Federal Probation

The Sentencing Reform Act of 1984 and Sentencing Guidelines

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This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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The Sentencing Guidelines: What a Mess

By Judy Clarke*

FEDERAL PROBATION sought an article from the "defender perspective" about the Federal sentencing guidelines.[1] The most concise perspective I can give is—what a mess. Congress envisioned a rational sentencing system, with judges imposing uniform and proportional sentences and defendants serving the time imposed. What we got was a real mess. Perhaps Congress gave mixed signals; perhaps the U.S. Sentencing Commission's compromises mixed the signals.

Goodbye to the Human Aspects

In 18 U.S.C. § 3553, Congress directed consideration of the nature and circumstances of the offense and the history and characteristics of the defendant as well as the four basic purposes of sentencing (punish, deter, protect, rehabilitate). At the same time, Congress directed imposition of the guideline sentence unless a departure was appropriate. In 28 U.S.C. § 994, Congress directed the Commission to consider typical offender characteristics (age, education, vocational skills, employment, family ties, mental and emotional conditions, alcohol and drug abuse, etc.) and to take these characteristics into account to the extent they are relevant to sentencing. Perhaps these two statutory provisions provided the mixed signals—one compelling consideration of the defendant and rehabilitation, the other permitting, but not requiring, the Commission to consider the history and characteristics of the defendant. The Commission then decided that the defendant's "human factors" and rehabilitation were *not ordinarily relevant* to the sentencing process. *See* § 5H. Indeed, in response to limited circumstances where the courts have permitted departures based on "offender characteristics," the Commission is actively seeking to clarify the irrelevance of the offender's background. *See e.g. United States* v. *Lara*, 909 F.2d 479 (2d Cir. 1990) (upholding downward departure based on potential for victimization of a "delicate looking young man" in prison) and the November 1991 amendment providing that "physique" is not ordinarily relevant in determining whether a sentence should be outside the guidelines; *see also United States* v. *Pipich*, 688 F. Supp. 191 (D. Md. 1988) (considering the defendant's military record as a basis for a downward departure); *United States* v. *Big Crow*, 898 F.2d 1326 (8th Cir. 1990) (excellent employment and consistent efforts to overcome adverse environment of the Indian reservation justified downward departure) and the November 1991 amendment providing that military, civic, charitable, or public service, employment-related contributions and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the guidelines.

Hello to Details and Disparity

At the same time the Sentencing Commission turned sentencing upside down with the above restrictions on consideration of offender characteristics, it imposed on the Federal courts a detailed, very technical system which produces sentences that vary dramatically with (1) the interpretation of terms, (2) the decisions of now very powerful prosecutors, and (3) the differing input of very different probation officers. And, what a mess. The system seeks uniformity but it gets interpretive disparity and control by the executive branch. At least under the "old law," disparity existed at the hands of the judicial branch, controlled to some extent by educational programs for judges, sentencing councils, the ever-present Parole Commission, and a limited system of review.

For a simple example, consider two hypothetical "border bust" cases in the Southern District of California. Both defendants, in completely separate cases, are arrested at the port of entry driving a car, each containing about 50 kilos of marijuana. Each gives a false name. In post arrest statements, both defendants correct their names, deny knowledge of the marijuana, and offer false explanations of how they came into possession of their cars. Both defendants are represented by lawyers in the same defender office, and both eventually plead guilty to a felony charge, importation of marijuana. Both have "deals" for acceptance of responsibility reductions and no obstruction adjustment with the Government to remain silent on the mitigating role reduction.

The probation officer for defendant 1 recommends the following: offense level 20 plus 2 for obstruction (false name) and no reduction for acceptance of responsibility (because of the obstruction), criminal history category I, with a resulting sentencing range of 41-51 months. Over strenuous objection and contrary to the "deal," the court concurs with the obstruction adjust-

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ment but also grants the acceptance of responsibility reduction, finding a range of 33-41 months. The court imposes a sentence of 37 months.

The probation officer for defendant 2 recommends the following: offense level 20 minus 2 for acceptance of responsibility, category I, with a resulting range of 27-33 months. The court agrees but also reduces by three additional levels based on the defendant's mitigating role, finding that the defendant was a "mule" and deserved a downward role reduction between "minimal" and "minor." The adjusted offense level for defendant 2 is then level 15 with a resulting range of 15-21 months, and the court imposes 18 months.

The defendants reside next to each other at the Metropolitan Correctional Center. One defendant gets 37 months; the other gets 18 months. Both are perfectly "legal" sentences within the "applicable guideline range." Except defendant 1 is now completely dissatisfied with his lawyer and wants to "hire" the other lawyer. Uniformity? No, a mess.

These two examples are simple but demonstrate that disparity may be magnified as different prosecutors, judges, probation officers, defense lawyers, and even case agents get involved. The disparity also increases as there are more application decisions to make. The same fraud case involving a $100,000 loss could *easily* end up with Level 11 (no specific offense characteristics, acceptance of responsibility) or Level 17 (more than minimal planning, abuse of trust) with ranges of 8-14 months to 24-30 months. The differences will likely depend upon the strength of negotiation by the defense, the determination of the prosecutor or investigating agent, the evaluation of the probation officer, and, finally, the guesswork of a confused court. Uniformity? No, a mess.

Very recently, a district court judge tried to even out a disparate application of the guidelines by departing downward for an equally culpable co-defendant who had been sentenced at a second hearing in the case where the Government had simply done a more competent job of presenting the facts. At the first defendant's sentencing, the Government was "slipshod" in building the record, and the court determined the amount of heroin involved was 10.19 grams. The applicable guideline range based on that amount was 21-27 months, and the court imposed 27 months. The Government improved its record at the second hearing, and the district court found relevant conduct of 755.75 grams of heroin. The court found the applicable guideline range for that amount was 87-108 months, but departed down to 27 months to equalize the sentences of the two defendants. The court of appeals reversed, finding that the disparity did not justify the departure. *United States* v. *Wogan*, No. 91-1214 (1st Cir. July 18, 1991). The opinion noted that both defendants were equally involved, equally culpable, and otherwise similarly situated. The only difference was the competence of Government counsel in presenting the evidence to the court at sentencing. A very difficult result to explain to a client. A real mess.

Disparity increases substantially in drug cases where often the "heavy" is able to offer cooperation and the lesser involved defendants are not able to assist. Because the cooperation departure is left in the hands of the Government, see § 5K1.1, the result all too often depends upon the time the case agent has available to pursue the investigation and the desire of the prosecutor to work extra hours to develop other cases. The person with more information to give has more cards to play and a greater sentence reduction to gain. The "lightweight" with nothing to offer suffers the greater sentence. A real mess.

Hello Relevant Conduct

Then there is consideration of uncharged, dismissed, or even acquitted conduct. *See* § 1B1.3; *see also e.g. United States* v. *Blanco*, 888 F.2d 907 (1st Cir. 1989) (quantities and types of drugs not specified in any count of conviction are included in determining the offense level if they were part of the same course of conduct or common scheme or plan as the offense of conviction); *United States* v. *Schaper*, 903 F.2d 891 (2d Cir. 1990) (it is not necessary that amounts of drugs be charged or even physically seized); *United States* v. *Ryan*, 866 F.2d 604 (3d Cir. 1989) (permissible to consider acquitted conduct); *United States* v. *Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (court can consider facts of an offense of which the defendant was acquitted as long as the facts are reliable); *United States* v. *Restrepo*, 903 F.2d 648 (9th Cir. 1989) (*en banc review pending*) (consideration of uncharged conduct permitted under relevant conduct section of guidelines). This uncharged, dismissed, or even acquitted conduct is treated identically to the conduct which is found beyond a reasonable doubt. Explain that to a defendant.

Goodbye Competence of Counsel

Then there is the matter of competence of counsel. The guidelines have been in full operation since the decision in *Mistretta*. There have been 362 amendments with an additional 59 scheduled to take effect November 1, 1991 (not to mention the addition of organizational sanctions). The circuit courts of appeal have published at least 2,000 opinions in the last 2½ years. What a mess. Just keeping current on how the courts interpret the individual guidelines and the amendments is almost a full-time job. And it may chase the occasional Federal court practitioner away. "The system" has only seen the surface of the problem; the inevitable multitude of collateral attacks have not

yet begun. *See e.g. Lee* v. *United States*, No. 90-2513 (7th Cir. August 12, 1991) (remanded to determine whether the failure of the defendant's lawyer to present evidence of legitimate income was constitutionally defective representation; defendant showed he was prejudiced by lawyer's failure); *United States* v. *Headley*, 923 F.2d 1079 (3d Cir. 1991) (trial counsel was ineffective for failing to argue the appropriateness of a mitigating role adjustment; case remanded to give the defendant the opportunity to make the argument to the district court); *United States* v. *Ford*, 918 F.2d 1343 (8th Cir. 1990) (a month before the sentencing, the guidelines were amended to permit a court to reduce a career offender's offense level for acceptance of responsibility, and the trial attorney failed to object, thereby rendering ineffective assistance; remanded for a determination of acceptance of responsibility).

A lawyer representing a defendant with any criminal history may have to become an expert in the laws of other states in order to explore the validity of alleged prior convictions. *See* §4A1.2, note 6 ("sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted"). At least in the Ninth Circuit, the Government has the burden of proving the facial validity of a prior conviction before it can be considered at sentencing. *United States* v. *Newman*, 912 F.2d 1119 (9th Cir. 1990). The defendant must then show the invalidity of the prior conviction through testimony or records. *Id.* The defendant also may seek to set aside the prior conviction in the state court. *See United States* v. *Guthrie*, 931 F.2d 564 (9th Cir. 1991). Because of the delicate impact of each criminal history point on a defendant's "applicable guideline range," defense attorneys have an *obligation* to investigate all priors and file necessary challenges in either the state or Federal court. Uniformity?—or does it depend on the quality and ingenuity of the defense lawyer? A real mess.

Hello Larger Defender Offices

With the advent of sentencing guidelines and sentencing appeals, the Federal defender offices are growing. In recent years, Federal Defenders of San Diego, Inc. has doubled in attorneys, from 10 to the present 20 lawyers. The caseload numbers have remained steady (with a decline in the high turnover cases) over the past several years, but the work associated with each case has dramatically increased.[2] Conferences with the client are more frequent and time-consuming; plea bargaining is more difficult and delicate; the time spent preparing for trial has increased; and this office has seen an increase in trials—for example, from 30 jury trials in FY 1986 to 56 during FY 1990; appeals have skyrocketed—for example, from 23 trial appeals in FY 1986 to 36 in FY 1990; guideline appeals play a significant role in the caseload—52 in FY 1988, 74 in FY 1989, and 76 in FY 1990.[3] Relationships with clients are at rock bottom because of the inevitable bad news that we must convey—yes, your lawyer will work hard for you, but yes, your sentence will be harsh.

Goodbye to "Probation" Officers and Hello to Guideline Guardians

I could not conclude an article for a probation magazine without noting concern for what the guidelines have done to the role of probation officers. Probation officers used to find out the good and bad about the people that appeared before the court for sentencing. They used to be alert to and care about the defendant's mental and emotional history; there was concern for the defendant's family history and record of employment. Probation officers used to care about whether a person had an alcohol or drug problem and find treatment programs for offenders to avoid prison. Now, probation officers are "guardians of the guidelines," trained to plug numbers into what they perceive are black and white facts. For a probation officer to make light of this new role and new power citing the district court's responsibility to make the ultimate sentencing determination is to ignore reality. *See United States* v. *O'Meara*, 895 F.2d 1216 (8th Cir. 1990) (comments by Senior Circuit Judge Bright, concurring and dissenting, and lamenting that "it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers to whose technical knowledge overworked district judges understandably, but all too often, uncritically defer"); *United States* v. *Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990) ("a defendant's conduct at the presentence interview can have a significant effect on the sentence recommendation in the presentence report, and district courts rely heavily on the contents of those reports . . . a single finding by the probation officer can significantly affect the ultimate sentencing range").

Yes, probation officers are now part of the adversarial system and are feeling the pressure of having many "decisions" challenged. Because of this new role and because apparently insignificant comments and admissions may drastically increase the guideline calculation, many defendants are appropriately exercising fifth amendment rights not to speak to probation; consequently, both the court and the Bureau of Prisons know less about them, and real problems they may have go unnoticed and untreated. Unless this newfound role changes, and probation officers return to evaluating *human beings* and not elements of crimes and technical guideline terms, society will suffer in the long run by the failure to meet and deal with individ-

ual defendants' needs and problems.

The Bottom Line

What Congress wanted was a rational sentencing system with uniformity and proportionality in sentencing. What Congress got—and what the Federal courts are living with—is a real mess.

NOTES

[1]I am not sure how the "defender" perspective differs from that of any other criminal defense lawyer with the exception of staffing issues based on volume.

[2]The lawyers on this staff continue to "bill" an average of 210-220 case-related hours each month. This average has maintained as the staff size has grown, an indication of the amount of work required with the same (or even slightly declining) caseload numbers.

[3]Sentencing appeals are not likely to decline appreciably for years. Unlike most statutes that typically face a declining flurry of litigation, the ever-evolving guidelines should face continual appellate litigation—because the cases involve often detailed and disputed factual findings by district courts, because of the need to interpret amendments, and because of the important and necessary *right* of the defendant to appeal.