

Survey Reveals Little Change in Sentencing Habits After *Booker*

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By many accounts, the U.S. Supreme Court's opinion in United States v. Booker was supposed to cause a disaster, but calamity has not ensued yet — at least not in Texas.

The Jan. 12 decision loosened the grip the U.S. Sentencing Guidelines have on federal district court judges presiding over criminal trials. The Booker majority held that the federal sentencing guidelines should be advisory, not mandatory. The decision had Congress, the U.S. attorney general and federal prosecutors predicting that punishment of criminals would become erratic and subject to the whims of an activist judiciary.

Immediately after the decision, U.S. Sen. Arlen Specter, R-Pa., who chairs the Senate Judiciary Committee, called on Congress "to establish a sentencing method that will be appropriately tough on career criminals."

Last month in a speech to the National Center for Victims of Crime, U.S. Attorney General Alberto Gonzales said that Booker has caused "a drift toward lesser sentences" and said he supports establishing mandatory minimum sentences.

But a recent survey by the U.S. Sentencing Commission titled "Sentencing in the Aftermath of United States v. Booker," shows that federal trial judges across the country largely have been sentencing criminals within guideline range over the past five months since the Supreme Court handed down its 5-4 ruling in Booker. [*See related charts below.*]

The guidelines establish a variety of factors a judge may take into account when sentencing a defendant, including the type of offense, whether he or she used a firearm while committing the offense and a convict's criminal history, among other things.

From mid-January to June, U.S. district judges nationwide have followed the guidelines 61.7 percent of the time, according to the sentencing commission survey, released on July 11. That figure differs only slightly from fiscal year 2002, when federal trial judges issued sentences within guideline range 65 percent of the time.

But federal trial judges who sit within the jurisdiction of the 5th U.S. Circuit Court of Appeals — which includes U.S. district courts in Texas, Louisiana and Mississippi — are sticking to the guidelines slightly more than their brethren in other circuits. The survey's January to June 2005 figures for sentences handed down within guideline range rises to 70 percent for federal trial courts within the 5th Circuit's jurisdiction. In fact, out of all 12 circuits, 5th Circuit judges were the most likely to sentence criminals within the guidelines, according to the survey.

Michael Courlander, a spokesman for the U.S. Sentencing Commission, declines to discuss the survey, saying the numbers speak for themselves.

But the guidelines are still the starting point for any sentencing decision, say several U.S. district judges and lawyers who practice before them. After all, the majority of U.S. district judges have known nothing other than the guidelines when it comes to sentencing.

Even one of the few federal district judges who was on the bench in Texas before the sentencing guidelines became mandatory in 1987 says he still adheres closely to the guidelines when considering how long to send a convict to prison.

"It makes sense for judges to stick with what they know," says U.S. District Judge Hayden Head of Corpus Christi, chief judge of the Southern District of Texas who was appointed to the bench in 1981 by President Ronald Reagan.

"I didn't say, 'Oh my God, the chains have been unshackled,' " Head says of the Booker decision.

"The guidelines still occupy a very central part of sentencing. And I think judges believe that."

U.S. district judges may not want to rock the boat, says Marlo Cadeddu, a Dallas criminal-defense solo. Some of the judges may fear that if they deviate too much from the guidelines Congress will pass legislation that takes away judicial discretion by imposing mandatory minimum sentences, she says.

"I think everyone is taking it slowly, and I think they are trying to do things carefully, so they don't raise the ire of Congress," Cadeddu says. "If they go crazy, Congress is going to take it away. Discretion is a novelty, and they [judges] don't want to jeopardize that by acting rashly."

The Mix

At first blush, the adherence to the guidelines by U.S. district judges who sit within the 5th Circuit's jurisdiction can be explained by the region's conservative judiciary, several criminal-defense lawyers say. But there is more to it than that, says Carolyn Dineen King, chief judge of the 5th Circuit.

"I think you would have to look at the case mix. We have a very high volume of criminal cases, and many of them come from the border," King says. "They have a certain pattern to the violations. There is more consistency in the violations. So you would expect more consistency in the sentencing."

For years, the Texas-Mexico border has generated thousands of drug cases and prosecutions of illegal immigrants, products of placing hundreds of additional federal law enforcement officers in the region. More cases meant more federal judgeships in cities such as El Paso and Del Rio. Several years ago Congress added two federal benches in El Paso for a total of four judges and established the first permanent district court bench in Del Rio.

The figures in the recent survey were to be expected, says U.S. District Judge Ricardo Hinojosa of McAllen, who presides over a busy border district and has chaired the U.S. Sentencing Commission since July 2004. He says 5th Circuit judges have always erred on the side of sentencing within the guidelines, because the guidelines work. The sentencing commission spent a lot of time doing research to create fair and uniform guidelines, he says.

It's too early to tell if the guidelines need to be adjusted, especially with just five months of post-Booker statistics to look at, Hinojosa says. "I don't think the 5th Circuit is that much different than the rest of the circuits," he adds.

In fact, so far this year, eight of the 12 circuits sentenced within guideline range 60 percent of the time or higher. The survey showed that the circuit that most often departed downward from the guidelines was the 2nd U.S. Circuit Court of Appeals, which sentences within the guidelines just 45 percent of the time.

The 2nd Circuit includes Connecticut, New York and Vermont, and the circuit's criminal caseload differ greatly from the 5th Circuit's, says Johnny Sutton, U.S. attorney for the Western District of Texas.

"I think Vermont has a very low crime rate and very different demographics," Sutton says.

"We've got good judges, and they're tough sentencers when they need to be and more lenient when they need to be," Sutton says of judges in his district. "But that's not true in other parts of the country. Some have a different philosophy about sentences. That's the challenge to come up with a system that's fair."

Second Circuit Chief Judge John M. Walker Jr. says, without further study, he cannot speculate as to why the federal trial courts within the 2nd Circuit's jurisdiction are the least likely to sentence within the guidelines.

The Prosecutors

According to the survey, when judges do depart from the guidelines and give a convict less than the

recommended sentence, it is often the least likely person in the courtroom who makes the downward-departure request — the prosecutor.

Across the country, judges depart downward more than they depart upward. So far in 2005, 36.5 percent of sentences involved downward departures from the punishment range set out in the guidelines, while only 1.8 percent of sentences departed upward, according to the survey. In 2002, 34.2 percent of the sentences nationwide were below the guidelines and .8 percent were above the guidelines.

Nationally, two-thirds of the downward departures were granted based motions made by the government. The government requested most of those departures based on defendants' "substantial assistance," where defendants who plead guilty agree to cooperate with the government in exchange for lesser sentences. Other sentences involve "early disposition" departures, in which defendants receive less prison time in exchange for early guilty pleas.

In Texas, the same holds true. In the Southern District — one of the nation's busiest criminal jurisdictions because of its proximity to the Texas-Mexico border — well over half of the downward departures in 2005 were based on motions made by the government, according to another survey released by the U.S. Sentencing Commission in July that focused on border regions of the country, including the Southern and Western Districts of Texas.

Southern District of Texas judges have (sentenced within the guidelines 65 percent of the time in 2005, while 1 percent of the sentences involved upward departures and 34 percent of the sentences involved downward departures. Two-thirds of those downward departures were made at the government's request, according to the survey, which was presented in July for a U.S. Border Conference meeting.

Many of the downward departures involved government-sponsored "fast track" pleas in prosecutions involving illegal immigrants, says Marjorie Meyers, public defender for the Southern District. Fast-track pleas, which allow defendants who plead guilty early to receive lesser sentences, are helpful in moving busy dockets, she says.

"You get anywhere from two to four levels off [the sentencing guidelines]," Meyers says of fast-track pleas. "But it has to be certified by the U.S. attorney general, and it's only for illegal re-entry" — after the person has already been deported and again crosses the border into the United States.

The figures are similar in the Western District of Texas, another jurisdiction with a heavy criminal docket. So far this year, 77 percent of convicted defendants in the Western District were sentenced within the guidelines, 3 percent of the sentences involved upward departures and 20 percent of the sentences involved downward departures. More than half of the downward departures were based on motions made by the government.

Sutton says the downward departures made at the government's request have been an important part of moving heavy dockets along the border regions of Texas.

"We've got a very set system on the border, especially for people who plead early to get better deals," Sutton says. "That's the same for most systems."

Those Western District figures seem about right to U.S. District Judge Fred Biery of San Antonio.

Biery says he doesn't depart upward or downward from the guidelines often. The most recent occasion was a few weeks ago, when he gave a defendant a higher-than-recommended sentence for bank fraud, he says.

"The guy got five years instead of four years," Biery says. It was a case in which the defendant was convicted of swindling \$150,000 from an elderly victim — a factor that Biery thinks the guidelines don't adequately address. "I thought it deserved a little extra credit," he says, referring to his upward departure during sentencing.

But overall, Biery says, Booker hasn't changed his sentencing much. "I can only speak for myself, but I upwardly departed or downwardly departed just as I did before."

**Southern Texas Guideline Application Trends
(FY 2000, 2001, 2002, 2003 and Partial FY 2005)***

Status	2000	2001	2002	2003	2005
Within Range	69.9%	68.5%	71.3%	68.4%	65.0%
Upward Departures	0.5%	0.5%	0.9%	0.7%	0.4%
Otherwise Above Range	--	--	--	--	0.7%
Substantial Assistance Departures	15.8%	13.5%	12.2%	9.3%	7.5%
Other Government-Sponsored Departures	--	--	--	11.2%	14.2%
Other Downward Departures	13.7%	17.5%	15.7%	10.4%	4.3%
Otherwise Below Range	--	--	--	--	7.9%

**Western Texas Guideline Application Trends
(FY 2000, 2001, 2002, 2003, and Partial FY2005)***

Status	2000	2001	2002	2003	2005
Within Range	72.2%	65.6%	67.0%	74.6%	77.7%
Upward Departures	0.3%	0.4%	0.8%	0.8%	0.4%
Otherwise Above Range	--	--	--	--	1.7%
Substantial Assistance Departures	8.9%	8.3%	13.1%	15.0%	7.9%
Other Government-Sponsored Departures	--	--	--	2.6%	2.9%
Other Downward Departures	18.6%	25.7%	19.1%	7.1%	1.2%
Otherwise Below Range	--	--	--	--	8.2%

**Footnotes containing explanation of data compilation methodology omitted throughout.*

SOURCE: U.S. Sentencing Commission, "Sourcebook of Federal Sentencing," 2000-2003. 2005 data is from the special post-Booker Coding Project, BOOKER05 (data extraction on May 5, 2005; table prepared July 1, 2005).