Federal Sentencing Post-*Booker*

By Hon. Victoria A. Roberts

The Sentencing Reform Act of 1984 (SRA)[1] always required a judge to select a sentence "sufficient, but not greater than necessary," to achieve the goals of 18 USC 3553(a)(2). The SRA established the United States Sentencing Commission (USSC) and charged it with creating "guidelines" for federal sentencing. Unfortunately, the United States sentencing guidelines (guidelines)[2] resulted in a mechanistic approach to sentencing and fixed a floor and ceiling within which discretion could be exercised.

Before the implementation of the guidelines in 1987, federal judges had almost unfettered sentencing discretion. However, the guidelines divested judges of much of that discretion and swung the sentencing pendulum into the arenas of prosecutors, who could dictate the sentence simply by charging decisions and impenetrable plea agreements.

The guidelines assign two numbers to a criminal defendant: an offense level, calculated on the basis of the crime of conviction, and a criminal history level, based on prior convictions and other criminal history. These two numbers are placed on a grid, and the point of intersection dictates the guideline range. Before the United States Supreme Court's decision in *United States v Booker,*[3] only extraordinary, aggravating, or mitigating circumstances—not adequately taken into account by the USSC or not otherwise accounted for in the guidelines—allowed a judge to depart from that range.[4] But, in January 2005, *Booker* held that requiring courts to impose sentences within the guidelines violates the Sixth Amendment.[5]

This article discusses the *Booker* decision, how a federal sentencing hearing must be conducted in this post-*Booker* era and the standard applied by the Sixth Circuit in reviewing sentences, and whether trial judges are exercising *Booker* discretion.

The *Booker* Decision

While most credit *Booker* with dismantling the mandatory sentencing guidelines, two earlier decisions paved the way for this holding. In *Apprendi v New Jersey,*[6] the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that any fact that increases the maximum penalty for a crime—other than a prior conviction—must be proved to a jury beyond a reasonable doubt. Subsequently, in *Blakely v Washington,*[7] the Supreme Court reversed a trial court that had relied on a Washington statute[8] to impose a sentence that exceeded the statutory maximum by three years. The trial court did so on the basis of its finding that the defendant had acted with "deliberate cruelty."[9] Following *Apprendi,* the *Blakely* Court held that the trial court violated the Sixth Amendment when it based the sentence on facts that were neither admitted by the defendant nor found by a jury.

Apprendi and *Blakely* set the stage for the issue in *Booker:* whether the same constitutional analysis applied to the strikingly similar federal sentencing scheme.

Booker consolidated two cases. In *United States v Booker,* a jury had convicted Booker of possessing at least 50 grams of crack cocaine. The evidence presented at trial was that he had 92.5 grams. *Booker*'s guideline range was 210 and 262 months. However, the prosecution urged the trial court to find by a preponderance of evidence that defendant had possessed 566 grams of crack and impose a sentence 10 years more than the guideline maximum. The trial court declined, relying on *Blakely.* In *United States v Fanfan,* the defendant had been sentenced by a similarly skeptical trial judge, who declined on the authority of *Blakely* to

increase the defendant's guideline range to 188 to 235 months after a jury verdict that supported a maximum of 78 months.

The Supreme Court upheld both decisions. As in *Blakely,* the *Booker* Court held that the SRA's mandatory guidelines scheme violates the Sixth Amendment.[10] To salvage the guidelines in a constitutionally permissible manner, the Court severed the SRA provision "that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)."[11] However, the Court held that district judges must take the guidelines into account in accordance with § 3553(a)(4)(a).[12]

The Court also excised the SRA provision that set the standard of review on appeal.[13] Rather than a review de novo of sentencing decisions, the proper standard is "review for reasonableness."[14]

Federal Sentencing Hearings Post-*Booker* and Appellate Review

District courts must focus on the § 3553(a) factors and "provide a reasoned explanation of sentencing decisions in order to facilitate appellate review."[15] The Sixth Circuit held that the appellate review process is to determine if the sentence is reasonable—whether within or outside the guideline range.[16]

Compliance with § 3553(a) is not optional. It mandates a district court to consider (1) the offense's nature and circumstances and the defendant's history and characteristics; (2) the need for the sentence imposed to (a) reflect the seriousness of the offense, promote respect for the law, and provide just punishment, (b) deter the defendant, (c) protect the public from the defendant, and (d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the appropriate advisory guideline range; (5) any other pertinent policy statement issued by the USSC; (6) the need to avoid unwarranted disparities among similarly situated defendants; and (7) the need for restitution.[17]

Section 3553(a) buries the lead by placing the guidelines as the fourth § 3553(a) factor. Courts of appeals are in agreement that while only one of seven factors, an erroneously calculated guideline range makes the resulting sentence "unreasonable."[18] Correct calculation of the applicable range is the imperative starting point in sentencing.[19]

In *United States v Foreman,*[20] the Sixth Circuit held that there must be evidence that the district court considered all the § 3553(a) factors. *Foreman* noted that a "sentence within the Guidelines carries with it no implication that the district court considered the [other] 3553(a) factors, if it is not clear from the record."[21] Furthermore, a guideline sentence is not reasonable in the Sixth Circuit if there is no evidence the district court considered the statutory mandate to "impose a sentence sufficient, but not greater than necessary," to comply with the purposes of sentencing in § 3553(a)(2).[22]

An evidentiary hearing may be necessary to determine if the court's probation department properly calculated the offense level and the criminal history level. Once the proper guideline range is determined, the court must address motions for downward or upward departure under the guidelines.

On the prosecutor's motion, significant sentence reductions can be had for cooperation if the defendant provided "substantial assistance" to the government.[23] The court must inquire whether the government brought its motion only under United States Sentencing Guidelines, § 5K1.1 or under 18 USC 3553(e) when the defendant faces a mandatory minimum sentence.[24] While expanding discretion, *Booker* did not give trial courts discretion to depart below mandatory minimums in the absence of § 3553(e) motions.

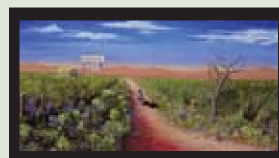
The Sixth Circuit reads Federal Rule of Criminal Procedure 32(h) and due process considerations to require the court to give notice if it intends to sentence outside the guideline range on its own motion, whether it relies on guideline factors or § 3553.[25] The notice must specify the ground on which the court will depart. No notice is required when the court applies a sentencing enhancement under the guidelines to increase a sentence.[26]

The court must permit counsel, the defendant, and any victims to address the court on the other § 3553(a) factors.[27]

This sentencing procedure does not require the court to resolve all facts in dispute; a ruling is not necessary if the matter is inconsequential or if the court will not consider it in imposing sentence.[28] However, all nonfrivolous § 3553(a) arguments for a lower nonguideline sentence must be addressed.

Finally, the court must announce that it considered the guidelines and the factors set forth in § 3553(a) and that it is imposing "a sentence sufficient, but not greater than necessary, to comply with the purpose set forth in [subsection (a)(2)]."[29] Such a sentence can be within the applicable guideline range (after applicable departures) if consistent with § 3553(a) factors. Or the court can impose a nonguideline sentence—referred to as a variance—if § 3553(a) factors justify that sentence.

Since *Booker,* it is clear that a nonguideline sentence can survive appellate scrutiny even if it cannot be supported by factors that would have justified a departure under mandatory guidelines. Furthermore, in evaluating § 3553(a) factors, courts are "free to rely upon departure case law in determining whether a



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guideline sentence is appropriate and in translating [their] findings into a numerical sentence."[30]

On June 21, 2007, in *Rita v United States,*[31] the Supreme Court resolved a split among the circuits and held that appellate courts may presume the reasonableness of a properly calculated sentence that is within the guidelines. The Court stated that "a Guidelines sentence will usually be reasonable, because it reflects both the [USSC's] and the sentencing court's judgment as to what is an appropriate sentence for a given offender."[32]

Rita had argued that allowing a presumption raises Sixth Amendment concerns, asserting that a "pro-Guidelines 'presumption of reasonableness' will increase the likelihood that courts of appeals will affirm such sentences, thereby increasing the likelihood that sentencing judges will impose such sentences."[33] The Court rejected this argument, stating that "[t]he Sixth Amendment question…is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)."[34] However, the Court found that a presumption of reasonableness does not limit sentencing judges in a manner that conflicts with the Sixth Amendment because a "nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence."[35] But the Court reiterated that the presumption applies only on appellate review. "[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[36]

Are Trial Judges Exercising *Booker* Discretion?

Each year, the USSC publishes its Sourcebook of Federal Sentencing Statistics. Compilations for the fiscal year ending October 1, 2006, demonstrate that trial judges in the Eastern District of Michigan departed or sentenced below the guideline range using only § 3553(a) factors in 8.6 percent of all cases sentenced. In the Western District, that figure was 11.6 percent. Judges relied on a combination of sentencing guidelines and § 3553(a) factors to sentence downward in 4.7 percent of cases in the Eastern District. Western District judges did so in 2.1 percent.[37]

Sentences above the guidelines are rare. Relying on guidelines in combination with § 3553(a) factors, Eastern District trial judges departed or sentenced above guidelines in only 0.7 percent of all cases in fiscal year 2006. In the Western District, that figure was 2.6 percent.[38]

The factors relied on the most are the offense's nature and circumstances/defendant's history (24.5 percent); reflecting the offense's seriousness, promoting respect for the law, and just punishment (13.2 percent); adequate deterrence (10.4 percent); unwarranted disparity (7.1 percent); and protecting the public from other crimes (7.1 percent).[39]

Conclusion

The Supreme Court ruled in *Booker* that while avoiding unwarranted disparities in sentencing remains a goal, the mandatory system "is no longer an open choice" under the Sixth Amendment.[40] Indeed, being wed to consistency can eclipse the reasoned process trial judges must engage in under § 3553. Thoughtful imposition of individualized sentencing based on a comprehensive examination of the particular defendant, his or her characteristics, and the particular offense is the only approach that can even begin to withstand appellate scrutiny. Well-prepared counsel will provide the arguments as trial and appellate courts shape the contours of what a reasonable sentence looks like in this post-*Booker* world. ■

Victoria Roberts was commissioned by President Clinton to serve as a United States District Judge for the Eastern District of Michigan. She was the 62nd president of the State Bar of Michigan and received its two highest awards: the Roberts P. Hudson Award and the Champion of Justice Award. In January 2008, Judge Roberts will begin teaching "Federal Sentencing: Evolution and Dynamics" at the University of Michigan Law School.

Judge Roberts acknowledges the assistance of her law clerk, Chanille B. Carswell, in preparing this article.

FOOTNOTES

1. PL 98-473, 98 Stat 1987, 18 USC 3551 *et seq.*
2. United States Sentencing Commission, 2007 Federal Sentencing Guideline Manual, available at <http://www.ussc.gov/2007guid/tabcon07_1.htm> (accessed November 18, 2007).
3. *United States v Booker,* 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).
4. United States Sentencing Guidelines (USSG), § 5K2.0.
5. *Booker,* 543 US at 232–234.
6. *Apprendi v New Jersey,* 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).
7. *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).
8. Wash Rev Code 9.94A.010 *et seq.*
9. *Blakely,* 542 US at 300–301.
10. *Booker,* 543 US at 232–234.
11. *Id.* at 259.
12. *Id.* at 259–260.
13. *Id.* at 259.
14. *Id.* at 261.
15. *United States v Webb,* 403 F3d 373, 385 n 8 (CA 6, 2005).
16. *United States v Trejo-Martinez,* 481 F3d 409, 411–412 (CA 6, 2007).
17. *United States v Johnson,* 467 F3d 559, 563 (CA 6, 2006).
18. *United States v Cantrell,* 433 F3d 1269 (CA 9, 2006); *United States v Williams,* 435 F3d 1350 (CA 11, 2006); *United States v Price,* 366 US App DC 166; 409 F3d 436 (2005).
19. *United States v Jackson,* 408 F3d 301, 304 (CA 6, 2005).
20. *United States v Foreman,* 436 F3d 638 (CA 6, 2006).
21. *Id.* at 644.
22. 18 USC 3553(a); see *Webb,* 403 F3d at 385.
23. USSG, § 5K1.1.
24. *Melendez v United States,* 518 US 120, 125–126; 116 S Ct 2057; 135 L Ed 2d 427 (1996).
25. *United States v Cousins,* 469 F3d 572, 580 (CA 6, 2006).
26. *United States v Hudson,* 491 F3d 590 (CA 6, 2007).
27. FR Crim P 32.
28. FR Crim P 32(i)(3)(B).
29. 18 USC 3553(a)(2).
30. *United States v Smith,* 359 F Supp 2d 771, 773 (ED Wis, 2005).
31. *Rita v United States,* ___ US ___; 127 S Ct 2456; 168 L Ed 2d 203 (2007).
32. *Id.* at 2465.
33. *Id.*
34. *Id.* at 2466.
35. *Id.*
36. *Id.* at 2465.
37. United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, table 26, available at <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm> (accessed November 18, 2007).
38. *Id.*
39. *Id.* at table 25B.
40. *Booker,* 543 US at 263.