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## SENTENCES IMPOSED ON EX-COPS IN DRUG CASE SCRAPPED BY PANEL

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Citing recent rulings that have cast doubt on the future of the federal sentencing guidelines, a divided appeals court has vacated enhancements that boosted the prison terms of two former Chicago police officers convicted for their part in a cocaine ring.

The 7th U.S. Circuit Court of Appeals concluded Tuesday that a jury -- not the sentencing judge -- should have made the factual findings on which the enhancements were based.

Sentences that are not based on facts presented to a jury and proved beyond a reasonable doubt violate recent case law, Judge William J. Bauer wrote in an opinion joined by Judge Michael S. Kanne.

The majority said that case law was the U.S. Supreme Court's ruling in [Blakely v. Washington](#), 124 S.Ct. 2531 (2004), and the 7th Circuit's ruling in [U.S. v. Booker](#), 375 F.3d 508 (2004).

But in a dissent, Judge Frank H. Easterbrook said he would uphold the officers' sentences.

And Easterbrook contended that any new sentencing hearings should be put on hold for a while anyway.

"Prudence counsels waiting to see what the Supreme Court says before resentencing, lest a re-sentencing lies in store," Easterbrook wrote.

The high court has agreed to hear the Justice Department's appeal in the Booker case as well as its appeal in a case out of Maine. Oral arguments in those cases are set for October.

In *Booker*, a divided 7th Circuit concluded that the federal sentencing guidelines violate the U.S. Constitution when the facts that enhance a sentence are not proved beyond a reasonable doubt.

In a dissent in that case, Easterbrook conceded that the Supreme Court's 1998 ruling in [Edwards v. U.S.](#), 523 U.S. 511, might be approaching the end of its life.

But Easterbrook argued that the Supreme Court was the only court "entitled to declare one of its decisions defunct."

The high court in *Edwards* had held that a judge may determine by a preponderance of the evidence the type and amount of drugs involved in an offense and then base the defendant's sentence on that determination, according to Easterbrook.

The *Booker* ruling came on the heels of the Supreme Court's decision in *Blakely*.

In *Blakely*, the high court struck down a Washington state law that allowed judges to make findings lengthening the sentence that had been calculated under that state's sentencing guidelines.

The court split 5-4 in holding that a defendant's sentence must be based solely on facts that were either proved beyond a reasonable doubt or admitted by the defendant.

The Supreme Court made its ruling four years after issuing its holding in [Apprendi v. New Jersey](#), 530 U.S. 466 (2000).

In *Apprendi*, the court held that with the exception of a prior conviction, any fact that pushes the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

Under procedures followed in federal court as well as in many state courts, judges make findings of fact that can increase a defendant's sentence.

Judges in making those findings typically use a less demanding standard of proof than that required to secure a conviction.

Matters that a judge might consider in imposing a sentence include the amount of money involved in a swindle, whether a gun was used in the crime or the quantity of drugs the defendant and his cohorts dealt.

In Tuesday's ruling, all three members of the 7th Circuit panel agreed that the convictions of brothers Christopher R. "Dick" Messino and Clement A. Messino should be affirmed.

The panel members also agreed that the conviction of Dick Messino's son, Christopher B. Messino, also should be affirmed.

The Messinos were among the defendants accused of taking part in a ring that bought cocaine in Florida and transported it to Chicago.

But the panel members split on the matter of the sentences.

The majority noted that U.S. District Judge David H. Coar found that Dick Messino was responsible for conspiring to distribute at least 19 times as much cocaine as the amount identified in the indictment.

Coar also found that Messino had obstructed justice and had been one of the drug ring's organizers, the majority said.

The majority said the charges against Clem Messino did not identify a specific amount of cocaine.

But Coar made his own findings about the amount of drugs involved in the conspiracy -- a calculation that pushed Messino's sentence under the U.S. Sentencing Guidelines over the maximum sentence allowed under the statute he was accused of violating, according to the majority.

The majority said Coar then imposed partially consecutive sentences on the conspiracy charge and a money laundering charge in order to reach the prison time set out in the guidelines.

The majority concluded that enhancing the Messinos' sentences based on Coar's factual findings violated the holdings in *Blakely* and *Booker*.

The majority directed that the enhancements be vacated.

The majority also directed that Dick Messino's sentence be vacated and that he be resentenced.

And the majority directed that the part of Clem Messino's sentence based on Coar's findings of

drug quantity be vacated.

But Easterbrook said he would affirm the Messinos' sentences for the reasons he gave in his dissent in Booker.

"One question presented in Booker is what to do next if the statutory provisions requiring judges to resolve factual disputes that affect federal sentences should be held unconstitutional," Easterbrook wrote. "Until the Supreme Court has spoken, not only what to do, but also how to do it, is uncertain."

U.S. v. Christopher B. Messino, et al., Nos. 02-1411, 02-1607 and 02-3641.

Dick Messino was represented before the 7th Circuit by Chicago attorney **Marc W. Martin**. Clem Messino was represented by attorney Douglas P. Roller of Clayton, Mo. Chris Messino was represented by Chicago attorney John L. Sullivan.

The government was represented by Douglas S. Goodman of the U.S. Justice Department in Washington, D.C.

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