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Expert Analysis

The Ex Post Facto Clause In the Post-‘Booker’ World

Fascinating” and “intriguing” are not words typically used when referring to the United States Sentencing Guidelines or the U.S. Constitution’s ex post facto clause. But that’s precisely how U.S. District Judge Lewis A. Kaplan recently described the question of whether the ex post facto clause continues to apply to the Guidelines in the wake of *United States v. Booker*,¹ which rendered the Guidelines advisory rather than mandatory.

Before *Booker*, the issue was relatively straightforward. Courts were required to apply the Guidelines manual in effect on the sentencing date unless its use caused a problem under the ex post facto clause by suggesting a harsher punishment than that recommended by the Guidelines manual in effect on the date that the offense of conviction was committed. Today, the choice is not as clear. Since *Booker*, at least one circuit court has held that use of the Guidelines manual in effect on the sentencing date never poses an ex post facto problem because courts are no longer bound by the Guidelines. (The U.S. Department of Justice has also adopted this view.) By contrast, numerous other courts have found that *Booker* did not change anything, and that the same potential ex post facto problems persist, even though the Guidelines are now only advisory.

This question remains unresolved in the U.S. Court of Appeals for the Second Circuit. Indeed, the Second Circuit recently noted in *United States v. Johnson*² that continued



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applicability of the ex post facto clause to the Guidelines “remains an open question to be decided in the appropriate case.” To more fully explore the issue in anticipation of such an “appropriate case,” this article will: (1) describe how the ex post facto

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clause applied to the Guidelines before *Booker*; (2) detail the conclusions reached by those courts that have found it no longer applicable to the Guidelines; and (3) explain why courts should continue its application even in the post-*Booker* world.

Before ‘Booker’

In *Miller v. Florida*³ the U.S. Supreme Court observed that a law that “makes more onerous the punishment for crimes committed before its enactment” violates the ex post facto clause. Deriving its understanding from a 1798 Supreme Court decision, *Calder v. Bull*,⁴ the *Miller* court observed that the clause was included in the Constitution to insure that “legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” It also noted that “almost from the outset, we have

recognized that central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.”

Based on these principles, the *Miller* court found that a law violates the ex post facto clause if it: (1) is “retrospective,” that is, if it “appl[ies] to events occurring before its enactment”; and (2) “disadvantage[s] the offender affected by it.” Applying this standard to the Guidelines, the Second Circuit held in *United States v. Gonzalez*⁵ (a pre-*Booker* case) that “an amendment to a guideline that occurs after the commission of an offense is a violation of the ex post facto clause if it works to the detriment of a defendant.”

This analysis is reflected in the Guidelines themselves. According to U.S.S.G. §1B1.11(a), courts are required to “use the Guidelines Manual in effect on the date that the defendant is sentenced.” Similarly, 18 U.S.C. §3553(a)(4)(A)(ii) provides that courts should use the manual “in effect on the date the defendant is sentenced.” But those directives are effectively neutralized by U.S.S.G. §1B1.11(b)(1), which provides that “[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.”

‘United States v. Demaree’

Many courts have continued to apply the ex post facto clause to the Guidelines even after *Booker*. However, the U.S. Court of Appeals for the Seventh Circuit held in *United States v. Demaree*⁶ that district courts need not. More specifically, the *Demaree* court adopted the view that the ex post facto clause applies only to those laws and regulations that bind, but not to those—like

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the now advisory Guidelines—that merely advise. In doing so it relied on its own decision in *United States v. Rocha*,⁷ in which it found that the Guidelines’ advisory nature “remove[d] the foundation” for application of the ex post facto clause.

The Seventh Circuit also cited the U.S. Court of Appeals for the Sixth Circuit’s decision in *United States v. Barton*,⁸ in which that court suggested in a footnote that “[n]ow that the Guidelines are advisory, the Guidelines calculation provides no [] guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness.”

Continued Viability

The Seventh Circuit’s reasoning in *Demaree* is, admittedly, somewhat alluring. After all, if the Guidelines are now only advisory and courts are not required to follow them, what’s the harm in calculating a sentencing range using the Guidelines manual in effect on the date of sentencing—even if it suggests a longer prison term? Notwithstanding its superficial appeal, *Demaree* is not persuasive. It ignores the realities of sentencing in the post-*Booker* world and contravenes well-established legal principles.

First, the existence of increased sentencing discretion as a result of *Booker* does not necessarily foreclose an ex post facto claim. Even under an advisory Guidelines regime, proper calculation of the applicable range of imprisonment continues to play an important role in the sentencing process. As described by the Supreme Court in *Gall v. United States*,⁹ a “district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” District courts must, according to *Kimbrough v. United States*,¹⁰ treat the Guidelines as “the starting point and the initial benchmark.” Indeed, the Second Circuit in *United States v. Crosby*¹¹ specifically directed that proper computation of the applicable Guidelines range is the first of two steps in the sentencing process.

Thus, practically speaking, the Guidelines continue to exert substantial influence on the outcomes of criminal sentencing proceedings. They provide an “anchor” for judges and strongly impact the ultimate sentence imposed. As the court in *United States v. Lewis*¹² put it, defendants are necessarily “disadvantaged by the more onerous Guidelines in effect at the time of [] sentencing” because the court’s “consideration of applicable grounds for

variance or departure begins at a higher level.” If “a review of the presentence report and arguments of counsel yields no articulable basis to stray from the calculated guideline range, the sentencing court is necessarily nudged in the direction of the Guidelines.”

But that’s not all. The Supreme Court confirmed in *Rita v. United States*¹³ that appellate courts may apply a presumption of reasonableness to district court sentences calculated in conformity with the Guidelines. As a result, district court judges in those circuits that have adopted such a presumption are more likely to sentence within the Guidelines to avoid the increased scrutiny that likely would result from the imposition of a sentence outside the Guidelines. (The Second Circuit has not adopted a presumption of reasonableness.)

All of the foregoing is confirmed by the U.S. Sentencing Commission. Its “2008 Sourcebook of Federal Sentencing Statistics” (issued in 2009)¹⁴ reports that *Booker* and 18 U.S.C. §3553 were responsible in 2008 for only approximately 10 percent of all federal sentences falling outside applicable Guidelines ranges.

Second, disregarding the ex post facto clause directly contravenes what for years has been standard sentencing practice in the Second Circuit. Both before and after *Booker* the Second Circuit has regularly and consistently conducted ex post facto analyses when faced with claims that Guidelines manuals in effect on the sentencing date produced harsher results than those in effect on the date offenses were committed.¹⁵ Indeed, the Second Circuit specifically noted in *United States v. Kilkenny*¹⁶ (decided two years after *Booker*) that “[w]hen application of the Guidelines in effect at the time of sentencing would result in a more severe penalty than would application of the Guidelines in effect at the time the offense was committed, the Ex Post Facto Clause requires the use of the earlier version of the Guidelines.”

Third, similarly, the weight of authority outside of the Second Circuit strongly favors continued application of the ex post facto clause to the Guidelines. For example, the U.S. Court of Appeals for the Sixth Circuit held in *United States v. Duane*¹⁷ that “this court has continued to examine the ex post facto implications of applying a revised version of the Guidelines retroactively.”

Likewise, the U.S. Court of Appeals for the Tenth Circuit found in *United States v. Thompson*¹⁸ that “the ex post facto clause

bars the sentencing court from retroactively applying an amended guideline provision when that amendment disadvantages the defendant.” And the U.S. Court of Appeals for the Eighth Circuit noted in *United States v. Carter*¹⁹ that, even after *Booker*, it has still “recognize[d] that retrospective application of the Guidelines implicates the ex post facto clause.” Indeed, the Eighth Circuit in *Carter*, the Sixth Circuit in *Duane* and the U.S. Court of Appeals for the First Circuit in *United States v. Gilman*²⁰ specifically considered and rejected *Demaree*.

Conclusion

Until the “appropriate case” presents itself, district courts in the Second Circuit should continue to use the Guidelines manual in effect on the date an offense is committed if use of the Guidelines manual operational at the time of sentencing triggers an ex post facto violation. And when the Second Circuit eventually considers such a case, it should reject *Demaree*’s reasoning as representing not only a break from longstanding practice in federal courts nationwide, but also as inconsistent with the reality of sentencing in the federal system, even after *Booker*.

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1. 543 U.S. 220, 125 S.Ct. 738 (2005).
 2. 558 F.3d 193 (2d Cir. 2009).
 3. 482 U.S. 423, 107 S.Ct. 2446 (1987).
 4. 3 Dall. 386, 1 L.Ed. 648 (1798).
 5. 281 F.3d 38 (2d Cir. 2002).
 6. 459 F.3d 791 (7th Cir. 2006).
 7. 415 F.3d 614 (7th Cir. 2005).
 8. 455 F.3d 649 (6th Cir. 2006).
 9. —U.S.—, 128 S.Ct. 586 (2007).
 10. —U.S.—, 128 S.Ct. 558 (2007).
 11. 397 F.3d 103 (2d Cir. 2005).
 12. Case No. 3:08CR06-HEH, 2009 WL 691216 (E.D. Va. March 16, 2009).
 13. 551 U.S. 338, 127 S.Ct. 2456 (2007).
 14. “United States Sentencing Commission, 2008 Sourcebook of Federal Sentencing Statistics,” at 50 (2009).
 15. See, e.g., *United States v. Boyle*, 283 Fed. Appx. 825 (2d Cir. 2007); *United States v. Gonzalez*, 281 F.3d 38 (2d Cir. 2002).
 16. 493 F.3d 122 (2d Cir. 2007).
 17. 533 F.3d 441 (6th Cir. 2008).
 18. 518 F.3d 832 (10th Cir. 2008).
 19. 490 F.3d 641 (8th Cir. 2007).
 20. 478 F.3d 440 (1st Cir. 2007).a