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U.S. v. KANDIRAKIS:
A BELLWETHER RULING
ON SENTENCING GUIDELINES?

by

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After the U.S. Supreme Court rendered the Sentencing Guidelines advisory in *United States v. Booker*, district courts struggled with the question of what weight to give the Guidelines at sentencing in light of *Booker*'s two conflicting majority opinions. The resounding answer from the U.S. Courts of Appeals has been that the Guidelines remain central to the sentencing process, along with the judge-made factual findings necessary under that scheme.¹ Given that most courts have found that advisory Guidelines sentences are presumptively reasonable, it is debatable whether *Booker* has had any meaningful impact on the sentencing process.

A recent decision by the Honorable Judge William G. Young of the District of Massachusetts, *United States v. Kandirakis*, 441 F. Supp. 2d 282 (D. Mass. 2006), stands squarely at odds, at least philosophically, with this precedent. Although Judge Young acknowledges he is bound by First Circuit law – “I hear and I obey,” *id.* at 329, he remarks at one point – he uses what would otherwise be a run-of-the-mill sentencing decision to expound on the derogation of the jury’s role in criminal trials and the dilution of the standard of proof governing sentence enhancements. Judge Young sees these two issues as the direct results of Justice Breyer’s problematic remedial opinion in *Booker*, and he ultimately concludes that the “functionally mandatory” nature of the Guidelines, as they have been interpreted by the circuits post-*Booker*, renders them unconstitutional. *Id.* at 336. Two years ago, in *United States v. Green*, 346 F. Supp. 2d 259 (D. Mass. 2004), Judge Young concluded that the then-mandatory Guidelines were unconstitutional, just six days ahead of the Supreme Court’s decision in *Blakely v. Washington*, which invalidated nearly-identical state sentencing guidelines. Given Judge Young’s seeming ability to predict the direction of the law in this area, and the thoughtful nature of his analysis, *Kandirakis* deserves a close reading by judges, defense attorneys and prosecutors alike.

Kandirakis begins with an extensive discussion of the contradictions between “the two faces of *Booker*” – the “Constitutional *Booker*” opinion by Justice Stevens, which held that the mandatory Guidelines violated the Sixth Amendment, and the “Remedial *Booker*” opinion by Justice Breyer, which remedied the unconstitutionality of the Guidelines by making them advisory. Courts and commentators (and the Justices

¹See, e.g., *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005); see also *United States v. Dorcely*, 454 F.3d 366, 375-76 (D.C. Cir. 2006); *United States v. Johnson*, 445 F.3d 339, 341 (4th Cir. 2006); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717-18 (8th Cir. 2005).

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themselves) immediately recognized the tension inherent in the two conflicting majority opinions. Judge Young observes that because “the whole of the Guidelines . . . is but one big policy statement of Congress,” and “a sentencing court may not depart from a Guidelines range for policy reasons contradictory to those expressed therein, then the *only* way to ensure respect for those policy choices is through enforcement of the Guidelines themselves.” *Kandirakis*, 441 F. Supp. 2d at 291, 292. The sentencing court, therefore, is left with no option but to follow the Guidelines, since “there are few factors that remain case-specific” and unaccounted for, and “appellate guidance concerning when it is permissible for a sentencing court to deviate from the suggested Guideline range, based on what facts, is mind-numbingly incoherent.” *Id.* at 293. Judge Young questions why this should be the case, since “the only clear mandate from the Supreme Court going forward is that sentencing courts ‘consult [the] Guidelines and take them into account when sentencing.’” *Id.* at 295 (quoting *Booker*, 543 U.S. 220, 264 (2005)). The reason, he concludes, is that “the primary theme of Justice Breyer’s remedial opinion is that Congress’s purposes were and are valid, and that federal judges should strive to apply the Act (and the regime created by the Act, almost all of which was left intact) to further those purposes.” *Id.* at 294 (quoting *United States v. Jimenez-Beltre*, 440 F.3d 514, 522 (1st Cir. 2006) (Howard, J., concurring in part and concurring in the judgment)). Most sentencing courts continue to presumptively apply the Guidelines in virtually the same manner as they did prior to *Booker*.

The current state of affairs, Judge Young maintains, violates the Sixth Amendment and constitutes a serious assault on the role of the jury in a criminal trial. Basing a defendant’s sentence “upon what a judge believes an offender ‘really’ did, as opposed to the actual crime of which he was convicted by the jury, is nothing less than offensive – let alone unconstitutional.” *Id.* at 302. He argues that the Guidelines fly in the face of “[a] fundamental premise of our Constitution,” that is, “it is not what one ‘really’ does that can be punished but only that conduct which is proven at trial.” *Id.* at 303. This premise has been echoed by the Supreme Court “in essentially the same formula for over a century,” as a rule with “three essential components: (1) every fact necessary to punishment; (2) [must be] proved to a jury; (3) beyond a reasonable doubt.” *Id.* at 303, 304.

Judge Young argues that after *Apprendi* and *Blakely* (and regardless of the holding of Remedial *Booker*), “every fact which the law identifies as relevant to guilt or punishment has heightened, constitutional significance,” and “must be represented in the verdict.” *Id.* at 309. He views the jury’s role as one of crucial importance because “the conclusions of twelve lay people who have examined the evidence and deliberated thereon are more likely to be correct (and accepted) than the pronouncement of a single, jaded and calloused employee of the state.” *Id.* at 324. This conclusion, as sensible and straightforward as it seems, is nothing short of revolutionary, given the current state of the law.

Equally compelling, and what should be of particular interest to defense counsel, is Judge Young’s conclusion that “[n]othing in Remedial *Booker* precludes judges from utilizing a reasonable doubt standard in the determination of enhancement facts.” *Id.* at 325. Reviewing *Apprendi* and its predecessors, he argues that although “the permissive use of the preponderance standard, as provided by the Guidelines commentary and pre-*Apprendi* Supreme Court rulings, was turned by circuit court precedent into a mandatory use,” the holding of Constitutional *Booker* has thrown these rulings into serious doubt because they “are predicated on the ‘authoritative’ nature of the Guidelines.” *Id.* at 327 (citation omitted). In fact, he states, “[t]he Fifth Amendment and its *current* Supreme Court interpretation require proof beyond a reasonable doubt of enhancement facts.” *Id.* at 329. However, he acknowledges that this view conflicts with First Circuit precedent and, therefore, he is “bound to apply a preponderance standard to enhancement facts, at least until . . . ‘the law’ on this issue has changed.” *Id.*

With his impassioned defense of the importance of the jury verdict to the sentencing process, Judge Young believes he is “do[ing his] part to protect our citizens’ voice in the judiciary,” and he calls on other courts to do the same. *Id.* at 336. It remains to be seen if other courts will follow Judge Young’s lead. But ultimately, if his reasoning is confirmed by the Supreme Court as it was in *Green*, *Kandirakis* may well prove to be another prescient decision, foretelling a more effective constitutional challenge to the Guidelines than *Booker*.