

Commentary

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United States v. Booker: Where Are We Now?

IT HAS BEEN a long journey for the Supreme Court in deciding the best way to handle the Federal Sentencing Guidelines in sentences that include aggravating factors that a jury had not proved. The journey started back in 2000 with the

decision handed down in *Apprendi v. New Jersey*,¹ when the Supreme Court held “other than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” From there it went to *Ring v. Arizona*,² in which the Court reaffirmed the conclusion that a characterization of critical facts is constitutionally irrelevant, and that those matters of sentencing enhancements should be left for the jury to decide. Finally, in *Blakely v. Washington*,³ the Court dealt with a determinate sentencing scheme similar to the one provided in the Federal Sentencing Guidelines, again stating that a jury should determine any factor that increases a sentence using a standard of review based on reasonable doubt not on the preponderance of the evidence. There is no reason to relive all these cases and go through each of the details through which these cases espoused relief for those who were the subject of their review. Everyone is more than familiar with these cases, having tried to use them in support of more lenient sentences.

What is of consequence to all of us now is the Supreme Court’s more recent decision handed down in *United States v. Booker*.⁴ Most of us will be deciphering the Court’s decision in this case for months to come. What does the ruling mean? Where can we go from here? Is the decision really what we had hoped for? Did it really make a difference? Certainly, the answer to these questions is not easily found in the Court’s opinion.

The Holding

The *Booker* decision breaks down into two parts. First, the Supreme Court determined that the Federal Sentencing Guidelines were unconstitutional, because they required judicial fact-finding that is not consistent with the Sixth Amendment. The second half of the decision held that, with the exception of two provisions separate from the Federal Sentencing Statutes, the rest of the system remained in place. As the *Booker* ruling explained, Congress only wanted “to main-

tain all provisions of the Sentencing Reform Act and engraft today’s Constitutional requirement onto that statutory scheme.”⁵ The Supreme Court severed a provision rendering the guidelines mandatory pursuant to 18 U.S.C. 3553(b) but left in place the adjoined provision 18 U.S.C. 3553(a), which defines the general purposes for sentencing and directs that the sentencing court “shall consider” certain factors when imposing a sentence. Among the factors listed in this section are “the kinds of sentence and sentencing range established” by the guidelines.⁶ This provision “requires a sentencing court to consider guideline ranges ... but permits the court to tailor the sentence in light of other statutory concerns.”⁷ However, *Booker* also directed the courts to abide by other provisions contained in the Sentencing Reform Act:

Without the mandatory provision, the Act nonetheless requires judges to take account of the guidelines together with other sentencing goals. ... [T]he Act ... requires judges to consider the guidelines sentencing range and establish ... the applicable category of offense committed by the applicable category of defendant, pertinent sentencing commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. The Act ... requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrents, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.

In addition, “[t]he Act continues to direct appeals from sentencing decisions” under a new standard of review for “unreasonableness.”⁸ This means that the sentences imposed by district courts must be reasonable in light of all the factors considered when imposing a sentence. Section 3553(a) “remains in effect and sets forth numerous factors that guide sentencing [one of them being the applicable guideline range]. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”

Although the *Booker* decision has determined the guidelines are no longer mandatory, the rest of the Sentencing Reform Act remains in force and specifically refers to the guidelines for guidance on how to

sentence an individual defendant. The key in crafting a “reasonable sentence” is the court’s consideration of not only the guidelines but also the other factors that the act specifically enumerates.

Booker also held that “district courts, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing.”⁹ The question that will be on everyone’s mind is how much weight to give the guidelines. The courts will also look more to jury decisions and plea waivers when determining any enhancement provisions that should guide the court for the purpose of imposing an increased sentence from any range that the court has deemed applicable.

Most courts will exercise little discretion when handing down sentences outside the guidelines and reviewing the evidence that supports any enhancements. Although judges were initially upset with the guidelines, it is now believed that they will be glad to have them in order to keep from creating a large disparate range of sentences throughout the country. Even if modified by *Booker*, the Sentencing Reform Act continues to direct that “the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purpose set forth” in the Sentencing Reform Act.¹⁰ The purposes as stated under the act are as follows:

- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - to afford adequate deterrents, to promote conduct;
 - to protect the public from further crimes of the defendant;
 - to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
- ...¹¹

Because the act contains the phrase “shall impose a sentence” that is “sufficient to comply with these purposes,” the court must look at each of these elements in making the final determination in what sentence to impose as “just punishment” that “affords adequate deterrents to criminal conduct.” These determinations included in the act create substantial room for renewed advocacy in the sentencing process. In including these elements as an item “for consideration,” the Sentencing Reform Act originally designed the guidelines to be flexible, acknowledging that each person cannot be categorized into numerical values.

One court has decided that the Federal Sentencing Commission is an “expert” authority on sentencing matters, and, therefore, courts should look directly to the commissions’s guidelines when determining which of the aforementioned act requirements apply in sentencing.¹²

Many judges might also believe that the Feeny

Amendment will remain in effect and require the courts to justify specific reasons for imposing sentences that are outside the Sentencing Reform Act’s guidelines when considering the totality of issues relevant to the sentencing process.¹³ Some will also say that following the guidelines achieves “just punishment.”¹⁴ However, this line of thought does not bode well when it comes to the question of crack cocaine offenses being highly disparate among African-Americans.¹⁵

One court has found that the guidelines generally achieve “just punishment, achieve crime control purposes, and find that rehabilitation does not justify a shorter sentence than the guideline sentence might impose.”¹⁶ For example, 18 U.S.C. § 3553 specifically calls for the court to consider vocational and educational programming considerations that address rehabilitation. In light of the *Booker* decision, relevant parties should continue to present objections to presentence reports and raise sentencing mitigation issues to all courts. Probation officers will probably continue to write presentence reports that include an analysis of the guidelines. Defense attorneys and prosecutors will be required to continue to object to factual issues that would change the perception of how the court might consider the guidelines.

The Remedies

Justice Stephen G. Breyer wrote the Court’s opinion that is related to the remedy for which a different majority of the Court determined the guidelines were severable. Justice Breyer’s opinion declared that the guidelines were alive and well, but advisory. He stated that the courts should continue to take the guidelines into account, including factors to be considered for imposing a sentence, but that the courts are not required to impose sentences within a particular guideline range. He was joined by Justices Rehnquist, O’Connor, Kennedy, and Ginsburg in this portion of the decision. This essentially means that, when determining the final outcome, most judges will still follow the guidelines, but they will have the flexibility to rely on evidence and good advocacy, including consideration of mitigating issues, sentencing memorandums, and sentencing discovery materials, thus bringing back the advocacy in the sentencing process that has been missing for so long.

One of the key areas that might be affected by *Booker* is related to defendants who were sentenced for offenses involving crack cocaine. For years, many have advocated vigorously that the racial disparity seen in these cases — much less the chemical disparity between crack and powder cocaine — was either unconstitutional because it violated equal protection and due process rights or simply “unreasonable.” Now that the Supreme Court has held the new standard of review for sentencing to be that of un-

reasonableness, individuals who face sentencing for offenses involving minimal amounts of crack cocaine might get some relief.¹⁷

Retroactivity

This discussion leads to the question of what review process is available to those who are in the pipeline as opposed to those who are not. It was clear from the Supreme Court's opinion that the "court's remedial interpretation of the sentencing act must be applied to all cases on direct review."¹⁸ However, the Court went on to say that "this does not mean that every sentence would give rise to a Sixth Amendment violation and that every appeal would lead to a new sentencing hearing," because the Court reasoned that reviewing courts are expected to apply ordinary prudential doctrines, determining whether the issue was raised below and where it failed the "plain error" test. In other words, if *Blakely* or *Booker* issues were not raised on direct appeal, the case might not be reviewed unless plain error can be proved. For plain error to exist, a defendant has the burden to show that "there is (1) 'error' (2) that is 'plain' and (3) that [it] 'affects substantial rights.'"¹⁹ "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"²⁰ Under review based on plain error, the silent defendant has the burden "to show the error plain, prejudicial, and disreputable to the judicial system."²¹ The Court also reasoned that in cases not involving Sixth Amendment violations, the answer to the question of whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend on application of the harmless error doctrine.²²

Currently, retroactivity appears to be unresolved in terms of how far back the question of relief based on the *Booker* decision will go. On the same day the *Blakely* decision was handed down, the U.S. Supreme Court concluded that one of *Blakely's* direct ancestors, *Ring v. Arizona* — which applied the principles of *Apprendi v. New Jersey* to death sentences imposed on the basis of aggravated factors — was not to be applied retroactively to cases once they were final on direct review. In *Schirro v. Summerlin*,²³ the Court basically said that any new procedural rule was not retroactive, thus creating a conflict for any retroactivity applied after the *Apprendi*, *Ring*, or *Blakely* decisions. There is, however, some question as to whether or not *Summerlin* would apply in the *Booker* decision, which was not based on a procedural change but a constitutional interpretation of the law and is substantive in nature. If any retroactivity is applied to *Booker*, beyond direct review, it will likely be effective only in cases heard after *Apprendi* was de-

cidated in June 2000. The *Booker* Court stated that "we must apply today's holding — both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act — to all cases on direct review."²⁴ "... A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet filed, with no exception for cases in which the new rule constitutes a "clear break with the past." The Supreme Court also stated: "that fact does not mean that we believe that every sentence gives rise to Sixth Amendment violation. ... It is also because in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of harmless error doctrine."

At first blush, this ruling would seem to limit the review of any cases that are not on direct review to either the post-plea or post-trial sentencing phase or to the appeal. However, because this situation is a "clear break" with the past, some question arises as to whether or not direct review also includes habeas corpus relief if one is in a position to file his or her first 2255 petition.

A great deal of litigation still needs to be determined on the retroactive application of *Summerlin* in any decisions reached after the *Apprendi* ruling. Because the *Booker* decision is based on a constitutional issue, *Summerlin* may not apply. Cases that were on direct review that raised the issue of *Apprendi* but did not receive the relief that the *Booker* decision now supports may have some limited remedy by means of filing a new habeas corpus petition and challenging the question raised in the *Summerlin* case.

Much advocacy lies ahead, and many decisions will be coming down fast and furiously in defining just how the *Booker* decision will affect sentencing decisions and further review of post-*Apprendi* cases.

What Does All This Mean?

At present, the *Booker* opinion means that attorneys' advocacy skills can be dusted off and brought out of storage — at least for a while. The decision may leave more room in plea bargaining where a client can admit to statutory elements without automatically conceding all elements included in the guideline enhancements. Jury trials will be extremely important in making sure that all the evidence that mitigates a client's conduct when committing the offense is also developed if the client is subject to a conviction. Again, because the standard of review on appeal for sentencing is "unreasonableness," judges will have some flexibility when it comes to sentencing, although it is believed that it will be limited in most courts. Prosecutors may not be willing to reach a plea agreement with defendants unless they agree to certain aggravating factors and agree to a particu-

lar sentence, thus perhaps creating more interest on the part of the prosecution and the defense alike to establish binding pleas.

In conclusion, the Supreme Court has decided that all factors that a jury has not determined cannot support a sentence that exceeds the maximum authorized by the facts established by a plea of guilty or by a jury verdict that must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Evidence presented at trial and at sentencing is now critical for making determinations on these findings made by jury verdict or waiver. **TFL**

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Endnotes

¹530 U.S. 466 (2000).

²536 U.S. 584 (2002).

³542 U.S. — (2004).

⁴543 U.S. — (2005).

⁵*Booker*, slip op. at 27.

⁶*Id.*, slip op. at 16.

⁷*Id.*

⁸The previous standard from the PROTECT Act was de novo review.

⁹*Booker* (2005), WL at 27.

¹⁰18 U.S.C. 3553(a).

¹¹18 U.S.C. 3553(a)(2).

¹²See *United States v. Wilson*, No. 2:03 cr-00882PGC (C.D. Utah Jan. 13, 2005).

¹³*Id.* at 10.

¹⁴See, generally, Paul G. Cassell, *Too Severe?: In Defense of Federal Sentencing Guidelines (and a critique of mandatory minimums)*, STAN. L. REV. 1017 (2004).

¹⁵The review process for sentencing offenders involving crack cocaine may be the most unreasonable of sentences imposed, thus giving courts more flexibility in sentencing those convicted of offenses involving crack cocaine. See *United States v. Peterson*, 143 F. Supp. 2d 569 (E.D. Va. 2001).

¹⁶*United States v. Wilson*, No. 2:03 cr-00882PGC (C.D. Utah Jan. 13, 2005).

¹⁷*United States v. Peterson*, 143 F. Supp. 2d 569 (E.D. Va. 2001).

¹⁸See *E.G. Griffith v. Kentucky*, 479 U.S. 314, 328.

¹⁹*United States v. Lejarde-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

²⁰*Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)) (other internal quotation marks and citations omitted).

²¹*Vonn*, 535 U.S. at 65.

²²*Booker*, slip op. at 26.

²³124 S.Ct 2519, 2526 (2004).

²⁴See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

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on Saturdays as a clerk for the judge because Judge Manos also worked on Saturdays.) The judge would assign a legal problem for the clerks to research and orally argue. Judge Manos would then critique their arguments and instruct them on the strengths and weaknesses of their arguments. His clerks have attested to the value of these sessions and to how much this training helped hone their legal skills.

A gifted public speaker, Judge Manos delivers a speech without notes and commands the attention of everyone present with his deep booming voice and his riveting gaze through his horn-rimmed glasses. In many of his speeches, he is likely to work in a short explanation of the jury system and how it was instituted in ancient Greece or why it is still worth studying Socrates today.

Even though he has received many awards throughout his judicial career (including the Ellis Island Medal of Honor), the award Judge Manos places above all others is the Solon Award that he received from the Order of the American Hellenic Educational Progressive Association (AHEPA), a Greek-American fraternal organization. Judge Manos has been very active in his support of AHEPA, and

through his efforts the Cleveland chapter of AHEPA has awarded more than \$300,000 to graduating high school seniors based upon academic merit. In fact, George Stephanopoulos, a senior adviser to former President Bill Clinton and host of ABC's "This Week" on Sunday mornings, was a 1978 recipient of one of these scholarships.

Never aspiring to the federal Court of Appeals because it would deprive him of the opportunity to try cases, Judge Manos did serve as a judge in the Ohio Court of Appeals for seven years. He has always enjoyed the challenges of the courtroom and is an ardent supporter and believer in the American jury system.

Judge Manos is grateful for his four children and 10 grandchildren, with whom he is very close. His wife Viola died in 1989. **TFL**

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