

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

End Of Mandatory Sentencing Guidelines

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LITIGATION CORNER

Unless you were recently out of the country, you have likely heard the scuttlebutt about the U.S. Supreme Court's Jan. 12 decision concerning the Federal Sentencing Guidelines (guidelines). In *United States v. Booker*,¹ the Supreme Court held, among other things, that the mandatory nature of the guidelines is now "advisory."

By way of background, Congress, in an attempt to create sentence uniformity throughout the federal district courts, created the Sentencing Commission. The commission drafted a book, effective Nov. 1, 1987 entitled the *Federal Sentencing Guidelines Manual* (manual), containing sentencing guidelines for all federal crimes.

The manual contains numerical "offense levels" (a number) for specific crimes. Additionally, other factors such as whether a defendant possessed a firearm (although not charged), embezzled money under a "sophisticated scheme," or accepted responsibility for the crime by pleading guilty, are all specifically designated with a number, which either raises or lowers a defendant's offense level. A defendant's criminal history is then calculated based upon previous arrests and convictions, and whether those crimes were committed while the defendant was on probation or parole.

A federal probation officer drafts a pre-sentence report for each defendant based upon the aforementioned factors and compiles two numbers. The first number is for the "offense level" and the second is for the defendant's criminal history. Using the "Sentencing Table" on the back of the manual, a sentence is computed by simply plotting the intersection of the two numbers to arrive at a sentencing range which is determined in months.

Prior to the sentencing date, both the government and defense counsel are permitted to submit written objections to any facts identified in the pre-sentence report and legal arguments as to why a particular "offense level" should or should not apply. At sentencing, the court will typically make findings of fact concerning any objections made, decide any legal issues, and render a sentence.



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Prior to *Booker*, it was statutorily mandated² that the court sentence a defendant within the given "sentencing guideline" range. In the wake of *Booker*, however, the formerly mandatory guidelines are now only advisory. On appeal, the issue will no longer be whether the court properly applied the guidelines, but rather whether the defendant's sentence is reasonable.

Following *Booker*, the U.S. Attorney for the Western District of New York, Michael A. Battle, sent a letter to Chief Judge Richard Arcara on Jan. 19, taking the position that any calculation within the guideline range is reasonable unless "highly unusual circumstances" are present.

Battle wrote: "Accordingly the government believes that *Booker* requires the district court to make a correct calculation under the existing sentencing guidelines and then consider the

guideline calculation when determining the sentence to be imposed. ... It is the position of the United States that, absent highly unusual circumstances, the sentence in a criminal case should fall within the guideline range as determined by the court."³

In other words, it is probably safe to assume that, absent highly unusual circumstances, the government will be requesting that a defendant be sentenced based upon the sentence range created by the guidelines.

In terms of plea agreements (which are frequently entered into between the U.S. Attorney's Office and defendants), Battle indicates the agreement "will state the parties understanding that the court must consider, but is not bound by the guidelines. The only other major change to the plea agreement will be, in some cases, to permit both parties to argue for a sentence outside the guideline range."

Typically, in plea agreements, the defense and government agree not to move for any type of downward reduction in a sentence, outside of what is stated in the plea agreement. According to Battle's letter, it appears that "in some cases" the government and the defendant may now be allowed to argue for a sentence outside the relevant guideline calculation.

So, the natural question is: Does the *Booker* decision ben-

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efit a criminal defendant? Some district courts have already answered this question in the negative.

In a fraud case in Allentown, Penn., District Court Judge James Knoll Gardner went above the sentencing range of 46 to 57 months and sentenced the defendant to 84 months.⁴ During the sentence hearing, Judge Gardner noted that under *Booker* he now has the power to go outside the guideline range as long as the sentence is reasonable.

Similarly, a district court judge in Colorado sentenced a defendant, in a mail fraud case, to 60 months when the defendant's sentence range under the guidelines was between 33 and 41 months.⁵ Likewise, a defendant in New Jersey was sentenced to a term 10 months longer than the sentencing range formulated by the guidelines.⁶

At least based upon the above examples, the *Booker* decision certainly did not benefit the respective defendants. Rather, the judges used their new found discretion and imposed sentences greater than the guideline range.

One must ask, if the guidelines were drafted to create uniformity throughout the country, did *Booker* destroy that goal? It certainly appears it may have. Now, individual judges may use their discretion when sentencing defendants and the guidelines are relegated to simple advice. Similar to their counterparts in New York State criminal courts, federal judges now have the ability to render a sentence within the statutory minimums and maximums for a criminal conviction, free of mandatory sentencing requirements.

Still confused? Maybe a hypothetical will help. A defendant is facing a statutory maximum of five years for a drug distribution conviction, involving one kilogram of marijuana. Under the guidelines he may have faced a range of

10 to 16 months. However, after *Booker*, the defendant can be sentenced up to five years and the only issue on appeal is whether the sentence is "reasonable." According to the U.S. Attorney's Office for the Western District of New York, it would be unreasonable to sentence the defendant to anything more than 16 months. However, the district court judges are not bound by what the government, defense counsel, or the guidelines believe is a "reasonable" sentence.

One thing is for certain, the guidelines will no longer prevent a judge from rendering a sentence below or above a defendant's guideline range. For almost 20 years, federal sentences were handed down based upon mandatory guidelines. Now, the mandatory nature of the guidelines has been removed, and district court judges are left to decide what constitutes a reasonable sentence. Thus, it may only be a short time before the sentence conformity the guidelines were designed to accomplish is a thing of the past.

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1 *United States v. Booker*, 125 S. Ct. 738 (2005).

2 18 USCA §3553(b)(1).

3 A copy of Battle's letter can be found at: http://sentencing.typepad.com/sentencing_law_and_policy/files/wdny_usa_letter_re_booker.pdf.

4 Elliott Grossman, "Businessman gets 7 years for fraud," *Morning Call*, Jan. 28, 2005.

5 Manny Gonzales, "Man acquitted in death of kin is jailed in fraud," *Den. Post*, Jan. 28, 2005.

6 Jeffrey Gold, "5 sentenced in plot that used credit data to buy goods," *Newsday*, Jan. 31, 2005.

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