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DEVELOPMENTS

Going by the Book

Almost three years ago, when the U.S. Supreme Court's ruling in *United States* v. *Booker* declared that the federal sentencing guidelines were no longer mandatory, most observers expected that future prison terms would be shorter and sentencing would become more variable. So far, it seems, they were wrong. Judges have been reluctant to use their new discretion in setting sentences that diverge from the old guidelines.

But a Supreme Court case this term may change that. By clarifying lower courts' power to set sentences that do not follow the guidelines, the Court could embolden judges to act more independently.

Judges still follow sentencing guidelines—even though they don't have to.

Under the Sentencing Reform Act of 1984, judges could only consider certain issues in sentencing, such as facts related directly to the crime or a defendant's prior record, and had to set sentences within predetermined ranges. But in the 2005 case of drug dealer Freddie Booker, the Supreme Court ruled that this system of mandatory sentencing was unconstitutional. At Booker's sentencing, the government presented evidence that he'd possessed far more cocaine than prosecutors had alleged at trial—boosting his mandatory sentence under the guidelines from 262 to 360 months. (It is common for evidence to be introduced during the sentencing phase that is not relevant or admissible during a trial.) The Supreme Court ruled that the sentence violated Booker's Sixth Amendment right to a jury trial, but also found that the constitutional problem would be solved if the guidelines were advisory.

Initially, *Booker* was seen as a big win for the defense bar. Defense attorneys say they now have more leverage during pretrial negotiations because prosecutors cannot threaten defendants with certain jail terms if they are convicted. And at sentencing, defense lawyers can now present additional information about their clients, including their charitable works or health concerns, that judges could not consider under the guidelines.

But this new flexibility hasn't led to fire-sale reduced sentences. "Defense attorneys thought school was out," says Ian Comisky, a white-collar criminal defense partner at Blank Rome, "and that has not happened."

According to the U.S. Sentencing Commission, before *Booker,* 74 percent of white-collar convicts received sentences within the federal guidelines. Since *Booker,* that number has declined only slightly, to 64 percent. Judges no longer have to follow the guidelines—but in general, they do.

In part, that's because plea agreements frequently provide that both parties will accept a guideline sentence, say several defense lawyers. Judges don't have to accept prosecutors' sentencing recommendations, of course, but the court rarely objects when the government and defense agree on sentencing. Also, judges appreciate having some objective framework for setting punishments, says Douglas Berman, a sentencing expert and professor at The Ohio State University Michael E. Moritz College of Law. They feel more confident when their decisions are endorsed by an independent authority.

But the dominant force in keeping sentences within the guidelines has been appellate court activism. Several circuits, including the Third and the Eighth, have been aggressive in overturning lower court decisions imposing below-guideline sentences in which judges did not provide "extraordinary" justification. A recent study by the New York Council of Defense Lawyers found that, as of November 2006, appellate courts nationwide had overturned 60 of 71 below-guideline sentences appealed by prosecutors. By contrast, they reversed only seven of 154 above-guideline sentences appealed by defendants.

Defense lawyers worry that harsh appellate review has kept district court judges from exercising the discretion granted them by the Supreme Court. Gregory Poe, a white-collar criminal defense partner at Robbins, Russell, Englert, Orseck, Untereiner, & Sauber, says that requiring judges to have an extraordinary reason for going below the guidelines is "a wolf in sheep's clothing. It's a pretext for doing mandatory sentencing all over again."

James Robinson of Cadwalader

The Supreme Court will consider precisely that issue in *United States* v. *Gall,* which was argued on October 2. In this case, the district court gave Brian Gall a reduced sentence of three years' probation for distributing Ecstasy instead of the guideline sentence of 30–37 months' prison time because, by the time he was prosecuted, Gall had kicked his habit, opened a legitimate business, and cooperated fully with authorities. The justices will decide on what grounds appellate courts can find such nonguideline sentences unreasonable.

Even if the Court gives judges more protection from being overturned, they still won't stray too far, predicts James Robinson, a white-collar criminal defense partner at Cadwalader, Wickersham & Taft who represented the U.S. Sentencing Commission in the Booker case. If there's a rise in inconsistent sentences for similar crimes or if prison terms shrink substantially, he says, Congress could pass legislation to make sentencing guidelines mandatory again.

For now, all eyes are on the Supreme Court. Defense lawyers believe that a win in *Gall* is critical to ensuring that the Booker decision has teeth. *Booker* will be a lost promise if appellate courts routinely reverse judges for going outside the guidelines, says David Gerger, a white-collar criminal defense lawyer at Houston's David Gerger & Associates. "You have to let judges be in charge," he says.

—*Elizabeth Goldberg*

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