



Prevention of Corporate Liability

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Sentencing

U.S. Sentencing Guidelines Violate Sixth Amendment Right to Jury Trial

The U.S. Sentencing Guidelines violate the Sixth Amendment right to a jury trial by providing for increases to the maximum term of the presumptive sentencing ranges based on facts that are found by the sentencing judge, the U.S. Supreme Court declared Jan 12. The sentencing system the court decided to put in place of the current guidelines scheme makes the sentences set out in the guidelines merely “advisory” sentences that judges are to consider but are not bound to impose. (*United States v. Booker*, U.S., No. 04-104, 1/12/05)

The court said it foresees the U.S. Sentencing Commission continuing to study sentencing and to propose amendments to the guidelines, but it also expressly recognized that the advisory scheme it creates is subject to Congress’s decision step in and do something else.

The court’s ruling that the sentencing guidelines as a whole are no longer mandatory means that the organizational guidelines’ provisions defining an effective corporate compliance program, which were recently overhauled, are now merely advisory as well. As a number of commentators suggested in the wake of *Blakely*, however, the

template set forth in those provisions may continue to serve as the most influential model for such programs. See, e.g., 7/19/04 Prev. Corp. Liability 76.

Right to Jury Trial

The constitutionality of the guidelines vis-a-vis the Sixth Amendment came under serious question when the court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), announced a rule that any fact, other than a prior conviction, that increases a sentence beyond the “statutory maximum” must be found by a jury beyond a reasonable doubt.

Then, on the last day of the 2003–04 term, the court stunned the legal community when in *Blakely v. Washington*, 7/19/04 Prev. Corp. Liability 65 (U.S. 2004), it invalidated a state guidelines scheme, stating that the “statutory maximum” for purposes of the *Apprendi* rule 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.*”

In the wake of the *Blakely* decision, federal sentencing was cast into varying degrees of turmoil as federal judges disagreed about *Blakely*’s implications for the federal guidelines. The Supreme Court quickly granted review, and this case became one of the most closely watched criminal cases in recent memory.

Apprendi Applies to Federal Guidelines

Notwithstanding the government’s efforts to distinguish the federal guidelines from the state scheme struck down in *Blakely*, the court ruled that the right to jury trial does not allow federal judges to find facts that trigger sen-

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tences higher than the sentences authorized by the facts found by the jury or admitted by the defendant.

The court’s conclusion regarding the constitutionality of the guidelines and its choice of remedy were set out in two separate opinions subscribed to by different majorities. The opinion applying the *Apprendi* rule to the federal guidelines was written by Justice John Paul Stevens.

The government and the dissenters emphasized that, traditionally, the Sixth Amendment has been interpreted as allowing judges to find sentencing factors that inform a judge’s imposition of a sentence within a prescribed statutory range. In Stevens’s opinion, the court reiterated the idea expressed in its prior decisions in the *Apprendi* line that modern sentencing constructs have made the historical distinction between elements of an offense and sentencing factors inadequate to safeguard the goals of fairness and reliability sought to be protected by the right to a jury trial.

The court decided that sentencing becomes the tail that wags the dog when facts found by the sentencing judge have the effect of multiplying the sentence that would be available on the basis of the facts found by the jury alone. What makes the guidelines unconstitutional, and what distinguishes them from a collective exercise of traditional sentencing discretion, is their mandatory nature, the court stressed.

Choice of Remedy

The government had asked the justices, in the event that they did apply the *Apprendi* rule to the federal guidelines, to declare that the guidelines would still be mandatory in those circumstances in which an enhancement did not exceed a statutory maximum sentence, and to hold that, in other circumstances, the guidelines would be advisory only. The court decided to give the government half a loaf. In a second opinion in this case, written by Justice Stephen G. Breyer, the court decided that in every case the guidelines would be relegated to advisory status.

The court reaffirmed the principle that the right to jury trial is not offended when judges find facts that inform the exercise of their discretion to impose a sentence within a range of sentences authorized by a jury's verdict or defendant's guilty plea. Ac-

ordingly, the problem is that the guidelines are mandatory in nature, and this problem can be solved, the court decided, simply by severing the provision of the federal Sentencing Reform Act that requires judges to impose sentences in accordance with the guidelines.

The competing remedy given the most consideration by the court was one that would impose the right to jury trial on top of the guidelines as written. The court decided that the advisory approach does less violence to the primary goal underlying the guidelines: eliminating unwarranted disparity in the sentences handed down to similarly situated defendants who commit similar crimes.

Other Views

In a separate opinion dissenting from the court's decision that the guidelines scheme is unconstitutional as written, Breyer argued that the right to jury trial allows judges to find "sentencing facts."

Stevens argued in a dissenting opinion that the court should allow the government to impanel juries to find those facts that boost a sentence above the maximum term of a presumptive range.

Justices Antonin Scalia and Clarence Thomas added separate partial dissents disagreeing with Breyer's remedy.

Implications for Corporations

Win Swenson, the former deputy general counsel at the Sentencing Commission and now senior advisor to Integrity Interactive, predicted that the court's ruling is unlikely to have a significant impact on corporate sentencing. To begin with, Swenson told BNA, "the Supreme Court's decision doesn't make the federal guidelines irrelevant—in fact sentencing courts 'must consult' and 'take into account' the guidelines."

Additionally, he said, the organizational guidelines, unlike their controversial counterparts for sentencing individuals, "are widely viewed as creating a good model for corporate sentencing which means that judges won't want to deviate from them."

"Most important," Swenson explained, the Justice Department has made clear that it will advocate that sentencing judges follow the guidelines. "I spoke personally with Mary Beth Buchanan, the director of the Executive Office of US Attorneys, and she says this is every bit as true of the corporate guidelines as with the individual guidelines," he said. "Since most corporate cases are resolved through plea bargains negotiated by the Department, the Department's continued endorsement of the corporate guidelines virtually guarantees their continued relevance."