

HENAK LAW OFFICE, S.C.

Attorneys at Law

Robert R. Henak

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
Telephone [414] 283-9300
Facsimile [414] 276-5525

February 6, 2005

Wisconsin Law Journal
P.O. Box 514033
Milwaukee, WI 53203-3433

To the Editor:

The Seventh Circuit last week issued a decision deserving of condemnation by the legal community, not so much for its result (which is, nonetheless, questionable), but for the Court's decision to ignore regular standards of procedure to rush its views to publication. The Court not only decided an issue of major significance to the liberty of thousands of federal inmates without appointing counsel but, after finding the issues significant enough to justify an appeal, proceeded to decide that appeal without even providing the *pro se* litigants an opportunity to brief the issues.

First, some background. Since 1987, federal sentences have been controlled by the federal Sentencing Guidelines. Under the Guidelines system, the sentencing court was required (absent very extraordinary circumstances), to impose a sentence within a prescribed range based upon certain factual findings made by the judge under a preponderance standard.

On January 12, 2005, however, the Supreme Court held that setting mandatory sentencing ranges based upon judicial findings by a preponderance of the evidence, as required by the federal Sentencing Guidelines, violates the fundamental principle that

[a]ny 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.

United States v. Booker, 125 S.Ct. 738, 2005 WL 50108, *15 (2005) (reaffirming holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

Other than holding that its decision applies to all cases not yet final, the Court did not further address the issue of retroactivity. The Court thus left to the lower courts the

initial determination of whether *Booker*'s invalidation of the mandatory sentencing guidelines regime applies retroactively to some or all of the thousands of federal inmates sentenced since 1987.

On February 2, 2005, a mere three weeks after *Booker*, the Seventh Circuit jumped into the breach, holding that *Booker* does not apply retroactively to sentences which became final before the date *Booker* was decided. *McReynolds, et al. v. United States*, Appeal Nos. 04-2520, 04-2632 & 04-2844 (7th Cir. 2005).

The major reason why the legal community should be concerned about *McReynolds* is not its ultimate decision against retroactivity, although there is plenty of reason to question that holding. Rather, the concern arises from the Court's willingness to ignore regular procedure in its extraordinary rush to judgment in this case.

McReynolds was not an extraordinary case. Three federal inmates, each proceeding *pro se*, challenged application of the Sentencing Guidelines on grounds similar to those ultimately found compelling in *Booker*. However, their convictions and sentences had become final and the district court had denied their petitions under 28 U.S.C. §2255 before *Booker* was decided. The district court then denied them the certificates of appealability required to appeal that denial. *See* 28 U.S.C. §2253(c)(2).

The inmates, still *pro se*, next sought the certificates directly from the Court of Appeals, and those requests were pending when the Supreme Court issued *Booker*.

Under normal circumstances such as this, the Court would merely grant the certificates and order briefing, either with appointed counsel or without. The certificate of appealability, after all, is not intended as a final decision on the merits, but merely a mechanism to wean out collateral challenges too frivolous to justify full briefing on the merits. The certificate is merely an initial hurdle to the appeal, similar to the filing of a notice of appeal.

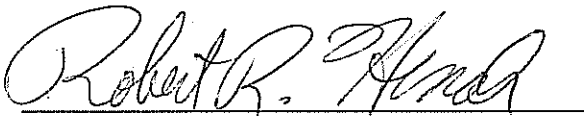
The Court in *McReynolds* properly concluded that, in light of *Booker*, each petitioner had satisfied the required showing for a certificate of appealability by making a "substantial showing of the denial of a constitutional right." Rather than following standard procedure and the requirements of due process by ordering briefing, however, the Court then took the wholly extraordinary step of simply deciding the appeal without submissions by the parties on the issue of retroactivity.

The adversarial system is based on the belief that justice and the correct result will be achieved when the opposing sides are allowed to present their respective positions fully before an unbiased tribunal. The central requirements of due process are notice and an opportunity to be heard prior to decision. When decisions of this magnitude are contemplated, moreover, affecting the lives and liberty of thousands of people, it also behooves the Court to appoint counsel before rushing to judgment.

For whatever reason, the Seventh Circuit in *McReynolds* chose to ignore these historic truths in its rush to clamp down on petitions by those whom the Supreme Court has now recognized to have been denied their constitutional rights at sentencing. Whether its decision on the merits ultimately will be upheld is open to question; the Court's circumvention of the adversarial process deprived it of substantial arguments contrary to its holding. Its choice to avoid ordinary procedures and due process, however, rightly deserves condemnation.

Sincerely,

HENAK LAW OFFICE, S.C.

A handwritten signature in cursive script, appearing to read "Robert R. Henak", written over a horizontal line.

Robert R. Henak