

# Criminal Justice

## Sensible sentencing?

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When he was practicing law in Fort Lauderdale, Garland Hogan represented such clients as the late, great jazz bassist Jaco Pastorius, a Lauderdale city commissioner accused of writing bad checks, and a Home Shopping TV host who alleged he was fired for age discrimination. Hogan directed a church choir and chaired The Florida Bar's arts and entertainment committee.

Now, Hogan is serving a 28-year sentence in a federal prison in north Florida for his role in representing a viatical company accused of bilking thousands of elderly investors out of their life savings.

But because of a recent ruling by the U.S. Supreme Court, Hogan's case may offer hope to others sentenced under tough, mandatory federal guidelines that were struck down this year by the court.

On Oct. 3, the Supreme Court remanded the cases of Hogan and three other defendants in the Financial Federated Title & Trust viatical fraud case to the 11th U.S. Circuit Court of Appeals for reconsideration and possible resentencing.

The defense lawyers for Hogan and the other defendants — Alan Lewis, Wanda Tirado and Zane Balsam — are relying on the Supreme Court's landmark January ruling in *U.S. v. Booker* to try to win new, shorter sentences for their clients. In *Booker*, the high court decided in a 5-4 decision that mandatory federal sentencing guidelines are unconstitutional under the Sixth Amendment and should be used by judges for advisory purposes only.

The Financial Federated cases are among nearly 1,000 other cases that the Supreme Court has sent back to federal appellate courts for sentencing review and possible resentencing on *Booker* grounds. Defense lawyers have been inundating the justices with requests for new sentences for defendants.

But the high court has refused to rule on individual cases and has sent most of them back to the appellate courts for review. The appellate courts then can deny resentencing or remand the case to the trial court for review.

The 11th Circuit is the only court in the country to refuse to rule in favor of defendants on *Booker* resentencing issues, experts say. They say Hogan and his lawyer, David Markus of Miami, should not hold out much hope.

"The 11th Circuit is the least defendant-friendly of all the appellate courts," said Ohio State University law professor Doug Berman, an expert on sentencing issues. "The defendants are least likely to get relief in that court."

But defense lawyers say the case of Hogan — a nonviolent, first-time offender who had worked for Financial Federated for just 17 months and did not appear to have made any riches off the clients — might be just the right case to push the prosecution-friendly 11th Circuit to remand a case for resentencing.

"This case nicely highlights why the Supreme Court was right in *Booker*," said Michael Pasano, a partner at Zuckerman Spaeder in Miami who heads the criminal justice section of the American Bar Association. "It's hard to believe that a lawyer would get that kind of sentence. I doubt if he made a lot of money off that company."

In addition, Pasano said, there are mitigating facts in Hogan's case, such as years of community service and serving as choir director.

Ellen Cohen, an assistant U.S. attorney in West Palm Beach who was one of the prosecutors in the case, said only that "the Supreme Court decision speaks for itself."

Amount of money key

Hogan, now 50, was one of 14 defendants sentenced in the Financial Federated cases in 2001. The president of the Lazy Lake-based viatical company, Frederick Brandau, was convicted in 2000 of masterminding the scam in which some 4,000 people were bilked of \$117 million.

The fraud victims thought they were investing in life insurance policies owned by terminally ill people. But in reality, Financial Federated used only about \$8 million of investors' money to purchase such policies and instead spent \$100 million to buy luxury cars, boats, properties, jewels and helicopters.

In August 2000, Brandau was convicted of 43 felony charges including money laundering, mail and wire fraud. In January 2001, he was sentenced to 55 years in prison — one of the longest sentences ever given in a white-collar case.

Thirteen Financial executives, including Hogan, either pleaded guilty or were convicted of similar offenses and have been sentenced and ordered to make restitution.

Hogan was the only one of a handful of attorneys who worked for Brandau to be convicted. He was convicted of nine counts of mail fraud and money laundering.

U.S. District Judge Daniel T.K. Hurley in West Palm Beach, who presided over the case, used mandatory sentencing guidelines to calculate sentences based on the amount of money stolen. Due to the large amount of money stolen, the sentences were relatively long. If the dollar figure had been under \$5,000, the sentences mandated by the guidelines would have been zero to six months.

The judge determined how much was stolen based on the probation office reports. These amounts were not found by the jury. Based on the probation report, Hurley decided to increase the base offense level with 35 points of sentencing enhancements.

In an interview, Hogan's mother, Phyllis Howard, a former Fort Lauderdale attorney herself, denied prosecutors' claims that her son was Financial Federated's in-house attorney. She said he worked out of his Wilton Manors home. He had been representing Financial Federated for 17 months.

Agents seized Hogan's house, which is now for sale, and his bank accounts. He was ordered to pay \$109 million in restitution and is paying a small amount every month with his meager earnings in prison, his mother said.

He was disbarred by The Florida Bar shortly after his conviction.

Markus said he's optimistic for several reasons that Hogan will be the case that cracks the 11th Circuit's hard-line stance.

"Garland Hogan's case is the prototypical example of the absurdities that came about from the mandatory guideline regime," he said. "We are very optimistic that the 11th Circuit will do the right thing in this case and order a resentencing so that Mr. Hogan can get a just sentence, unlike the previous sentence which was forced on the district judge by the unjustifiably harsh and rigid guideline book that all of us would like to burn."

Markus also said he's optimistic about Hogan's case because Hogan's former defense lawyer, Fort Lauderdale lawyer Benson Weintraub, raised the issue at the time of sentencing in 2001 of whether judges could make findings at sentencing that were not presented to a jury.

That issue was at the heart of the Supreme Court's subsequent Booker ruling, which held that having judges rather than juries make factual findings violates a defendant's Sixth Amendment right to a jury trial. Under the mandatory sentencing guidelines system, judges routinely based their sentences on probation office findings of aggravating factors.

Defense experts say defendants have a better chance of winning resentencing post-Booker if their lawyers raised the Sixth Amendment issue in proceedings prior to Booker, as Benson did in Hogan's case.

Ironically, Hogan lost his sentencing appeal before the 11th Circuit in a decision handed down on the same day the Supreme Court issued another key opinion. In *Blakely v. Washington*, a precursor to the Booker decision, the Supreme Court decided that judges could not increase a defendant's sentence absent a jury finding as to the enhancement.

Booker held that there was no constitutional violation in considering an enhancement so long as the judge only used the enhancement as a guide but not in a mandatory fashion. Both *Blakely* and *Booker* rulings came down in 2004.

Markus said he doesn't know yet how long a sentence he would request if the 11th Circuit overturns Hogan's original sentence. He doesn't rule out the possibility of making a deal with prosecutors. He expects a ruling from the appellate court in three to six months.

Phyllis Howard has sold her house and moved to Inverness to be near her son, who's serving his time at a federal penitentiary in Coleman. She's the one who paid Markus' legal fees.

Howard said she was "very happy" with the Supreme Court's remand decision. "This was our first win, and we had to go all the way to the Supreme Court to get it," she said. "The law was on our side."

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