

## Creativity Urged After Ruling On Sentencing

*By Correy E. Stephenson*

Lawyers say that criminal defense attorneys are trying more "creative" approaches to minimizing their clients' sentences in federal court in the wake of a recent landmark U.S. Supreme Court ruling on sentencing guidelines.

In a decision rendered on the cases of *U.S. v. Booker* and *U.S. v. Fanfan* last month, the high court determined that the guidelines are not mandatory. The court also severed two portions of the Federal Sentencing Act and declared the remainder of the guidelines advisory.

The ruling went the way many had expected, as it was the highly anticipated follow-up to last summer's invalidation of Washington state's mandatory sentencing guidelines in *Blakely v. Washington*.

Some practitioners told *Lawyers Weekly* that because of the U.S. Supreme Court's decision, criminal defense attorneys might now be able to make more of an impact on the type of sentences their clients receive.

"People had gotten in a mode that because there was so little flexibility in the guidelines, sentencing didn't receive as much advocacy as the rest of the criminal process," said Boston criminal defense attorney Michelle R. Peirce.

Urging creativity, she said defense attorneys now need "to give real specifics about a defendant" in order to personalize him or her for the judge.

Boston attorney Rosemary C. Scapicchio, who argued on behalf of one of the defendants before the Supreme Court last October, added that defense attorneys' sentencing memoranda will become extremely important.

"If you have extenuating circumstances or other factors, such as family issues, medical issues, evidence that the crime was a rarely exhibited behavior, those are all things the guidelines could not have taken into consideration," she noted.

Further, said Peirce, defense lawyers now have the opportunity to be creative not just on the facts, but also in terms of the law.

"Specifically, people should be spending more time and attention where appropriate on the legislative history and the history of the guidelines to show discrete areas where [they] ... should not be followed," she explained, such as illegal re-entry cases.

Nationally, defense attorneys seem to agree that the times may be changing.

"Sentencings should go back to what they were like in the pre-guidelines era, where the judge has to take a more holistic view of not only the offense, but the offender and the offender's

characteristics," said Assistant Federal Public Defender David M. Porter of Sacramento, Calif. "The guideline range is just one factor among many factors."

However, federal prosecutors said that there will be a renewed push in favor of giving the guidelines weight.

In a prepared statement, Assistant Attorney General Christopher A. Wray said: "The Department [of Justice] will continue to urge courts to apply the guidelines and to sentence offenders under the guidelines in order to vindicate the core purposes of sentencing."

The full text of the U.S. Supreme Court's 124-page ruling can be found under the Important Documents section of our website, [www.masslawyersweekly.com](http://www.masslawyersweekly.com), and on the website of our sister publication, Lawyers Weekly USA, [www.lawyersweeklyusa.com](http://www.lawyersweeklyusa.com).

### The Decision

The Booker and Fanfan ruling includes a majority opinion authored by Justice John Paul Stevens and joined by justices Antonin Scalia, David Souter, Clarence Thomas and Ruth Bader Ginsburg, holding the guidelines are not mandatory.

The remedy portion of the opinion, authored by Justice Stephen Breyer, Ginsburg, is composed of an alternate majority of Chief Justice William H. Rehnquist and justices Sandra Day O'Connor, Anthony Kennedy and .Judges, the U.S. attorney and defense attorneys will discuss the implications and implementation of the U.S. Supreme Court's decision in *U.S. v Booker*, on Wednesday, Feb. 2, in the second floor jury lounge of the federal courthouse in Boston. The discussion is free and open to all.

Four other opinions dissenting in part were also filed.

The US Supreme Court first held that the Sixth Amendment as construed in *Blakely* applies to the federal guidelines

"As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the federal sentencing guidelines and the Washington procedures at issue in that case," Stevens wrote.

However, "[i]f the guidelines as currently written could be read as merely advisory pro-visions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."

The court acknowledged that in some cages, "jury fact-finding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial - a common-law right that defendants enjoyed for centuries and that is now enshrines in the Sixth Amendment - has always outweighed the interest in concluding trials swiftly....

"[Therefore,] any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," the court said.

In the remedy portion of the decision, Justice Breyer severed two provisions of the guidelines: 18 U.S.C. §3553(b)(1) and §3742(e). "So modified, the Federal Sentencing Act makes the guidelines effectively advisory. It requires a sentencing court to consider guidelines ranges ... but it permits the court to tailor the sentence in light of other statutory concerns as well," Breyer wrote.

The court said severing the two provisions made the guidelines advisory "while maintaining a strong connection between the sentence imposed and the offender's real conduct - a connection important to the increased uniformity of sentencing that Congress intended its guidelines system to achieve."

Finally, the court held that because the section of the guidelines dealing with the standard for reviewing sentences on appeal had been severed, the proper standard going forward should be a "reasonableness" one.

### Uncertainty Abounds

The decision has left lawyers wondering what happens next.

"It's a 'Star Trek' ruling - we all have to go where no man or woman has gone before," said Peirce. "It's uncharted territory for defense attorneys."

Scapicchio added: "It's going to be a while before we work out the ins and outs of how sentencings will actually proceed."

Nationally, lawyers also agreed that the decision raises as many questions as it has answered.

According to University of Ohio Professor Douglas Berman, the decision "clears up the most important thing: We can't apply the old rules, which was itself an uncertainty. But [it doesn't] do a good job clarifying what the new rules will look like."

Porter, the federal public defender from California, said he expects the situation to settle down in time.

One big issue of concern to defense attorneys is how the "reasonableness" standard for reviewing sentences will play out.

"We don't know what is reasonable, but I can't imagine the court would mean anything above or below the guideline range is unreasonable, because that would just be imposing mandatory guidelines, without calling them mandatory or guidelines," Scapicchio said.

Given the uncertainty in the days ahead, Peirce emphasized the importance of memorializing a sentencing decision.