.

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. So long as these legal issues were not erroneous, the

appeals court did not second-guess the sentencing judge.

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

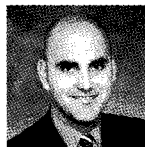
Given the wide diversity of philosophies among appellate judges, it is easy to predict that the recipient of a lenient sentence may find herself before a very skeptical three-judge panel. How this will work remains to be determined. Critical to the review process will be the need for district courts 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 (in other words, substituting its judgment for the sentencing court with no deference whatsoever)? Will the court of appeal accept the district court's findings unless clearly erroneous and determine reasonableness based on its findings?

Which brings us nearly full circle to the executive that we posited at the beginning of this article. White collar defendants are uniquely positioned to take advantage of Booker. 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 courts will evaluate that evidence, how much a particular piece of evidence will be

permitted to inform a defendant's sentence — it appears certain that federal courts will be free to base sentences on any factor that they deem relevant, regardless of whether it is mentioned in the guidelines. Since business persons convicted of crimes are far more likely than other defendants to possess factors counseling leniency, Booker will be a boon to white collar defendants.

On the other hand, prosecutors will have increased appeal rights under Booker. Sentences that are "unreasonably" light may be reversed on appeal. The prosecutor who loses a sentencing battle with the defense attorney for that corporate executive will have the right, which did not exist before, to make his case for a longer sentence in a higher court.

And who is the biggest winner? The judges. The Supreme Court has freed them from the yoke of the Guidelines. Perhaps this empowerment of judges will be Booker's most notable legacy.



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