White Collar Defense And The Death (For Now) Of Sentencing Guidelines

R. Christopher Cook

On January 12, 2005, the Supreme Court in *United States v. Booker*, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005) announced that the Federal Sentencing Guidelines would no longer require judges to impose sentences within a narrow range as had been the case for the last 20 years. Rather, the guidelines are now advisory. Under *Booker*, trial judges are required to consult the Guidelines in imposing sentences, but the courts are no longer subject to almost automatic reversal when they sentence defendants outside the prescribed range. Instead, appellate courts will reverse a sentence only if it is not “reasonable.”

The *Booker* decision has sent shock waves through the legal community and all three branches of government. The coming months will bring uncertainty in federal criminal sentencing. Importantly, these changes in the Guidelines will shift the balance of power between prosecutors and defendants, particularly in business crime or “white collar” prosecutions. It remains to be seen whether these changes will bode well or ill for targets of such investigations. Regardless, *Booker* presents opportunities for defendants to seek just results in situations that otherwise would be subject only to the cookie-cutter justice meted out under the Guidelines. *Booker* essentially transferred away from prosecutors and back to courts substantial power over defendants’ sentences. That fact will provide white collar defendants and their lawyers with a credible threat to reject agreements with the government in favor of a judicial determination.

The Old Guidelines System

The Sentencing Reform Act of 1984 represented years of legislative negotiations designed to reshape federal sentencing. The goal of the Act was to implement “a system that diminishes sentencing disparity” and “base[s] punishment upon the real conduct that underlies the crime of conviction.” *Booker*, 125 S.Ct. at ___, 2005 U.S. LEXIS 628 at 461 (emphasis in original). To reach this goal, the Guidelines required judges to make factual findings about a defendant’s “real conduct” and to use those findings in calculating a sentencing range.

The Guidelines range is based upon two calculated numbers: the defendant’s offense level and his criminal history category. The offense level reflects the conduct the court finds the defendant committed. The criminal history category reflects prior convictions of the defendant. Once these two numbers are determined, the court looks up a sentencing range in a chart. Absent extraordinary circumstances, the court is required to sentence the defendant within that range.

The court calculates a defendant’s Guidelines level after conviction. Facts established by the conviction form the starting point for the process. Both sides have an opportunity at the sentencing hearing to prove additional facts by a preponderance of the evidence. That is, the facts must be shown to be more likely true than not. At trial, by contrast, the government must prove facts beyond a reasonable doubt under the Sixth Amendment of the Constitution. Many of the facts the government typically seeks to prove at the sentencing stage consist of so-called “relevant conduct” not encompassed within the offense of conviction.

The sentencing hearing can prove to be more important than the trial in determining the actual sentence a defendant receives. A defendant’s sentence increases (that is, points are added to the offense level) for factors such as:
- the amount of loss in a fraud scheme;
- the weight of drugs in a controlled substances case;
- obstruction of justice;
- the nature of the victim, as an official government agency, an elderly person or other class of victim for which Congress seeks special protection;
- the complexity of a fraud, including the amount of planning required to accomplish it;
- the leadership role of the defendant in a multi-person scheme; and

Please email the author at christophercook@jonesday.com with questions about this article.
• the sincerity of the remorse expressed by the defendant at sentencing.

In many instances, the amount of time a defendant will spend in prison can vary by years or even decades depending on the court’s findings at the sentencing hearing.

Congress has imposed draconian punishment for white collar crimes by ratcheting up the sentencing ranges for fraud convictions in 2002 and again in 2003. For example, a corporate officer convicted in an $8 million accounting fraud in 2000 would have faced five to six years in prison. By 2003, that same executive would face 20 years in prison. If the fraud caused $500 million in losses – perhaps by causing stock prices to fall – the same executive would face life in prison under the Guidelines after the 2003 amendments.

Virtually the only way to avoid these prison sentences under the Guidelines is to plead guilty and cooperate with the government. Under the Guidelines, the court may depart downward from the sentencing range only if the prosecutor makes a motion based upon the substantial cooperation of the defendant. The government is the sole arbiter of the truthfulness of the defendant’s cooperation. If the government decides that the defendant has not cooperated sufficiently, the court is without power to depart from the Guidelines range. Not surprisingly, this places enormous pressure on a defendant to plead guilty and cooperate.

How Booker Changed The Sentencing Guidelines

The Supreme Court held in Booker that the Guidelines violate the Sixth Amendment right to have a jury decide all facts on which punishment will be based. Interestingly, the Court did not simply strike down the Guidelines and send judges and prosecutors back to pre-1986 law. Had that been the case, trial courts would have unfettered discretion to impose a sentence within the statutory range. Thus, in the example above, if the defendant had been convicted of five counts of wire fraud, his sentence could have been anything between probation and 150 years in prison. Instead, the court declared that the Guidelines are advisory. This placed the Guidelines in a limbo between being truly invalidated and fully enforced.

Under Booker, courts must consider the Guidelines before imposing a “reasonable” sentence. Appellate courts will reverse any sentence that is not reasonable. The Court did not, however, indicate whether a sentence within the Guidelines range would be presumed to be reasonable. Likewise, the Court did not indicate whether reasonableness would be measured by the Guidelines, by the guiding principles articulated in the Sentencing Reform Act or by some subjective measure to be developed by courts over time. Courts are coming out on all sides of this issue as they begin to grapple with how to implement Booker.

The Department of Justice is advocating for the status quo ante. In a January 28, 2005 memo, the Deputy Attorney General, James B. Comey, directed federal prosecutors to “actively seek sentences within the range established by the Guidelines in all but extraordinary cases.” Clearly, the Department of Justice does not intend to relinquish voluntarily the certain punishment created by the Guidelines or the power that this placed in their hands.

All of these questions may be resolved by the legislative branch. Indeed, the Court in Booker itself suggests as much, openly inviting Congress to fix the Guidelines. At this time, it is impossible to say whether and how Congress may do so. Hearings have been held, and more are scheduled. Possible solutions include an increased use of mandatory minimum sentences; creation of smaller statutory ranges based upon amount of loss or other factors; the implementation of advisory guidelines similar to Booker; or directing that facts necessary to sentencing will be decided by the jury at the time of conviction.

The Impact Of Booker On White Collar Prosecutions

Booker will affect white collar crime prosecutions by creating short term inefficiency and widespread uncertainty. It is not clear how these consequences will benefit the prosecution or the defense. One can assume from the Department of Justice’s response to Booker, however, that the Department was not pleased with the decision.

The inefficiency created by Booker stems from the lack of clear rules to guide courts. Sentencing appeals predictably will explode, now that sentences within the Guidelines range arguably can be appealed as “unreasonable.” Similarly, courts will see an increase in post-conviction litigation. As the Department of Justice responds to this collateral litigation, it will have fewer resources to devote to the investigation and prosecution of offenses, including resource-intensive white collar investigations. The judicial discretion that Booker injects into the sentencing process will have a more direct impact on white collar prosecutions, clearly benefiting defendants in most cases. Federal prosecutors in white collar cases have leverage in plea discussions because of the near certainty of stiff prison terms following conviction. Because almost the only relief from these sentences is cooperation, defendants will do the government’s bidding and plead guilty even when valid defenses remain available. Under Booker, neither the defense nor the prosecution can be certain that the lengthy prison terms decreed by the Guidelines will be imposed. This change gives defendants a realistic threat to go to trial or to plead guilty without a written agreement with the prosecutor. The defense can now take its chances with the judge, rather than currying favor with the government.

Conversely, the newly-created judicial discretion could hurt defendants where a low Guidelines range has acted as a limit on judges imposing a harsher sentence. Because of its policy pronouncement, the Department of Justice presumably will take the position that the court should not impose a sentence above the Guidelines range, thus reducing any negotiating leverage this might afford the prosecution in such cases. At sentencing, however, the defendant may nonetheless face a longer prison term imposed by a judge who is not bound by a modest Guidelines range or by the Department’s position regarding the court’s sentencing authority.

Booker may create an opening for self-defined cooperation departures. No longer is the sufficiency of a defendant’s cooperation decided exclusively by the government. Instead, the sentencing court arguably has independent authority to impose a reasonable sentence below the Guidelines range based upon a defendant’s cooperation, even if the government is not satisfied with the cooperation. Here again, Booker threatens to undermine the government’s power in white collar prosecutions, particularly during plea negotiations, because it shifts to the court much of the power that previously was reserved exclusively to the prosecution.

Only time will tell how these issues play out. If Congress acts as the Booker Court invited, all of these considerations could become moot. Until then, Booker has leveled the playing field slightly for defendants and their attorneys when negotiating and litigating with federal prosecutors in white collar cases.

Please email the author at christophercook@jonesday.com with questions about this article.