

# Supreme Court Strikes Down Mandatory Provisions of Federal Sentencing Guidelines



## *The Federalist Society for Law and Public Policy Studies*

*The Federalist Society takes no position on particular legal or public policy initiatives. All expressions of opinion are those of the author or authors. We hope this and other white papers will help foster discussion and a further exchange regarding current important issues.*

## Supreme Court Strikes Down Mandatory Provisions of Federal Sentencing Guidelines

In one fell swoop, the United States Supreme Court struck down the mandatory provisions of the eighteen-year old Federal Sentencing Guidelines (hereinafter "Guidelines") while preserving the remaining Guidelines law as an essentially advisory scheme to be considered by federal district judges in sentencing defendants. *United States v. Booker* and *United States v. Fanfan*, 2005 WL 50108 (Jan. 12, 2005)(hereafter "*Booker*"). Relying on its prior decision in *Blakely v. Washington*, 542 U.S. \_\_\_ (2004), the Supreme Court, in an opinion authored by Justice Stevens, held that the Sixth Amendment right to trial by jury applies to the Guidelines and that juries, not judges, must find facts relevant to sentencing. In a second opinion authored by Justice Breyer, the Court rejected the defendants' assertion that the procedural mandates of *Blakely* and precedent cited therein could be "engrafted" onto the Guidelines in their present form. Instead, the Court "severed" and "excised" both the provision that had made the Guidelines compulsory upon sentencing courts, and the provision setting forth the standard of appellate review, from the Sentencing Reform Act of 1984.

In the earlier case of *Blakely*, the Supreme Court held that a state court's upward sentencing departure from a standard guideline range violated the defendant's Sixth Amendment right to trial by jury because the facts on which the judge relied at sentencing were neither admitted by the defendant nor found by a jury. In reaching its conclusion in *Blakely*, the Supreme Court applied even earlier precedent *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed "statutory maximum" must be submitted to a jury and proved beyond a reasonable doubt. The "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.

The Supreme Court in *Booker* concluded that the Sixth Amendment right to jury trial, as construed in *Blakely*, applies to the Guidelines. *Booker* involved two criminal cases consolidated from the First and Seventh Circuit Courts of Appeal. In the case of Freddie Booker, the judge found additional facts at the sentencing hearing that resulted in a substantially higher guideline range for Booker than would have been imposed had the judge relied solely on the facts found by the jury in reaching their verdict. Complying with the mandatory nature of the Guidelines, the judge sentenced Booker to 30 years imprisonment, nine years more than the sentence authorized by the guidelines applicable by virtue of the jury verdict alone, that is, had no sentencing hearing been conducted. Booker appealed his sentence and the Seventh Circuit held that application of the Guidelines conflicted with the Supreme Court's holding in *Apprendi* that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Relying on *Blakely*, the Seventh Circuit found that the statutory maximum per *Apprendi* is the maximum sentence that may be imposed solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In Ducan Fanfan's case, the sentencing judge refused to follow controlling provisions of the Sentencing Guidelines after finding additional facts at the sentencing hearing that would have required imposition of a sentence substantially higher than that which was permitted by the jury

verdict alone. Relying, in part, on *Blakely*, the district judge sentenced Fanfan within the lower guideline range, imposing a sentence based solely on the jury verdict in the case. In so doing, he decided to follow the Guideline provisions that did not contravene the Sixth Amendment. The government appealed to the First Circuit and, as in Booker's case, also filed a petition for *certiorari* to the Supreme Court. In both petitions, the government asked the Court to determine whether the *Apprendi* line of cases (referenced above) applies to the Sentencing Guidelines and, if so, which provisions of the Guidelines remain legally valid.

Accordingly, the Supreme Court in *Booker* held that the Sixth Amendment right to jury trial applies to the Guidelines. The Court premised its holding and reaffirmation of *Apprendi* on two basic precepts steadfastly embedded in common law. The first is that the Constitution protects every criminal from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. The second is that the Constitution grants each defendant the right to a trial by jury, which must find him guilty of all the elements of the crime with which he is charged. In reaching its holding that *Blakely* applies to the Guidelines, the Court reviewed precedent it considered relevant to the inquiry, including *Jones v. United States*, 526 U.S. 227 (1999), which the Court said foreshadowed its holding in *Booker* by concluding that the harm to the victim was an element of the crime. The *Booker* Court also reasoned that because the Guidelines are binding, they have the force and effect of laws. As such, their use clearly and impermissibly violates the Sixth Amendment, and in that context the Guidelines are unconstitutional.

Weighing the issue of whether and particularly to what extent the Guidelines are inapplicable, in a separate opinion authored by Justice Breyer the Supreme Court went on to invalidate two specific provisions of the Guidelines. The first provision held unconstitutional by *Booker*, and therefore "severed" as being incompatible with the Sixth Amendment, is 18 U.S.C. § 3553(b)(1), which makes the Guidelines mandatory upon sentencing courts. The other provision is 18 U.S.C. § 3742(e), which provides for the standard of review on appeal. As now modified by *Booker*, federal judges must nevertheless still *consider* the Guidelines--particularly the factors outlined under § 3553(a)--in tailoring appropriate sentences, subject to a "reasonableness" standard of review by appellate courts. Thus, a sentence must still reflect the seriousness of the offense, promote respect for the law, provide just punishment, provide adequate deterrence, and protect the public. The Court's holding in *Booker* is based on a number of considerations, including original Congressional intent in drafting the Guidelines. Thus, the Court stated that the basic goal Congress intended in promulgated the Guidelines was to move the federal sentencing scheme in the direction of increased uniformity. Therefore, the excision of the mandatory aspects of the Guidelines still leaves the federal sentencing system consistent with original legislative intent.

In summary, *Blakely* applies to the Guidelines; and *Booker* has reaffirmed the Supreme Court's holding in *Apprendi*. Application of the Guidelines violates the Sixth Amendment. Therefore, the Guidelines are no longer mandatory and binding on federal courts. Instead, they are effectively advisory; federal sentencing courts must still consult them in exercising their discretion in tailoring appropriate sentences, subject to a "reasonableness" standard of review. Finally, the *Booker* decision is applicable to all cases pending on direct review. However, in view of the unanimity of federal circuit courts holding *Apprendi* not retroactive to cases on

collateral review, it is likely that *Booker* is also not available to defendants in § 2255 challenges, among other forms of collateral attack.