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WLF URGES SUPREME COURT TO REDUCE ROLE OF DEFECTIVE U.S. SENTENCING GUIDELINES

(Claiborne v. U.S.; Rita v. U.S.)

The Washington Legal Foundation (WLF) filed a brief yesterday in the U.S. Supreme Court in a pair of related cases that will decide what weight the U.S. Sentencing Guidelines should be given by federal judges in determining the appropriate sentence in a particular criminal case. The outcome of the case will have a significant impact on federal sentencing practices that affect business owners and executives, particularly with respect to regulatory offenses where the current Guidelines call for excessive prison terms for minor infractions.

In its brief filed in *Claiborne v. U.S.* and *Rita v. U.S.*, WLF argued that Congress intended that punishments should fit the crime and the offender, but that the Sentencing Guidelines do neither. For almost 20 years, the Guidelines dictated mandatory sentences that regularly called for severe prison terms, some from three to nine years or even more, for minor regulatory infractions, including environmental offenses where no harm occurred. Early last year, however, the Supreme Court in *Booker v. United States* struck down the mandatory feature of the Guidelines as unconstitutional under the Sixth Amendment right to jury trial. Henceforth, the Guidelines were only to be advisory, and thus, true Guidelines.

Since the *Booker* decision, however, many courts of appeal have reversed sentences imposed by district court judges below the Guideline level as unreasonable. In doing so, they ruled that the Guidelines should be given a presumption of reasonableness and special weight. WLF argued in its brief, however, that such a standard basically makes the Guidelines mandatory, and thus, inconsistent with *Booker's* ruling that the Guidelines be considered as only one of six other factors that a court must consider in imposing a sentence.

WLF further demonstrated in its brief that the Guidelines have serious design defects. For example, Congress intended that the sentencing courts consider other factors in imposing a sentence, such as the defendant's history and characteristics, disparity in sentencing, and the nature of the offense, all of which the Guidelines do not adequately take into account. Congress also directed that the Guidelines allow for probation for first offenders in non-violent cases, yet in some cases, the Guidelines call for the statutory maximum prison sentence for a first offender. Overall, the Guidelines simply do not

follow Congress's primary goal that any sentence "be sufficient, *but not greater than necessary*" to meet the sentencing goals of deterrence and just punishment.

"Just as we have junk science in the courtrooms, we unfortunately also have junk guidelines that dictate lengthy prison sentences for first-offenders, including small businessmen," said Paul Kamenar, WLF's Senior Executive Counsel. "The Supreme Court should emphatically reiterate what it said in *Booker*, namely, that the Sentencing Guidelines were advisory only, and are not to be given special weight by sentencing courts," Kamenar added.

WLF's brief, filed on behalf of itself and the Allied Educational Foundation, pointed out examples of excessively severe prison terms for first offenders. For example, in one case that WLF litigated (*McNab/Blandford v. U.S.*), three small businessmen were sent to prison for eight years under the Guidelines for importing frozen seafood because they were packed in plastic bags instead of cardboard boxes. In another WLF supported case (*Thurston v. U.S.*), a businessman is facing at least three years in prison for an offense where the more culpable co-defendant was given probation as part of a plea bargain. WLF pointed out in its brief that these sentences are not only unreasonably severe and produce unwarranted disparities, but they are triply harsh when one considers that before the Guidelines were promulgated, federal prisoners were usually released on parole after serving one-third of their time. Since parole has been abolished, a prison term of three years today is functionally equivalent to prison term of nine years before the Guidelines came into effect.

WLF has long been in the forefront of opposing criminalization of business activities and has spoken out critically on the U.S. Sentencing Guidelines. WLF participated in the *Booker* case and many other Guideline cases, in addition to suing the Sentencing Commission for not conducting its business in an open and transparent manner.

Numerous other organizations and individuals have filed briefs in this high-profile case, including a group of former federal prosecutors and sentencing experts who agree with WLF's argument that the Supreme Court should find that the Guidelines have serious design flaws. The Supreme Court will hear oral arguments in these cases on February 20, 2007, with a decision by June.

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