A Primer on Booker/Fanfan

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On January 12, 2005 the United States Supreme Court in a 5-4 vote issued its long awaited decisions in companion cases known as *United States v, Booker*, No 04-104, slip op January 12, 2005 and *United States v Fanfan*, No 04-105 slip op, January 12, 2005. Succinctly, the Supreme Court struck down significant (but textually small) portions of the of the1984 Sentencing Reform Act, 18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998, as amended, (SRA) as being unconstitutional and altered the standard of review to be used by appellate courts in reviewing district court sentences. The SRA created and implemented the United States Sentencing Guidelines.

What started out as 'typical" federal criminal cases for Messrs. Booker (USP McCreary) and Fanfan (MDC Brooklyn) have turned out to be the most significant case regarding sentencing since the enactment of the Sentencing Reform Act in 1984.

Freddie J. Booker was charged with possession with intent to distribute at least 50 grams of cocaine base (crack). Convicted after a jury trial, Mr Booker's base level called for a sentence of between 210 and 262 months. However, the sentencing judge enhanced the sentence under the United States Sentencing Guidelines finding that Mr Booker actually possessed 566 grams of cocaine base and obstructed justice. Mr. Booker was sentenced to 30 years in prison.

Mr. Ducan Fanfan's procedural history was not dissimilar. Mr. Fanfan was charged was possession of cocaine and after a trial a jury found him guilty of possessing "500 grams or more" of cocaine. As a result, he faced between 188 and 235 months in prison. The sentencing judge, however, concluded that he possessed 2.5 kilos of cocaine and 261.6 grams of cocaine base, and was an organizer leader and manager of a criminal activity. Thus, Mr Fanfan faced an additional 10 years in prison. Unlike what happened to Mr. Booker, the sentencing judge, relying on *United States v. Blakely*, 542 US. ----- (June 24, 2004) refused to add the additional time and sentenced him "based solely upon the guilty verdict in this case." The Government appealed. With the applicability of the *Blakely* decision squarely presented in the context of the application United States Sentencing Guidelines, both cases wound there way to the Supreme Court and were consolidated for argument, briefing and decision. Due to its potential significance, the Supreme Court issued expedited briefing and argument orders.

In order to understand the importance and reach of *Booker/Fanfan,* a brief discussion of two other cases is necessary. In 2000 in *Apprendi* v. *New Jersey,* 530 U. S. 466, (2000) the Supreme Court held that "[o]ther 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. *Id*. 490

Four years later, the court 'expanded the holding of *Apprendi* and held in *Blakely* v. *Washington*, 542 U. S. ___ (2004), that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.,* at ___ (slip op., at 7). In other words, except for prior criminal history, any fact which would enhance or increase a sentence had to be found beyond a reasonable doubt by a jury (or the judge in a jury waived trial). *Blakely* however was limited in applicability to the determinate sentencing scheme adopted and used in the State of Washington. Since the State of Washington's sentencing statute was modeled after the federal scheme, it became readily apparent that the United States Sentencing Guidelines were in constitutional jeopardy. Since *Blakely,* many courts and found themselves in a state of flux and confusion---and, some say, hysteria. Some federal courts refused to impose a sentence enhancement; some continued under their pre-*Blakely* practice. The Department of Justice began to take note and changed their practice regarding pleas often requiring the defendant to admit to facts in addition to the those that support the elements of the crime so as to entitle it to request sentence enhancements. Indictments often became much more specific and detailed and quite often the government was required to prove these additional facts before a jury. Pending *Booker/Fanfan*, many courts delayed sentencing or imposed alternative sentences.

In *Booker/Fanfan,* the court not only held that the prohibitions of *Blakely* apply to the United States Sentencing Guidelines, but went a step further and ruled that the "mandatory nature" of the guidelines was unconstitutional. Instead of just requiring a "finding of fact" needed to be proven to a jury to 'preserve' the constitutionality of the Guidelines; the Court ruled that the mandatory nature of the guidelines is, in and of itself, unconstitutional. Let me quote part of the decision:

> "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."

In concluding the *Blakely* analysis the Court held:

> All of the foregoing support our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We recognize, as we did in *Jones, Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.

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> Accordingly, we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

The Court did not stop there. Once it ruled that the practice of utilizing sentencing enhancements in the federal system effected a violation of a defendant's Sixth Amendment rights, it needed to fashion a remedy.

In fashioning a remedy, the court had several options: 1. declare the United States Sentencing Guidelines unconstitutional *in toto*; 2.Declare parts of it unconstitutional and excise the offending and sever the remaining parts or 3. Declare none of it unconstitutional but "engraft" upon it a constitutional jury trial requirement discussed above. The court elected the second alternative and declared the "mandatory" application and imposition of the sentencing guidelines to be unconstitutional. In so doing, and in order to achieve what it believes to be Congress' intent, the Supreme Court "excised" two provisions of the Act: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U. S. C. §3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, *see* 18 U.S.C §3742(e) (main ed. and Supp. 2004)

As a result, district courts are now to view the United States Sentencing Guidelines as advisory only. The sentencing courts are now permitted to take into consideration a multitude of sentencing factors and not have to specifically find a reason for a downward departure under §§ 5k1 and 5k2 of the USSG's or 18 USC §3553. Courts are now at liberty to fashion "individualized' sentences based upon sound principles of penology, criminal justice and rehabilitation. Courts can now look at the offender characteristics and history, remorsefulness, a sentence's affect on innocent third parties, native intelligence and learning disorders, education, background, childhood experience, aberrant behavior factors, victomology, physiological and psychological stressors, inherent weaknesses, criminal history (or lack thereof) conduct of the government, state of mind at the time of the offense.

Additionally, the Supreme court held that in order for the Courts of Appeals to reverse a district court sentence, it must be found that the sentence was "unreasonable" in light of all the facts and circumstances. This should make it harder for the Government to successfully appeal "lighter' sentences. The inverse is also true. It will be difficult for a defendant to successfully appeal a harsh sentence.

This is not to say the a majority of the district courts *will* consider these factors and much depends on the particular judge and the particular *provable* facts presented to the court in support of the alleged factor. Some judges may, and likely will continue to apply the United States Sentencing Guidelines' table and base level criteria and will continue to apply many criteria contained in the Guidelines. However, Courts are no longer *required* to mechanically and methodically apply the legal straightjacket imposed upon them by Congress and the Sentencing Commission. In addition, the so called Feeney Amendment to the PROTECT Act (Public Law 108-21) have been nothing short of eviscerated. Portions of the PROTECT ACT prohibited downward departures in many circumstance and created Congressionally mandated "blacklist" of judges that departed nonetheless.

Needless to say, countless people are justifiably investigating the possible retroactivity of the decision. Many---but not all--- are holding out unjustifiable hope. Professor Douglas Berman recently wrote:

> Justice Stevens' opinion for the Court suggests the Court is just "reaffirm[ing] our holding in *Apprendi*" which might suggest application back to 2004, while Justice Breyer's opinion for the Court speaks of *Booker* as if it is a "new rule" only applicable to pending cases. Of course, even if *Booker* is a new rule, arguments can (and surely will) be made that this new rule fits into one of *Teague's* exceptions so as to be retroactive.

Our review of this issue is that the decision should apply retroactively. Based on policy, principles of constitutional jurisprudence and fundamental principles of fairness, *Booker* cries out for retroactive application. If an offender was *unconstitutionally* sentenced as a result of an improper enhancement as was clearly and unequivocally established in *Booker/Fanfan*, the Judicial and Legislative Branches of the government have an equally unequivocal *obligation* to correct that sentence. There is not one member of Congress nor one member of the Judiciary that declined to take there oath of office that mandates that they "uphold the Constitution." Some of these members of the National Legislature or the Judiciary on a *personal or intellectual level* might not like the impact, reach or law established by *Booker/Fanfan*, but each swore to uphold the law and the Constitution nonetheless. If they intend to pay more than "lip service" to their oath they must address in some fashion the constitutional deprivation that has occurred to many federal and state offenders.

Although little has been done yet in the courts it appears that a very significant number of federal inmates can and should be re-sentenced in a Constitutional manner. It is expected that a substantial number of various types of legal proceedings will be initiated in the near future. There is no clear generalized answer as each federal

offender's case will need to be analyzed by their lawyer individually to determine the likelihood of success of such a proceeding.

One factor that appears to have been lost by the jubilance in the wake of *Booker/Fanfan* is that the door swings both ways, so to speak. Many offenders that find themselves in a position to get re-sentenced in accordance with *Booker/Fanfan* might find that they face a harsher sentence. Since the Guidelines are no longer mandatory and the Courts now have substantially more discretion, courts also have the right to exercise that discretion subject to only an appellate determination as to whether the sentence was "unreasonable." Many might find that the judge was of the opinion that the sentence was too light---but mandated by the Guidelines. As such, they are now free to impose a stiffer sentence in accordance with *Booker/Fanfan.* Caution and sound legal thought and guidance is absolutely required before anyone should reasonable seek a re-sentence.