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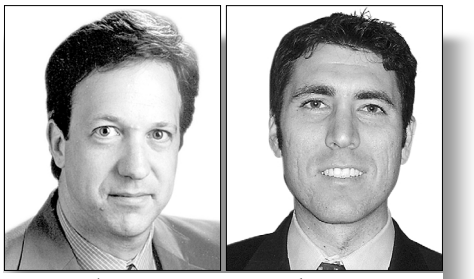
Sentencing Post-'Booker'—From a Defense Perspective

The U.S. Supreme Court's Jan. 12, 2005 decision in *United States v. Booker* has dramatically altered the landscape of federal criminal practice. Though most discussion thus far has centered around its impact on federal judges and prosecutors, this article will address *Booker's* impact on federal criminal defendants and their counsel.



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Defense in the Guidelines Era

During the U.S. Sentencing Commission Guidelines era, defendants without strong grounds to contest prosecution generally were best served by cooperating. Defendants willing and able to provide "substantial assistance" to the government became eligible for a "5K1" motion under the guidelines (and a §3553 motion if they faced statutory mandatory minimums). A 5K1 motion comprised the only reliable way to obtain a sentence below the guidelines range.[1] Cooperation posed great risk to a defendant for, among other reasons, it might require revealing more "relevant conduct" to the government, thus increasing the guidelines' range or even adding to the offenses to which a defendant would be required to plead guilty.[2] Nevertheless, the downward departure benefit of cooperation generally outweighed any such risk.

Defendants who did not have a significant cooperative contribution to offer the government generally plead guilty rather than proceed to trial. Unable to secure cooperation agreements, these defendants entered into "guidelines agreements" where the parties agreed to a guidelines range that judges routinely enforced. Pleading guilty without a guidelines agreement was risky, if not reckless, because it left defendants susceptible to guidelines enhancements and increases based on: 1) judicial, not unanimous jury, findings of fact; 2) a preponderance of the evidence standard, not beyond a reasonable doubt; and 3) evidence that would be inadmissible at trial. Entering into guidelines agreements ensured relative certainty over the sentencing facts and ranges at issue.

All nine justices agreed on one issue: the guidelines should not cease to exist as juridical authority, returning to a pre-guidelines world of unhindered judicial sentencing discretion.

In the guidelines regime, defense counsel rarely advised defendants to go to trial because of the substantial punitive costs associated with going to trial. Defendants proceeding to trial and testifying in their own defense frequently lost an otherwise reliable downward adjustment for acceptance of responsibility and suffered an otherwise rare upward adjustment for obstruction of justice if they were convicted. The net effect of these two adjustments could total several years of additional jail time.

The 'Booker' Decision

In *Booker,* the Supreme Court held that the mandatory nature of the guidelines rendered Mr. Booker's sentence unconstitutional in light of *Blakely v. Washington,* 124 SCt 2531 (2004). Writing for the majority in the substantive opinion, Justice John Paul Stevens held that Mr. Booker's sentence violated the Sixth Amendment because the sentencing judge, as required by the guidelines' prescription for judges to determine a defendant's "real offense," had increased the sentencing range beyond the maximum authorized by the facts reflected in the jury's verdict. *Booker,* Substantive Opinion, slip op. at 8-11.

In the remedy opinion, the Court grappled with the appropriate remedy to fashion in light of the substantive opinion. Justice Ruth Bader Ginsberg, who had been part of the five-justice majority in the substantive opinion, joined the four substantive opinion dissenters in holding that those parts of the Sentencing Reform Act that made the guidelines binding on judges (§3553(b)(1)) and that set forth the standard of review on appeal (§ 3742(e)) should be "severed and excised." *Booker,* Remedy Opinion, slip. op. at 1.

Despite the fact that the Court rendered the guidelines advisory rather than mandatory, the Court was clear that sentencing judges must "consider guidelines

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ranges," along with the other sentencing factors set forth in §3553(a), in fashioning an appropriate sentence. Id. at 2. Indeed, all nine justices agreed on one issue: the guidelines should not simply cease to exist as juridical authority, returning to a pre-guidelines world of effectively unhindered judicial sentencing discretion.

The Court did, however, leave the lower courts to determine how to consider the guidelines in conjunction with the other §3553(a) factors.[3] See id. at 19 ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts…in determining whether a sentence is unreasonable."). The Court also was careful to point out that its advisory guidelines remedy was judicial supposition about how Congress would want to respond to the substantive opinion, with Congress itself free to impose the sentencing apparatus it desires (subject to constitutional limitations) going forward. Id. at 23 ("Ours, of course, is not the last word: The ball now lies in Congress' court."). On Feb. 10, 2005, Congress began its initial hearings on *Booker.* See Sentencing Law and Policy Web log, available at http://sentencing.typepad.com/sentencing_law_and_policy/ (last visited Feb. 14, 2005).

Criminal Defendants

In this post-*Booker* era, given sentencing judges' new mandate to consider the guidelines in conjunction with §3553(a)'s other sentencing factors, criminal defense counsel should expect a likely increase in judges' discretionary power. During the guidelines regime, courts were required to apply the guidelines mechanistically, even if the results were at odds with the other §3553(a) factors. See, e.g., *United States v. Ranum,* No. 04-CR-31, 2005 WL 161223, at *2 (E.D. Wisc. Jan. 19, 2005) (stating that the remedy opinion directs "courts to consider all of the §3553(a) factors, many of which the guidelines either reject or ignore"). Now, however, courts are instructed to consider all of the §3553(a) factors and, where the guidelines conflict with other aspects of §3553(a), "courts will have to resolve the conflicts." Id.; see also *United States v. Crosby,* No. 03-1675, slip op. at 18 (Feb. 2, 2005) ("the duty imposed by §3553(a) to 'consider' numerous factors acquires renewed significance").

Although the full import of *Booker's* grant of renewed judicial discretion to sentence outside of a guidelines range, where reasonable, will take some time to assess, at least three immediate features of the post-*Booker* landscape will likely impact the criminal defense perspective on sentencing: 1) prosecutors no longer have a monopoly on access to a sentence below a guidelines range; 2) advisory guidelines result in less certainty over sentencing outcomes; and 3) defendants now face less certain risk in going to trial.

First, as noted above, during the guidelines era, the only safe way for a criminal defendant unwilling to contest the charges to secure a sentence below the guidelines range was to cooperate and receive a 5K1 substantial assistance motion from the government.

Now that the guidelines are merely advisory, a defendant may not need a 5K1 motion to obtain a sentence below the guidelines range.[4]

Because cooperating with the government exposes the defendant to charges of additional "relevant conduct" or substantive offenses about which the government may have previously lacked information, the risk/reward calculus of cooperation agreements might well warrant a decision by defendants not to enter into such agreements post-*Booker.* Moreover, defendants can still benefit from cooperation by presenting to the sentencing judge various types of cooperative conduct, such as a quick and full admission and guilty plea, any assistance actually provided, and other remedial steps, without having to sign a cooperation agreement. See, e.g., *U.S. v. Ochoa-Suarez,* No. 03 CR. 747(JFK), 2005 WL 287400, at *2 (SDNY Feb. 7, 2005) (rejecting the government's motion to deny a three-level reduction in offense level based on acceptance of responsibility because, while the defendant "may not have completely articulated her full involvement in the conspiracy at the proffer sessions… she did plead guilty to the exact charge in the indictment and saved the government the costs of a trial").

Ultimate Sentence

Second, *Booker* has reduced the certainty of a defendant's ultimate sentence—and the concomitant strong negotiating card for prosecutors during the guidelines era—because, even if a guidelines agreement is entered into, the judge can no longer sentence based solely on the guidelines range. Particularly if prosecutors seek to condition guidelines agreements on defendant waivers of departure grounds or other mitigating factors, defendants may simply choose to plead guilty and "go it alone" when it comes to the sentencing determination.

Judges have adopted starkly contrasting approaches to sentencing under *Booker,* with most judges endorsing either the approach taken by Judge Paul Cassell in *United States v. Wilson* or the approach taken by Judge Lynn Adelman in *United States v. Ranum.* In *Wilson,* Judge Cassell determined that sentencing courts should continue to adhere to the guidelines post-*Booker* absent "unusual cases for clearly identified and persuasive reasons." *Wilson,* No. 2:03-CR-00882, slip. op. at 3 (D. Utah Jan. 13, 2005).

Conversely, in *United States v. Ranum,* Judge Adelman ruled that "[t]he approach espoused in *Wilson* is inconsistent with the holdings of the merits majority in *Booker*." *Ranum,* No. 04-CR-31, 2005 WL 161223, at *2. Instead, Judge Adelman stated, courts "must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual." Id. at *5.

While the courts of appeals may eventually clarify how to apply the guidelines post-*Booker*, there is no guarantee that they will find either a *Wilson* or *Ranum* approach to be sufficiently "unreasonable," potentially upholding as reasonable two almost mutually exclusive approaches to *Booker.*

Guideline Agreements

As different courts interpret *Booker* differently, especially in terms of how much the guidelines should be determinative of a sentence, defendants facing certain judges in certain districts may well decide that the detriment of waiving downward departure or nonguidelines mitigating factors in exchange for the government stipulating to sentencing facts is not worth the potential

gain in bringing these factors to the court's attention. Nor is this mere speculation: for the first time since the guidelines were enacted, defendants have begun pleading guilty but rejecting guideline agreements with increasing frequency.

For example, in *United States v. Myers*, No. 3:04-cr-147, 2005 WL 165314 (S.D. Iowa Jan. 26, 2005), Mr. Myers pleaded guilty, apparently without a guidelines agreement, to a charge of unlawful possession of an illegal firearm. The court found that Mr. Myers received a shotgun from his parents when he was a boy, sawed a portion of the barrel off when it began to rust to make the gun safer to use—and to what he believed was a legal length (though in actuality he had sawed it off beyond the legal limit)—and later sold the gun to his cousin for $50. The court further found that Mr. Myers had no prior criminal history other than minor traffic violations, was uniformly acclaimed as a pillar of the community, was an exemplary husband and parent, and was relied on by his family as the primary means of financial support. Under the guidelines, absent any unusual downward departure, the court stated that the defendant likely would have faced a sentence of 20-30 months' imprisonment. *Myers*, 2005 WL 165314, at *5. By entering into a guidelines agreement with the prosecution, Mr. Myers might have been able to negotiate a slightly lower range of imprisonment. The court, applying *Booker* and *Ranum*, and in consideration of all the §3553(a) factors, granted Mr. Myers a downward departure for aberrant behavior and sentenced Mr. Myers to no term of imprisonment. Id. at *6.

These contrasting approaches have already resulted in intra-district conflicts. In the District of Nebraska, whether a defendant will benefit from a guidelines agreement may well differ depending on which judge is assigned the case. Compare *United States v. Wanning*, No. 4:03CR3001-1, slip op. (D. Neb., Feb. 3, 2005) (Kopf, J.) (applying a guidelines range of 18 months in prison because the court deemed the guidelines presumptively reasonable post-*Booker*) with *United States v. Huerta-Rodriguez*, No. 8:04CR365, slip op. (D. Neb. Feb. 1, 2005) (Bataillon, J.) (sentencing the defendant to 36 months rather than the 70 months sought by the government pursuant to the guidelines due to the court's consideration of all the §3553(a) factors).

Rolling the Dice

Third, defendants might decide more often now to roll the dice and go to trial. Because the guidelines-based impact of going to trial might well be lessened in a guidelines-as-advisory system, defendants whose guilt is not clear-cut or who cannot obtain favorable cooperation agreements with the government might decide, with greater frequency than during the guidelines, to hold the government to their burden of proof by going to trial. The pre-*Booker* case of *United States v. McDermott* is instructive. In that decision, Mr. McDermott was convicted of passing insider trading information to his girlfriend, Katherine Gannon. Despite the fact that Mr. McDermott took the stand in his own defense and proclaimed his innocence, Judge Wood granted downward departures that reduced his sentence from approximately 30 months to eight months. See http://www.mercurynews.com/mld/mercurynews/3712208.htm?1c (last visited Feb. 14, 2005). During the guidelines regime, testifying defendants rarely received such a downward departure. Now, however, with the multiplicity of §3553(a) factors that courts examine, testifying on one's own behalf does not risk the same negative impact—in terms of "acceptance of responsibility" and "obstruction of justice" departures—that it did during the guidelines era. Instead, sympathetic defendants willing to go to trial are more likely to net *McDermott*-like departures, thereby increasing the benefit and reducing the risk of going to trial.

Defendants might decide more often to roll the dice and go to trial. Those whose guilt is not clear-cut might decide to hold the government to its burden of proof.

Brave New World

Booker's ultimate impact on how criminal defendants act will depend on how prosecutors react to *Booker*. Should prosecutors seek to regain any lost control over sentencing terms by enticing defendants to enter into agreements on more favorable terms than before, defendants likely will enter into such agreements. Should prosecutors react by charging more mandatory minimum offenses, defendants may well respond by going to trial given the post-*Booker* risk/reward calculus. Or perhaps, at least during this nascent post-*Booker* period filled with uncertainty over how judges will interpret *Booker*, prosecutors and defendants will choose a flexible middle ground by entering into plea agreements, pursuant to 11(c)(1)(C), which allow either party to withdraw from the agreement should the judge indicate that she will sentence the defendant outside of the agreed-upon sentencing range.

One thing we do know is that *Booker* has ushered in a brave new world of sentencing and that prosecutors, defendants and judges are all in for a bumpy ride.

1. Indeed, even under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(d), 117 Stat. 650, 670 (2003) (codified at 18 USC §3742(e) (2003)), which restricted the grounds for which a judge could grant a downward departure and called for reporting judges who did grant downward departures, downward departures based on government-initiated "substantial assistance" motions remained viable and did not trigger judicial reporting.

2. This risk was even more heightened by the practice in some districts, such as the U.S. District Court for the Southern District of New York, of requiring cooperating defendants to plead to the most serious readily provable offense.

3. These factors are: the nature and circumstances of the offense and the history and characteristics of the defendant, §3553(a)(1); the need for judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public and effectively provide the defendant with needed educational or vocational training and medical care, §3553(a)(2); the kinds of sentences available, §3553(a)(3); the sentencing range established for the applicable category of offense committed by the applicable category of defendant, §3553(a)(4); the pertinent Sentencing Commission policy statements, §3553(a)(5); the need to avoid unwarranted sentencing disparities, §3553(a)(6); and the need to provide restitution to victims, §3553(a)(7).

4. Defendants facing statutory mandatory minimums still need the government to file a downward departure motion, pursuant to 18 USC §3553(e), in order to receive a sentence below the mandatory minimum, other than in specified circumstances pursuant to the "safety valve" provision of 18 USC §3553(f).