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**HEADLINE:** Booker ruling leaves sentencing questions unanswered

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**BODY:**

In its eagerly awaited opinion on the fate of the Federal Sentencing Guidelines, a deeply divided Supreme Court in January declared the guidelines unconstitutional and granted federal district court judges a measure of sentencing discretion unknown since the enactment of the guidelines nearly two decades ago. While there can be no dispute that the court's decision in *United States v. Booker*, No. 04-104, drastically altered the nature of federal sentencing, the exact contours of post-Booker sentencing are already the subject of spirited debate.

Uncertainties in the wake of Booker flow largely from the fact that the court issued its ruling through two separate, and largely contradictory, opinions. The first half of the court's ruling was authored by Justice John Paul Stevens on behalf of the same five justices who initiated the court's federal sentencing revolution last summer in *Blakely v. Washington*. Those five justices held that the federal guidelines violated the defendant's Sixth Amendment right to a jury trial by allowing a judge, rather than a jury, to find facts that increased his sentencing range.

But when it came time to decide how to remedy the guidelines' constitutional flaw, Justice Ruth Bader Ginsburg abandoned her *Blakely* counterparts, allowing Justice Stephen Breyer, a former member of the Sentencing Commission and the most vocal opponent of the court's Sixth Amendment holdings in *Blakely* and *Booker*, to craft the remedy.

On behalf of the court, Breyer wrote that the guidelines' defect of allowing too much judicial fact-finding could be cured by rendering the guidelines advisory and, in effect, granting judges even more authority to sentence defendants based on facts not found by a jury. Under the new sentencing regime created by the Breyer majority, district courts are required to consult the guidelines and "take them into account when sentencing," but are not required to impose a sentence within their recommended range.

In the weeks following *Booker*, courts are already deeply divided over how to interpret the competing portions of the court's opinion. The central dispute involves how much deference district courts are required to give the sentencing ranges provided by the guidelines. Some judges, and the Department of Justice, have determined that district courts should continue to impose sentences within the ranges established by the guidelines in all but extraordinary cases.

Other judges have concluded that federal sentencing statutes require them to view the guidelines as only one of many factors to consider in determining an

appropriate sentence. That is because sentencing statutes direct district courts to consider a broader range of information about the defendant and the purposes of sentencing (including rehabilitation and treatment) than would be allowed under the guidelines.

This critical question regarding how much deference to give the now-advisory guidelines will, in the near term, be resolved by the courts of appeals, which have been tasked with reviewing the sentences imposed by district courts to determine if they are "reasonable." Will the courts of appeals judge a sentence 's reasonableness by referring to the advisory guideline range or, instead, by referring to all of the factors enumerated by the sentencing statutes? Tying the reasonableness of a sentence too closely to the guidelines could have the effect of rendering the guidelines once again mandatory, thus violating the Sixth Amendment and Justice Stevens' majority opinion in Booker.

It is clear that federal sentencing practice has changed significantly in the short time since Booker. A number of defendants already have received substantially different sentences than they would have under the mandatory guidelines regime. Several district court judges have imposed sentences outside of the previously mandatory guideline range, citing such factors as the need to treat defendants convicted of the same offenses similarly, the need to eliminate the disparity caused by different prosecutorial policies in certain districts or the desire to protect a defendant's ability to make restitution.

As Justice Breyer's opinion in Booker expressly recognized, the courts will not have the last word on the guidelines or mandatory sentencing. Congress and the Department of Justice are both monitoring the post-Booker sentencing trends closely, presumably with the hope of reinstating a mandatory and harsher guidelines regime.

The Department of Justice has instructed its prosecutors to report all sentences that fall outside the now-advisory guidelines range. And there is already speculation that a Congress that has grown increasingly suspicious of judicial independence in sentencing will act quickly to re-impose mandatory sentencing ranges. The House Judiciary Committee scheduled hearings in February to review the effect of the court's ruling in Booker. Many commentators, including a task force of the American Bar Association's Criminal Justice Section, are urging Congress to go slowly and let the post-Booker sentencing experiment continue for at least a year before proposing any legislation.

For the moment, however, many district courts are taking advantage of what they consider a welcome opportunity to create a more individualized and flexible approach to federal sentencing. Jeffrey E. Stone is chairman of the white-collar criminal defense practice group at **McDermott Will & Emery**. Douglas E. Whitney, a former attorney in the Federal Defender Program in the Northern District of Illinois, is a partner in McDermott's trial department.

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