

Justices Rule On Federal Sentencing Guidelines

By Coney E. Stephenson

The mandatory application of the federal sentencing guidelines violates the Sixth Amendment, the U.S. Supreme Court has ruled.

In a highly anticipated follow-up to last summer's invalidation of Washington state's mandatory sentencing guidelines in *Blakely v. Washington* (124 S.Ct. 2531), the court ruled as many had expected and held that the guidelines are not mandatory.

The court then severed two portions of the Federal Sentencing Act and declared the remainder of the guidelines advisory.

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 Boston criminal defense attorney Michelle R. Peirce. "It's uncharted territory for defense attorneys."

Boston attorney Rosemary Scapicchio, who argued on behalf of one of the defendants before the Supreme Court last October, agreed.

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

The 124-page decision 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 that the guidelines are not mandatory.

The remedy portion of the opinion, authored by Justice Stephen Breyer, is composed of an alternate majority of Chief Justice William a Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy and Ginsburg.

Four other opinions dissenting in part were also filed.

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."

Assistant Federal Public Defender David M. Porter of Sacramento, Calif. expects the situation to settle down in time.

"It's a new kind of confusion, but I wouldn't say it's chaos. I think that after every major Supreme Court decision there is a certain amount of dislocation and the need for lawyers and judges to make adjustments," he said.

But, he added, "anyone who comes away from the decision with the simple notion that the guidelines are now advisory and not mandatory is not fully appreciating what the [ruling] says."

In addition to the uncertainty of defendants waiting to be sentenced, those who plead or were sentenced while the case was pending need guidance on whether the ruling applies retroactively.

"Pick your problem and pick your solution," Berman, the author of the sentencing blog <http://sentencing.typepad.com> told Lawyers Weekly USA. "This is an exciting time and there is going to be a lot of case development and uncertainty."

'Effectively Advisory'

The defendant in the first case before the court, Freddie Booker, was found guilty of possession with the intent to distribute at least 50 grams of cocaine base. At sentencing the judge determined that he possessed at least 658.5 grams of cocaine base and had perjured himself at trial. Under the guidelines, the judge sentenced the defendant to 30 years in prison.

Finding *Blakely* applicable, the 7th Circuit held that the defendant's Sixth Amendment rights had been violated.

The defendant in the second case before the Supreme Court, *Duncan Fanfan*, was found guilty by a jury of conspiracy to possess with the intent to distribute at least 500 grams of cocaine.

At sentencing, a U.S. District Court judge found that the defendant had possessed 2,500 grams of cocaine and 281.6 grams of cocaine base, which elevated his sentencing range from 53 to 78 months to a range of 18 to 235 months.

However, in light of *Blakely*, the judge sentenced the defendant to 78 months, the highest sentence possible without taking into account any additional judicial findings.

The U.S. 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, "if the guidelines as currently written could be read as merely advisory provisions 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 cases, "jury fact-finding may impair the most expedient and efficient sentencing of the 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 enshrined 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.

Two Different Approaches

The day after the Supreme Court's decision was handed down, Utah District Court Judge Paul G. Cassell issued a sentencing memorandum offering the first interpretation of the new world order.

The defendant, James Wilson, who was convicted of armed bank robbery, faced 188 to 235 months in prison. After a lengthy discussion of the intent and value of the guidelines, the judge sentenced Wilson to 188 months.

More importantly, he fired the opening shot in the post-Booker world:

"[T]he court concludes that considerable weight should be given to the guidelines in determining what sentence to impose.... Therefore, in all future sentencings, the court will give heavy weight to the guidelines in determining an appropriate sentence. In the exercise of its discretion, the court will only depart from those guidelines in unusual cases for clearly identified and persuasive reasons," he wrote.

Porter expressed concern with the holding.

The guideline imprisonment range is "not the baseline," he said. "It's not something that judges should start with and then look at all these other factors as an after-thought."

Just days later Judge Lynn Adelman, of the Eastern District of Wisconsin weighed in with an alternative point of view.

The defendant, bank officer Mark Ranum, was convicted of misapplying bank funds and faced 37 to 47 months in prison under the guidelines.

The judge referenced the Wilson decision and agreed that the range prescribed by the guidelines should be considered, but found that to be "just one of a number of sentencing factors."

After considering all the relevant factors, she sentenced the defendant to one year and a day.

"Sentencing will be harder now than it was a few months ago," the judge wrote. "District courts cannot just add up figures and pick a number within a narrow range. Rather, they 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."

Be Creative

These divergent opinions reflect the post-Booker possibilities, attorneys agree.

In this environment, creativity will be essential for defense attorneys, Peirce said.

"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," she said.

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

"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," Porter said. "The guideline range is just one factor among many factors."

Scapicchio said 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 in illegal re-entry cases.

In a prepared statement, Assistant Attorney General Christopher A. Wray stated the government's position.

"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," he said.

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.

"Draft proposed findings of fact and conclusions of law, and submit them for sentencing," she suggested. "That way you have something to appeal from and something in writing."

U.S. Supreme Court. *U.S. v. Booker*, 543 U.S. 506, 121 S. Ct. 1208, 155 L. Ed. 2d 1633 (2005). *U.S. v. Fanfan*, No. 04-105. Jan. L., 2005. *Lawyers Weekly USA* No. 9929916.

U.S. District Court for the District of Utah. *U.S. v. Wilson*, No. 2:03-CR-00882. *Jars*, 13, 2005. *Lawyers Weekly USA* No. 9929934.

U.S. District Court for the Eastern District of Wisconsin. *U.S. v. Ranum*, No. 04-CR-31. Jan. 19, 2005. *Lawyers Weekly USA* No. 9929933.