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SUPREME COURT RULES THAT SENTENCING GUIDELINES SHOULD BE GUIDELINES

(*U.S. v. Booker*; *U.S. v. Fanfan*)

In a sharply divided 5-4 ruling written by Justice Stevens, the U.S. Supreme Court ruled that the federal Sentencing Guidelines violate a person's Sixth Amendment right to a jury trial when judges impose a sentence under those guidelines based on aggravating factors not found by a jury beyond a reasonable doubt. But the Court remedied this violation by a different 5-4 ruling written by Justice Breyer (joined by Chief Justice Rehnquist and with Justice Ginsburg being the only justice agreeing to both rulings) by striking down the provision of the Sentencing Reform Act of 1984 that made the guideline sentences mandatory for federal judges.

The guidelines are now only advisory, that is, although judges should consider them in deciding what sentence to impose in a particular case, they are not strictly bound by them. This decision will greatly diminish the power of overzealous prosecutors who effectively controlled what prison sentences would be meted out, and restore sentencing discretion to experienced and impartial judges. In short, the guidelines are now true guidelines. Congress is already considering remedial legislation in the new Congress, and it is unclear what reform will be enacted.

The Court also struck down the so-called "Feeney Amendment" that was designed to further limit the judge's sentencing discretion by requiring appellate judges to review the sentence *de novo* rather than give deference to the trial judge's sentence. WLF, which had filed a brief in the *Booker* case, had also filed one in *United States v. Thurston*, urging the Court to take that case and rule that the Feeney Amendment was unconstitutional. Because of the decision in *Booker*, the Court is expected to grant review of *Thurston* and summarily reverse the lower court ruling in that case as well.

"Today's ruling should come as welcome news to many businessmen and individuals who have been unfairly prosecuted for minor regulatory offenses and given draconian prison sentences under the strict guidelines," said Paul Kamenar, Senior Executive Counsel of the Washington Legal Foundation (WLF). "The decision will allow judges, many of whom have been critical of the guidelines, to impose fairer and more rational sentences," Kamenar added. In one case cited in WLF's brief, WLF's clients, small seafood importers, are currently serving guideline-imposed prison sentences of eight *years* for importing lobster tails from Honduras in clear plastic bags instead of cardboard boxes. Individuals have been sent to prison for lengthy terms for placing clean fill on their own property that the Environmental Protection Agency

deems to be a wetland. However, it is not clear whether the decision will be retroactive to those cases no longer on direct review.

Critics of the *Booker* decision claim that it undercuts the intent of Congress which enacted the guideline system in 1984. There were two distinct and legally separate reasons articulated by Congress when it enacted the guideline scheme. The first was the lack of "truth in sentencing" or indeterminate sentencing. Prior to the Sentencing Reform Act of 1984, the actual time served by a defendant was often approximately one-third of the sentence imposed by the judge, as allowed by the U.S. Parole Board. Parole was abolished in the federal system, and the sentence imposed is what the defendant will serve. Thus, a three-year prison sentence imposed under the guidelines today for a crime is equivalent to a nine-year sentence imposed for that same crime before 1984. Overlooked by many legal observers and commentators is that the *Booker* decision leaves intact this major feature of the guidelines. The sentence imposed by the judge will continue to be the sentence that the defendant will serve.

The second reason for mandatory guidelines was the perceived disparity of sentences imposed for similar crimes. The rationale was that a defendant convicted, for example, of robbing a bank of \$50,000 in one state should receive a similar sentence as another defendant who robbed a bank of the same amount in a different state. However, the empirical evidence did not show that there were wide unwarranted disparities of sentences in the federal system as opposed to that found in the state system. Indeed, as WLF argued in *Thurston*, the guidelines allow for gross disparities. In that case, one business executive who pled *nolo contendere* to one count of conspiracy received probation. A less culpable executive who stood trial for the same count was convicted and was given a reasonable three-month sentence by the trial judge; but invoking the guidelines, the Department of Justice successfully argued to an appeals court that even as a first offender, the second executive should have been sentenced to the statutory *maximum* sentence of five years. Thus, if the guidelines were designed to *reduce* sentencing disparities, the result in *Thurston* clearly demonstrated just the opposite effect.

For years, WLF has challenged the U.S. Sentencing Commission and many of its guidelines, particularly those that require substantial prison terms for minor environmental infractions. WLF's brief in *Booker*, filed on behalf of itself and the Allied Educational Foundation, was drafted with the *pro bono* assistance of Donald B. Verrilli, Jr. and Elaine J. Goldenberg of the Washington, D.C. office of Jenner & Block LLP.

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For information, contact WLF Senior Executive Counsel Paul Kamenar at 202-588-0302. WLF's briefs in both *Booker* and *Thurston* are available on its website at www.wlf.org.