Federal Sentencing – Where Do We Go From Here?[*]

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In *United States v. Booker,*[1] the Supreme Court held, by a vote of 5 to 4, that the provision of the Sentencing Reform Act that required judges to impose sentences within the guideline range fixed by the U.S. Sentencing Guidelines is unconstitutional because it does not respect defendants' rights to have the maximum sentence that a judge may impose determined solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In a separate opinion, by a different 5 to 4 majority, the Court held that the remedy was to excise the requirement that judges sentence within the guideline range while leaving the balance of the Sentencing Reform Act in place. This requires sentencing judges to consider the guidelines as well as the other objectives of sentencing articulated in the Act. Sentences are reviewable on appeal for unreasonableness. The question naturally arises, "Where do we go from here?"

II

The reaction to *Booker* has tended toward the extremes.

At one end of the spectrum is a comment by Mark Pomerantz, a former chief of the criminal division of the United States Attorney's office for the Southern District who now is a

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[1] 124 S.Ct. ___, 2005 WL 50108 (Jan. 12, 2005).

prominent defense lawyer. Mr. Pomerantz was quoted as saying that "The defense bar has viewed the guidelines as the wicked witch for a long time." He happily pronounced that "[d]ing-dong the wicked witch is dead."[2]

At the other end of the spectrum, perhaps, is Congressman Tom Feeney of Florida, author of the controversial Feeney Amendment last year, which further restricted judicial sentencing discretion. Calling *Booker* an "egregious overreach," he reportedly said that "[t]he Supreme Court's decision to place this extraordinary power to sentence a person solely in the hands of a single federal judge – who is accountable to no one – flies in the face of the clear will of Congress."[3]

In view of these reactions, it is no surprise that the newspapers are rife with reports that Congress may take action. Before racing headlong into a new legislative effort, however, it is important to consider whether either of these responses rests on an accurate assessment of *Booker* and its consequences.

III

Booker itself suggests that they do not.

To begin with, the Court in *Booker* stressed that most of the Sentencing Reform Act is unaffected by the decision. This includes the provision that requires judges to impose sentences that take into account "the need to avoid unwarranted sentence disparities."[4] Since the guidelines

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2 Mark Hamblett, *Defense Lawyers Hail Sentencing Decisions,* N.Y.L.J. 1:4 (Jan. 13, 2005).

3 Carl Hulse and Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen,* N.Y. TIMES A-29:3 (Jan. 12, 2005).

4 18 U.S.C. § 3553(a)(6).

are the only standard of reference, judges must consider the guidelines in imposing sentence. Reports of the death of the "wicked witch," to use Mr. Pomerantz's phrase, have been greatly exaggerated.

Nor has *Booker* left the power to sentence solely in the hands of a single federal judge, accountable to no one. Every sentence imposed by every district judge is subject to appellate review to determine whether it is reasonable. Given that sentencing judges must consider the guidelines and must avoid unwarranted sentencing disparities, it seems a safe bet that the guidelines will be a significant factor in assessing reasonableness.

Although little time has elapsed since *Booker,* we already have one careful analysis by a thoughtful district judge that suggests that not much will change as a result of the decision.

In *United States v. Wilson,*[5] Judge Paul Cassell in Utah, ruling the day after *Booker* was decided, confronted the question of "just how 'advisory' the Guidelines are." He concluded that courts should sentence within the guideline range except "in unusual cases" where "clearly identified and persuasive reasons" warrant a different sentence.[6] In other words, the guidelines, in his view, are entitled to heavy weight, and "the appropriate sentence will be the Guidelines sentence" "[i]n all but the most unusual cases."[7]

It is useful to consider the factors that led Judge Cassell to this result. The decision not surprisingly begins with the fact that the principal portion of the Sentencing Reform Act

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[5] No. 2:03-CR-00882 (PGC) (D. Utah filed Jan. 13, 2005).

[6] *Id.* at 2.

[7] *Id.* at 6.

invalidated in *Booker* was the provision that *required* a sentence within the guideline range. The requirement that judges *consider* the guideline range in determining sentence remains in effect.[8] But the decision goes on to argue that the guidelines ordinarily should be followed also because they are authoritative indications of the sentences that are just in particular cases.[9] They reflect public opinion regarding the appropriateness of particular sentences for given crimes.[10] The sentences they have required, in Judge Cassell's opinion, have assisted in the control of crime.[11] Perhaps most important, Judge Cassell argues that:

> "[T]he court is still obligated to consider 'the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct . . . .' The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines."[12]

To be sure, Judge Cassell's view is not the only one, even this early in the post-*Booker* period. In *United States v. Ranum,*[13] Judge Lynn Adelman in Milwaukee apparently took issue with Judge Cassell. The Sentencing Reform Act, he pointed out, required sentencing judges

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8 *Id.* at 4.

9 *Id.* at 7-10.

10 *Id.* at 10-14.

11 *Id.* at 14-19.

12 *Id.* at 24-25 (citations omitted).

13 No. 04-CR-31 (E.D. Wis. filed Jan. 19, 2005).

to consider the "history and characteristics of the defendant. "[14] The pre-*Booker* requirement that judges generally sentence within the guideline range, he argued, usually prevented sentencing judges from doing that because the guidelines provided that judges ordinarily should not consider such factors as a defendant's age, education and vocational skills, mental and emotional condition, family responsibilities, and civic and military contributions. Thus, he argued, the invalidation of the *requirement* of imposing a guidelines sentence leaves judges free to consider all of the factors enumerated in the Sentencing Reform Act and diminishes the weight to be accorded to the guidelines. Nevertheless, Judge Adelman concluded his analysis of the effect of *Booker* by saying that he agreed "that courts must in all cases seriously consider the guidelines" and that "courts not imposing sentences within the advisory guideline range should provide an explanation for their decision."[15]

Although there is a difference in the rhetoric employed in *Wilson* and *Ranum,* it is not clear to me that Judge Adelman's formulation would lead to results different than Judge Cassell's in specific cases. And for my purpose, that is not of principal importance.

What is important, I suggest, is that these are very early days in the post-*Booker* era. It is impossible to know how the debate begun by Judges Cassell and Adelman will play out if matters are left to develop in the courts. One possibility is that federal sentencing after *Booker* eventually will look very much the same as federal sentencing before *Blakely:* judges will follow the guidelines in a very large majority of cases. Courts of appeals may demand substantial

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14 *Id.* at 2-3 (quoting 18 U.S.C. § 3553(a)(1)).

15 *Id.* at 4-5.

justification for non-guidelines sentences, just as they previously demanded for sentencing guidelines departures. Hence, the extent to which defendants receive sentences outside the guideline range remains to be seen. And regardless of the frequency of such sentences, the reasons for which non-guidelines sentences may be imposed may warrant serious consideration.

We Americans are a people who pride ourselves on our common sense. There's an old adage that seems to fit here: "If it ain't broke, don't fix it." Without meaning to suggest that the guidelines were above criticism -- and I take no position on that, one way or the other -- that old adage counsels caution here. Before Congress concludes that *Booker* "broke" the sentencing system and sets out to "fix" it, it would be useful if it allowed some time to pass to see whether the results of *Booker* warrant further action. If the rate at which courts impose non-guidelines sentences is not markedly different from the past, perhaps a legislative reaction to *Booker* will seem unwarranted. Nor would an increase in the frequency of non-guidelines sentences necessarily warrant a legislative response. After all, consideration of the reasons judges give for imposing such sentences in individual cases might satisfy even the most demanding critics of the justice of those outcomes. Furthermore, it is important to bear in mind that such sentencing disparities as exist are not solely the result of sentencing decisions by judges. If and when Congress considers further legislation in the pursuit of reducing disparity in sentencing, I respectfully submit that there are related matters worthy of consideration.

IV

Prime among these is the fact that decisions by prosecutors, not judges, may be responsible for considerable disparity in the manner in which defendants committing like crimes are

sentenced. These disparities may arise where prosecutors undercharge in the first place, where prosecutors agree to dismiss serious charges in exchange for guilty pleas to lesser offenses, and where prosecutors bargain not only about the guilty pleas they will accept, but about the facts relevant to sentencing that will be brought to the sentencing judge's attention.

Perhaps the most egregious of these situations has been the so-called "fast-track" programs for alien illegal reentry cases along the southwest border. Some of the United States Attorneys in border districts frequently offer to charge illegal reentrants with offenses that carry lower maximum sentences than otherwise might be charged in exchange for quick guilty pleas.[16] This means that the maximum sentence to which an illegal reentrant is exposed could vary by a factor of more than two depending upon whether he or she is arrested in a border district with a fast-track program or in a district farther away from the border.[17] If one is concerned about sentencing disparities, one should reflect on whether it is justifiable to give an illegal reentrant who crosses the border in Tijuana and makes it all the way to New York a sentence of 70 to 87 months while another illegal reentrant who rides the same truck across the border and who has an identical criminal history gets only 30 months because he was caught in San Diego.[18]

I certainly recognize the practical needs of resolve the huge volume of illegal reentry

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16 *See, e.g., United States v. Bonnet-Grullon,* 212 F.3d 692, 694-95 (2d Cir. 2000); Comment, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection,* 2004 UTAH L. REV. 827 (2004).

18 *See, e.g., United States v. Bonnet-Grullon,* 53 F. Supp.2d 430 (S.D.N.Y. 1999), *aff'd,* 212 F.3d 692 (2d Cir.), *cert. denied,* 531 U.S. 911 (2000).

cases in these border districts. But if the overall goal here is equal treatment for equal conduct, then there is at least a question whether administrative convenience or a reluctance to invest the resources required to prosecute all of these cases in the normal fashion warrants such wholesale disregard of the principal of uniformity.

Another example is the disparity in the use of downward departures under the guidelines for substantial assistance to the government. In fiscal year 2002, prior to the enactment of the PROTECT Act, there were downward departures for substantial assistance to the government in 17.4 percent of all cases nationally. In the Tenth Circuit, however, there were such departures in only 11 percent of the cases while the figure was almost three times as high in the District of Columbia Circuit.[19] If you look at individual districts, the rate of substantial assistance departures ranged from 3.8 percent in the Eastern District of Oklahoma to 46.3 percent in the Middle District of Alabama.[20] There was variation also in the extent of the sentencing reductions in cases where substantial assistance departures were granted.[21]

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[19] United States Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* 53 (2003).

[20] *Id.* 53-54. The territorial court in the Northern Mariana Islands had an even higher rate.

[21] The present Administration and the Feeney Amendment have made efforts to reduce disparities due to the exercise of prosecutorial discretion. In a September 2003 memorandum to all federal prosecutors, former Attorney General Ashcroft directed prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . ." with a few enumerated exceptions that require express authorization at a supervisory level. Memorandum from Attorney General John Ashcroft to All Federal Prosecutors 2 (Sept. 22, 2003), at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.Htm (last visited Jan. 25, 2005). In addition, the Feeney Amendment and the Ashcroft memorandum limited the use of fast-track programs by requiring that they be approved by the Attorney General and announcing a policy of granting approval only in exceptional cases. *Id.* § I.B.2; PUB. L. NO. 108-21, §

I suppose it may be necessary to give substantial assistance departures to almost half of all defendants in Middle Alabama in order to keep the wheels of justice turning but that prosecutors in Oklahoma can get by with giving them to less than one in twenty five defendants. But I suspect that this is not so. I suspect, instead, that there is a vast difference in the way in which prosecutors in different districts approach substantial assistance departures. And this prompts consideration also of the Antitrust Division's amnesty program.

As many of you know, corporations and individuals who report antitrust violations prior to the commencement of an investigation may qualify for amnesty under established Antitrust Division policy.[22] In other words, the whistle blower gets a free pass. Contrast this with, for example, the policy of the United States Attorney's Office for the Southern District of New York. It requires all cooperators to plead guilty to every chargeable federal offense in exchange for the hope of a downward departure if the government later determines that the cooperator has rendered substantial assistance to the government and the judge goes along. Far from getting a free pass, Southern District cooperators wind up with felony convictions and, probably in most cases, jail sentences. This disparity in treatment is undeniable.

It often has been said that the sentencing guidelines resulted in a substantial shift of discretion from judges to prosecutors. That certainly is true. And there is ample basis for thinking that prosecutors' exercise of that discretion has led to substantial disparities in treatment. So if we

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401(m)(2)(B), 117 Stat. 670, 675.

22 U.S. Dep't. of Justice, Antitrust Division, *Leniency Policy for Individuals* (Aug. 10, 1994) (available online at http://www.usdoj.gov/atr/public/guidelines/0092.htm) (last visited Jan. 26, 2005); U.S. Dep't. of Justice, Antitrust Division, *Corporate Leniency Policy* (Aug. 10, 1993) (available online at http://www.usdoj.gov/atr/public/guidelines/0091.htm) (last visited Jan. 26, 2005).

truly are serious about sentencing uniformity, Congress might well consider that an examination of prosecutorial contributions to any unwarranted disparities is appropriate.

V

But my purpose is not to start a campaign against prosecutors. Far from it. My central message instead is that this is a moment for reflection, not for hasty action. We do not know how *Booker* will evolve if the courts are left to work out these problems. That is something well worth knowing before the legislature acts. Further, I respectfully suggest that the courts and the Congress are not, and should not become, adversaries here. Whatever the initial reaction to the sentencing guidelines may have been almost twenty years ago, and despite the well known controversy about the guidelines and the limitations they placed on judicial discretion, I suspect that the area of agreement between Congress and the courts may well be larger than either believes. I doubt if anyone believes that a system with wide and unjustified sentencing disparities is desirable. It is quite possible that we are not talking about substantially different objectives, but about ways and means of achieving largely shared goals. And even if that is not as true as I suspect it is, we are well past the days in which sentences were not reviewable on appeal. The appellate process has been, and is likely to be, a significant force promoting uniformity. So let us try to remember that the things that bind us together are far greater than whatever may divide us. Let us reason together.