

White Collar Crime - USA

Supreme Court Makes Federal Sentencing Guidelines Advisory

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Since the publication of "[Constitutionality of US Sentencing Guidelines is Questioned](#)", which examined *Blakely v Washington*(1) and its aftermath, the US Supreme Court issued its widely anticipated ruling regarding the Federal Sentencing Guidelines. In *United States v Booker* and *United States v Fanfan*,(2) decided on January 5 2005, the Supreme Court concluded that the Federal Sentencing Guidelines violate the Sixth Amendment right to a trial by jury. Since the guidelines oblige judges to examine evidence and make factual findings that may increase a defendant's sentence above what would be permitted by a jury's verdict alone, the court determined that mandatory application of the guidelines was unconstitutional.

The court salvaged the guidelines, however, by making them advisory. The court concluded that with advisory guidelines, a judge may exercise his or her discretion to select a specific sentence within a defined range without violating the Sixth Amendment, because under these circumstances, a jury need not find the predicate facts bearing on sentencing. Under the court's holding, "district courts, while not bound to apply the guidelines, must consult them and take them into account when sentencing".(3) Appellate review of the district court's sentence will be under the 'unreasonableness' standard, which the court did not carefully define. It is likely that what exactly makes a sentence that departs from the 'advisory' Sentencing Guidelines 'unreasonable' will be a staple of appellate arguments following *Booker/Fanfan*.

District courts are beginning to grapple with the ramifications of *Booker/Fanfan*. For the present, the only certainty is that the process of sentencing will be very different from what counsel and courts have grown used to in the last 18 years since the advent of the guidelines. Instead of a fairly mechanical application of factors, courts will be able to consider additional factors and defence counsel will be free to argue for sentences below the guidelines. How receptive courts will be to such arguments will vary from judge to judge. In addition, it remains to be seen whether Congress will push to change the substantive federal sentencing laws to raise the sentencing range or add mandatory minimum sentences for particular crimes.

In response to the Supreme Court's decision, the US Department of Justice issued a memorandum advising all federal prosecutors to "take all steps necessary to ensure adherence to the Sentencing Guidelines".(4) Specifically, federal prosecutors have been instructed to seek sentences within the range established by the guidelines in all but extraordinary cases, and must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate guidelines range or to refrain from objecting to a defendant's request for such a sentence. Prosecutors must also continue to report adverse sentencing decisions to their superiors.(5)

For the time being, the new sentencing practice gives judges far more discretion to impose a sentence than has been available since the advent of the guidelines. Prior to the Sentencing Reform Act, judges were generally free to use their discretion to sentence a convicted criminal and to base a sentence on both the facts of the case and the defendant's individual history and background, and expression of remorse and involvement in the crime. It appears that judges may once again exercise such discretion.

Thus, foreign criminal defence lawyers and counsel advising clients with respect to sentencing (which may influence critical litigation decisions, including the risk assessment of accepting or rejecting plea offers) may wish to consult with US counsel to familiarize themselves with the best approach to a sentencing disposition in order to advise clients who have been or may be charged in the United States.

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Endnotes

(1) 2004 WL 1402697 (June 24 2004).

(2) *United States v Booker* and *United States v Fanfan*, 543 US ___ (2005).

(3) *Id.*

(4) See January 28 2005 Memorandum from Deputy Attorney General James Comey re Department Policies and Procedures Concerning Sentencing.

(5) *Id.*