

Chicago Daily Law Bulletin®

Volume 159, No. 130

Court's sentencing guideline ruling to have large impact in criminal cases

Although it was not publicized as much as the ruling on DNA that came out a few days earlier, the U.S. Supreme Court's June 10 ruling in *Peugh v. United States*, 12-62, will likely have a far broader immediate impact on criminal cases in federal courts. The court ruled that the Constitution's ex post facto clause is violated when a defendant is sentenced under a later and more harsh sentencing guideline, even though the federal sentencing guidelines are not mandatory.

Split along the usual liberal/conservative divide with Justice Anthony M. Kennedy tipping the balance, the court held that a defendant convicted of wrongdoing from 1999 and 2000 could not be sentenced under guidelines promulgated in 2009.

Writing the majority opinion, Justice Sonia M. Sotomayor noted that although the federal sentencing guidelines have been advisory since the court ruled so in 2006 in *United States v. Booker*, every federal sentencing begins with the sentencing guidelines being properly calculated and proceeds with a full analysis as to whether a sentence within the guideline range is reasonable.

Consequently, Sotomayor wrote, quoting a prior ruling, that as "a matter of administration and to secure nationwide consistency, the guidelines should be the starting point and the initial benchmark."

This is because the "post-Booker" sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the guidelines and that they remain a meaningful benchmark through the process of appellate review." As a result, because the "Guidelines are the lodestone of sentencing," use of a later more harsh guideline violates the progeny of ex post facto clause cases that forbid the government from action designed "to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range."

Ultimately, the court overturned a ruling from the 7th U.S. Circuit Court of Appeals here in Chicago that upheld the sentence of Marvin Peugh. Peugh, a businessman convicted of bank fraud for what was essentially an extensive check-kiting scheme designed to keep a drowning business afloat, was sentenced to 70 months in prison. His sentence was at the very bottom of the 70- to 87-month guideline promulgated in 2009 — the year Peugh was sentenced.

But, that 70-month sentence was nearly twice as long as the high end of the 30- to 37-month sentence range for the 1998 Guideline that was in effect at the time that Peugh was kiting checks.

The dissent, written by Justice Clarence Thomas, contended that

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because the guidelines are advisory and not mandatory, the ex post facto clause is not violated by use of a later guideline in sentencing a defendant.

This ruling is important because according to the U.S. Sentencing Commission, 97 percent of all federal criminal cases result in a guilty plea as of 2012. Of the 3 percent that went to trial, the government was successful in obtaining convictions 100 percent of the time on drug cases and 87 percent of the time on sexual abuse cases with fraud and other cases re-

sulting in convictions a little more than 90 percent of the time.

This means that almost all federal criminal litigation is about the sentence. And, unlike Congress, the Sentencing Commission is fairly active, promulgating revised guidelines every year.

Immediately following the release of the *Peugh* opinion, the Sentencing Commission released a statement, saying in part, "The court recognized that the post-Booker federal sentencing system aims to achieve uniformity by ensuring the sentencing decisions are anchored by the guidelines and all members of the court recognized the continuing influence of the guidelines."

As a result of this ruling, not only will the defendant in *Peugh* be resentenced, but federal judges will not have to apply the most favorable guideline to defendants being sentenced for conduct that covered multiple years. Given that the bulk of federal cases involve either drug or fraud conspiracies that span multiple years, knowing which guidelines from which years are most favorable to a given defendant will be vital to a proper defense.

Federal criminal defense frequently boils down to deciphering the often impenetrable Sentencing Guidelines and making various arguments that mitigate the sentence. The Supreme Court gave defense attorneys another bullet in their arsenal in *Peugh*.

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