

U.S. v. BOOKER/U.S. v. FANFAN
GSB Meeting Talking Points

I. What did the Court hold in U.S. v. Booker/Fanfan?

- January 12, 2005—U.S. Supreme Court decided two companion cases, U.S. v. Booker (Wisconsin) and U.S. v. Fanfan (Maine), in two separate opinions, holding:
 - Sixth Amendment guarantee of a trial by jury precludes any federal sentencing schemes based on judicially determined facts alone—only a jury can find facts which increase a sentence beyond a statutory maximum penalty—J. Stevens, 5-4 majority opinion.
 - Judges cannot be mandated to apply the Federal Sentencing Guidelines—merely advisory—J. Breyer, 5-4 majority opinion.
 - Interesting note: Justice Breyer helped create the federal sentencing guidelines in his capacity as counsel to the Senate Judiciary Committee and a member of the Sentencing Commission. Although some scholars petitioned for his recusal, he consulted an ethics expert from NYU Law School who issued a letter advisory opinion indicating that the Justice’s recusal was not necessary since he was no longer on the Sentencing Commission.
 - Interesting note: Justice Ginsburg provided the majority vote for both opinions, but issued no opinion explaining her position.
- A Confusing Dichotomy Created:
 - The guidelines were not struck down as unconstitutional in their entirety, the court struck down their current mandatory application, which usurps judicial discretion in sentencing.
 - Although the court held that the mandatory nature of the guidelines violates the Sixth Amendment, they still held that they could be relied upon on an advisory basis.
- What was the dilemma that the Court resolved?
 - The guidelines allowed instances where defendants were sentenced above the guideline range based on conduct that was judicially determined by a preponderance of the evidence at sentencing, but never found beyond a reasonable doubt by a juror.
 - The Court resolved that this application of the guidelines violated the Sixth Amendment guarantee of a trial by jury.
 - Common example:
 - In drug cases, at sentencing a defendant who the DEA learn from a cooperating witness also sold 50 grams of crack that is not already incorporated in the charged conduct, the possession of this quantity

of drugs, under the guidelines, can be taken into account at sentencing if the Government has proof by a preponderance.

- Booker was convicted of possessing 92.5 grams of crack by a jury but at sentencing received an additional 8 years on a 22-year sentence when the judge found that he possessed an additional 566grams. The additional finding by the judge increased his sentencing range to 360 to life from 210-262 months.
- Fanfan was convicted by a jury of distributing at least 500 grams of cocaine, but the sentencing judge found that the defendant was responsible for 2.5 kilograms of cocaine and 261.6 grams of crack. These finding entitled the defendant to an additional 15-16 years as opposed to 5-6 years authorized by the jury verdict alone.

II. How did we get here—history of the guidelines dispute?

- In response to a perceived disparity in sentencing and to increase uniformity among federal judges, Congress enacted the Sentencing Reform Act of 1984, creating the U.S. Sentencing Commission, who formulated the U.S. Sentencing Guidelines.
- From its inception, the Guidelines have been controversial and sometimes criticized as Congress' attempt to obliterate judicial discretion in sentencing.
- Additionally, the guidelines have been criticized by judges as being too inflexible and not allowing discretion to take an individualized look at defendants' conduct during sentencing.
- Since 2000, significant legal challenges to the guidelines' have arisen with respect to the Sixth Amendment challenge to relevant conduct at sentencing which increased a defendant's sentence without a jury finding the factual basis to support the increase.
- In 2000, the Court decided Apprendi v. NJ, 530 U.S 466 (2000) and last summer the Court decided Blakely v. Washington, 542 U.S. __ (June 24, 2004) —both cases led to the Court's decision in Booker/Fanfan that only a jury can find facts that increase a defendant's sentence and the mandatory application of the guidelines in this manner is unconstitutional.

III. What are the guidelines anyway?

- The federal sentencing guidelines are federal statutes, which define mandatory sentencing ranges for federal defendants based on criminal history and the offense conduct.

Paulette Brown, Esq.
Garden State Bar Meeting
1/20/05

- The guidelines assigned a point system for the defendant's criminal history and assigned levels for the offense conduct, which intersect on the sentencing table to determine the applicable mandatory sentencing range for a defendant.
- The guidelines allowed some room for departures under limited circumstances and significantly removed federal judicial discretion.
 - Example: A defendant convicted of distributing 100 grams of heroin with no prior convictions was assigned a level 24 and a criminal history category of 1. The corresponding range is 51-63 months according to the sentencing table.

IV. What does Booker mean for the future?

- Greater discretion for federal judges to consider individual factors when sentencing.
- General confusion over the meaning and effect of the decision since the guidelines were not struck down as unconstitutional, but rather were deemed unconstitutional when judges are mandated to apply them.
- Congressional and Executive (Justice Department) response imminent in order to reign in judicial activism and attempt to regain a system for uniformity.
- Difficulty for Court of Appeals judges to review sentences under the "reasonableness" standard.
- Increased judicial discretion at the trial level but less guidance for appellate judges.
- Potential for less uniformity in sentencing
- Less incentive for defendants to cooperate with the Government in light of inability to provide gauges of where the sentence will likely fall.
- Current prisoners may receive favorable review of their sentences.
- White collar and drug offenders more likely to receive less severe sentences (constitute approx 55% of federal prisoners according to the Sentencing Project).

V. Questions