



U.S. Department of Justice

United States Attorney
Western District of New York

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FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NEW YORK

Federal Centre
138 Delaware Avenue
Buffalo, New York 14202

716-843-5700
FAX 716-551-3052
Writer's Extension: 814
Writer's E-Mail Address: michael.battle@usdoj.gov

January 19, 2005

Hon. Richard J. Arcara
Chief U.S. District Judge
U.S. Courthouse
68 Court Street
Buffalo, New York 14202

Re: **Application of United States v. Booker
to the Federal Sentencing Guidelines**

Dear Judge Arcara:

I am writing to advise the Court of this office's position on the application of United States v. Booker, 2005 WL 50108 (January 12, 2005) to the Federal Sentencing Guidelines. As I am sure you have ascertained, in United States v. Booker, the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in Blakely v. Washington, 124 S. Ct. 2531 (2004). The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. As a remedy, the Court severed and excised only the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) and the relevant appeals standard in 18 U.S.C. § 3742(2). Thus, the Guidelines become "effectively advisory." Booker, 2005 WL 50108 at *16. This ruling results in a system in which the sentencing court, after considering the Guidelines, may impose any reasonable sentence up to the statutory maximum penalty for the offense of conviction. The sentence will be subject to review by the Court of Appeals for "reasonableness." Id. at *24. Significantly, the other portions of the Sentencing Reform Act remain firmly in place, as discussed below.

Justice Breyer's majority opinion directed that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Id. at *27. Accordingly, the government believes that Booker requires the district court to make a correct calculation under the existing Sentencing Guidelines and then consider that Guideline calculation when determining the sentence to be imposed.

The Sentencing Guidelines and all other sentencing statutes remain in effect. These include 18 U.S.C. § 3553(a), which lists the general purposes of sentencing and directs that sentencing courts “shall consider” the listed factors, including “the kinds of sentence and the sentencing range” established by the Guidelines, and 18 U.S.C. § 3553(c), which requires a sentencing court to state in open court the reasons for a particular sentence and, if the sentence is outside the guideline range, the specific reasons for the imposition of a sentence that is different from the guideline range.

It is the position of the United States that, absent highly unusual circumstances, the sentence in a criminal case should fall within the guideline range as determined by the Court. This view is shared by Congress and the Supreme Court. As every Supreme Court Justice in the various opinions in Booker recognized, the Guidelines carry out the express national policy, as articulated by Congress, that sentences be uniform across the country to the extent possible and be based on the offender’s actual conduct and history. See, e.g., id. at *21 (majority opinion of Breyer, J.) (“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”); id. at *19 (same) (“Congress’ basic statutory goal -- a system that diminishes sentencing disparity -- depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”); id. at *42 (dissenting opinion of Stevens, J.) (“The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress’ principal aim.”); id. at *47 (dissenting opinion of Scalia, J.) (“the primary objective of the Act was to reduce sentencing disparity.”).

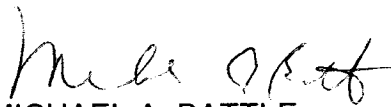
The Guidelines require that the government make certain motions for a downward adjustment -- such as the third point for acceptance of responsibility and a downward departure pursuant to § 5K1.1 of the Guidelines. It is our position that the government will continue to make the necessary motions, when appropriate, for the Court to consider in calculating the Guideline range.

The government commends to the Court’s attention the scholarly opinion in United States v. Wilson, 2005 WL 78552 (D. Utah Jan. 13, 2005), which supports the position the government asserts here. In Wilson, decided the day after Booker, Judge Cassell explained at length the reasons supporting this view. The Sentencing Guidelines, Judge Cassell said, plainly reflect the public’s will, as expressed by their democratically elected representatives, in that Congress has repeatedly approved of the Guidelines or acted to adjust them to Congressional preference. Judge Cassell further observed that guided sentencing appears to have had a positive impact in deterring criminal conduct throughout the country, and thus, serves the purpose of deterrence as well as punishment and fairness. For all of these reasons, Judge Cassell determined that “the court will give heavy weight to the Guidelines in determining an appropriate sentence. In the exercise of its discretion, the court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons.” Id. at *1.

In plea agreements, we will state the parties understanding that the Court must consider, but is not bound by the Guidelines. The only other major change to the plea agreement will be, in some cases, to permit both parties to argue for a sentence outside the guideline range.

Please feel free to contact me if you wish to discuss these issues further or require additional information or clarification.

Respectfully yours,


MICHAEL A. BATTLE
United States Attorney

MAB/sas

cc: Hon. John T. Curtin
Hon. John T. Elfvin
Hon. David G. Larimer
Hon. Charles J. Siragusa
Hon. William M. Skretny
Hon. Michael A. Telesca
Hon. Marian W. Payson
Hon. Jonathan W. Feldman
Hon. Leslie G. Foschio
Hon. H. Kenneth Schroeder, Jr.
Hon. Hugh B. Scott

Joseph A. Giacobbe
Chief, Probation Office

✓ Joseph B. Mistrett, Esq.
Federal Public Defender