



SECOND CIRCUIT REVIEW

BY MARTIN FLUMENBAUM AND BRAD S. KARP

Sentencing in the Post-'Booker' World

In this month's column, we report on a decision issued earlier this month in which the U.S. Court of Appeals for the Second Circuit became the first federal appeals court to address the impact on federal sentencing of the Supreme Court's consolidated opinion in *United States v. Booker* and *United States v. Fanfan* ("Booker").¹

Booker struck down as unconstitutional those portions of the Sentencing Reform Act of 1984 (SRA) that required a sentencing judge to enhance a defendant's sentence, pursuant to the U.S. Sentencing Guidelines (Guidelines), based on judicial fact-finding. The Supreme Court also imposed a "reasonableness" standard of appellate review.

In *United States v. Crosby*,² the Second Circuit, in a unanimous opinion written by Judge Jon O. Newman, and joined by Judges Amalya L. Kearse and Jose A. Cabranes, provided an exposition on how district judges ought to implement *Booker*. The court stated that, although *Booker* removed the mandatory aspect of the Guidelines, *Booker* "do[es] more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of the sentencing judge."³ According to the Second Circuit, district



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judges have a continuing duty to "consider" the Guidelines as well as the other factors identified in 18 USCA §3553(a). Because the district judge in *Crosby*, sentencing prior to *Booker*, committed constitutional error when he mandatorily applied an enhanced Guidelines sentence based on judicial fact-finding, the Second Circuit remanded for reconsideration of whether to resentence.

Background

Jerome Crosby pleaded guilty, without a plea agreement, to possession of a firearm by a convicted felon. In the course of his arrest, Mr. Crosby pointed a loaded shotgun at a police officer. After accepting Mr. Crosby's plea, District Judge Frederick J. Scullin Jr. held an evidentiary hearing to resolve factual disputes pertaining to the available sentencing enhancements under the Guidelines. Applying the 2002 Sentencing Guidelines Manual, Judge Scullin determined that Mr. Crosby's base offense level was 24. Judge Scullin went on to make the following three enhancements, all based on judicial fact-finding: (1) four additional levels for possessing a firearm in connection with another

felony — namely, reckless endangerment; (2) three levels because Mr. Crosby's actions created a significant risk to law enforcement; and (3) two levels for obstruction of justice based on materially false pretrial testimony.

With an adjusted offense level of 33 and a Criminal History Category IV, the applicable sentencing range was 188 to 235 months. However, because the statutory maximum for the offense was 120 months, Judge Scullin imposed as much of the Guidelines as possible, sentencing Mr. Crosby to 120 months' imprisonment, three years of supervised release and a special assessment of \$100.

Mr. Crosby appealed his sentence to the Second Circuit.

Supreme Court in 'Booker'

The Supreme Court's decision in *Booker* consists of two separate 5-4 majority opinions. The substantive opinion, written by Justice John Paul Stevens, considered the impact of the Court's opinion in *Blakely v. Washington* on the SRA and the Guidelines.⁴ *Blakely* held that Washington State's determinative sentencing scheme violated the Sixth Amendment right to jury trial by requiring judges to impose sentences based on facts other than those found by a jury or admitted by the defendant. *Booker* extended the Court's decision in *Blakely* to the Guidelines, concluding that the Guidelines and Washington State's scheme suffer from the same constitutional infirmity — the relevant sentencing rules are mandatory. As the Court explained: "If the Guidelines as currently written could

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be read as merely advisory provisions that recommended, rather than required, selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.”⁵

In the remedy opinion, authored by Justice Stephen Breyer, the Court addressed the impact of the Guidelines’ constitutional shortcomings on the existing system. Rather than conclude that the entire SRA is unconstitutional, the Court sought to retain those aspects of the SRA that are: (1) constitutionally valid; (2) capable of functioning independently; and (3) consistent with Congress’ basic objectives. On this basis, the Court severed and excised the two problematic provisions — specifically, §3553(b)(1), which made the Guidelines mandatory, and §3742(e), which provided for de novo appellate review of district judges’ decisions to depart from the Guidelines.

The Court’s modifications render the Guidelines “effectively advisory;” district judges are required only to consult and consider the Guidelines in sentencing. Moreover, the Court substituted “a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness].’”⁶

The Second Circuit’s Decision

Two days prior to oral argument in *Crosby*, the Supreme Court decided *Booker*. At oral argument, Mr. Crosby argued, predictably, that the district judge impermissibly based the Guidelines enhancements on facts found by the court and was operating under the misimpression that the SRA required their application. In response, the government conceded that the district judge committed the sort of constitutional error described in *Booker*, but maintained that the error was harmless because it resulted in a “reasonable” sentence.

The Second Circuit emphasized in its opinion that *Booker* did not discard the Guidelines. Rather, under the new advisory approach, “sentencing judges remain under a duty ... to ‘consider’ [the Guidelines],

along with other factors listed in section 3553(a).” The Second Circuit explained that this “duty to consider” requires more than a general reference to the entirety of the Guidelines. In most cases, a sentencing judge first will need to determine the applicable Guidelines range and consult any relevant policy statements, including departure authority.⁷

Importantly, the Second Circuit stated that under the post-*Booker*, non-mandatory Guidelines regime, a sentencing judge is entitled to find all of the facts relevant to determining a Guidelines range and sentence — as well as those relevant to a non-Guidelines sentence.⁸ This is so, the Second Circuit explained, because, despite

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the Court’s pre-*Booker* precedents that define the maximum allowable Guidelines sentence as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,”⁹ under the advisory regime, the maximum lawful sentence is the statutory maximum. The court concluded that “because judicial fact-finding under advisory Guidelines cannot increase the lawful [statutory] maximum, judicial fact-finding now encounters no Sixth Amendment difficulties.”¹⁰

After a sentencing judge has determined the applicable Guidelines range, the Second Circuit explained that *Booker* requires the judge to “consider” that range, along with the other factors listed

in §3553(a). Section 3553(a) lists, among other factors, the nature and circumstances of the offense; the need for the sentence imposed, including the seriousness of the offense and the potential deterrent effect; the kinds of sentences and the sentencing range established for the applicable category of offense by the applicable category of defendant; and any pertinent policy statements.

The Second Circuit declined to determine how much consideration is required under *Booker* or to prescribe a formula by which sentencing judges can satisfy their duty. Instead, the court opted to allow “the concept of ‘consideration’ in the context of the applicable Guidelines range to evolve as district judges faithfully perform their statutory duties.”¹¹

The Second Circuit next addressed the scope of appellate review in the wake of *Booker*’s “reasonableness” standard. As an initial matter, the court stated that reasonableness review will not be limited to the length of the sentence. Analogizing to appellate review under the abuse of discretion standard, the Second Circuit explained that *Booker*’s reasonableness standard contemplates review of both the merits of a district judge’s sentence and any errors of law made in reaching that sentence.¹²

The Second Circuit pointed to four procedural errors that, if properly preserved and not deemed harmless, the court will find unreasonable: (1) judicial fact-finding and mandatory enhancement of the Guidelines range beyond that applicable to the facts found by a jury or admitted by the defendant; (2) mandatory application of a Guidelines range based only on facts found by a jury or admitted by the defendant; (3) refusal to consider the Guidelines range and other factors listed in §3553(a); and (4) refusal to consider the applicable Guidelines range based on facts found by the court.

For pre-*Booker* sentences pending on direct review with respect to which any of the above errors has occurred, the Second Circuit concluded that the proper

procedure is to remand the case to the district court, "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence."¹³ The court based its conclusion on an interpretation of §3742(f), which provides, in relevant part: "If the court of appeals determines that ... the sentence was imposed in violation of law ..., the court shall remand the case for further sentencing proceedings." The court reasoned that §3742(f)'s language, which normally is read to contemplate remand for resentencing, necessarily includes the lesser power to remand for a determination of whether to resentence.

The Second Circuit further explained that remanding for resentencing will ensure appropriate consideration of the prudential doctrines of plain and harmless error:

Without knowing whether a sentencing judge would have imposed a materially different sentence, under the circumstances existing at the time of the original sentence, if the judge has discharged his or her obligations under the post-*Booker* regime and counsel has availed themselves of their new opportunities to present relevant considerations, an appellate court will normally be unable to assess the significance of any error that might have been made.¹⁴

Therefore, if, on remand, a sentencing judge determines that the sentence would essentially have been the same under the post-*Booker* regime, any procedural errors in the original sentencing resulting from a mistaken perception of the law will be harmless and not prejudicial under a plain error analysis. The Second Circuit stated that district judges need not determine on remand the exact sentence they would have imposed under *Booker*; their analysis can be limited to a determination whether the sentence would be "nontrivially different" from the sentence imposed originally.

In resolving the impact of *Booker* on a specific sentence, the Second Circuit urged

district judges to obtain the views of counsel, at least in writing. The Second Circuit noted that the defendant is not required to be present at these initial proceedings, though a defendant has the option of promptly notifying the sentencing court on remand that he/she will not seek resentencing.¹⁵ The defendant must be present, however, if the district judge decides to vacate the original sentence and resentence the defendant.

Turning to the facts of the *Crosby* case, the Second Circuit concluded that remand was warranted to allow Judge Scullin the opportunity to determine whether Mr. Crosby's original sentence would have been "nontrivially" different under the post-*Booker* regime. Accordingly, the Second Circuit expressed no opinion as to the reasonableness of the length of Mr. Crosby's sentence.

Conclusion

The Second Circuit's opinion provides much needed guidance to district judges as they endeavor to apply the Supreme Court's opinion(s) in *Booker*. At its core, *Crosby* stands for the following propositions:

- (1) the Guidelines are no longer mandatory;
- (2) a sentencing judge nonetheless must consider the Guidelines and the other factors listed in §3553(a);
- (3) consideration of the Guidelines ordinarily will require determination of the applicable Guidelines range;
- (4) after due consideration, a sentencing judge may opt to impose a sentence within the applicable Guidelines range or permissible departure authority, or impose a non-Guidelines sentence; and
- (5) the sentencing judge is entitled to find all facts appropriate for determining a Guidelines or non-Guidelines sentence.

More Issues

Going forward, however, several issues remain to be resolved, including the

applicability of *Booker* to an appeal arising on collateral review and whether the Ex Post Facto Clause prevents a district judge from imposing a more severe sentence on remand than imposed originally. Many district courts have found the sentencing guidelines to be a source of great frustration. With the Supreme Court's ruling in *Booker* and the Second Circuit's decision in *Crosby*, district judges at long last have been unshackled from the rigid constraints imposed by the Guidelines.

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1. 125 S.Ct. 738 (2005).
2. No. 03-1675, 2005 WL 240916 (2d Cir. Feb. 2, 2005).
3. *Crosby*, 2005 WL 240916, at *7.
4. 124 S.Ct. 2531 (2004).
5. 125 S.Ct. at 750-51.
6. *Id.* at 765 (citing 18 U.S.C. §3753(e)(3) (1994 ed.)).

7. The Second Circuit noted that under the advisory Guidelines system, precise calculation of the applicable Guidelines range will not be necessary in situations where, faced with two potentially applicable Guidelines, the sentencing judge opts to impose a non-Guidelines sentence. The court explained that this conclusion is consistent with the Second Circuit's pre-*Booker* case law, including *United States v. Borrego*, in which the Second Circuit held that a sentencing judge was not required to resolve a dispute over two potentially applicable ranges where the judge had decided to make a permissible departure. 388 F.3d 66, 68-60 (2d Cir. 2004).

8. The Second Circuit explained that a "non-Guidelines sentence" refers to a sentence that is neither within the applicable Guidelines range nor imposed pursuant to the departure provisions in the Guidelines' policy statements. A "departure," by contrast, is considered a "Guidelines sentence" even though it is not within the applicable Guidelines range.

9. *E.g.*, *Blakely*, 124 S.Ct. at 2537 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

10. *Crosby*, 2005 WL 240916, at *3 n.6. Indeed, according to the Second Circuit, *Booker's* remedy opinion contemplates that "the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection." *Id.* at *5.

11. *Crosby*, 2005 WL 240916, at *7. On the same day it issued its opinion in *Booker*, the Second Circuit had its first opportunity to address the parameters of *Booker's* duty to consider. In *United States v. Fleming*, the Second Circuit reviewed a two-year sentence imposed on a defendant for violation of supervised release. The Second Circuit concluded that the district judge sufficiently considered the Guidelines where the judge was "well aware of the 5-11 month range recommended in the commission's policy statement and explicitly decided that a longer term was warranted." No. 04-1817, 2005 WL 237200, at *4 (2d Cir. Feb. 2, 2005).

12. In *Fleming*, the Second Circuit described the reasonableness standard as a "flexible concept" and stated that appellate courts should not exhibit "micromanagement" of sentencing courts. 2005 WL 237200, at *4. The court based its view on the district court's comparatively greater familiarity with the details of the case, including the defendant. *Id.*

13. *Crosby*, 2005 WL 240916, at *11; cf. *Fleming*, 2005 WL 237200, at *4 (holding that remand was not warranted because sentencing judge was "functioning under a sentencing regime that, even before [*Booker*], was advisory with respect to supervised release").

14. *Crosby*, 2005 WL 240916, at *11.

15. *Crosby*, 2005 WL 240916, at *13 (citing Fed. R. Crim. Proc. 43(b)(3)).

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