Testimony Before the United States Sentencing Commission

Hon. Richard C. Tallman
United States Circuit Judge

Stanford, California
May 28, 2009

My name is Richard C. Tallman, and I am a United States Circuit Judge on the United States Court of Appeals for the Ninth Circuit with chambers in Seattle, Washington. I also serve as the Chair of the Advisory Committee on the Federal Rules of Criminal Procedure of the Judicial Conference of the United States.[1] I am pleased to appear before you to discuss a few issues we currently face that arise from major changes in sentencing law over the last twenty-five years. I practiced in the field before becoming a judge, both as an Assistant United States Attorney and later as a white collar criminal defense lawyer for several years prior to November 1987, when the United States Sentencing Guidelines became effective. I therefore offer the perspective of one who has practiced criminal law under both pre- and post-Guidelines sentencing.

1. Developments in the Case Law

The first issue I would like to discuss arises from changes in case law not

[1] The views expressed herein are my own. They do not reflect controlling law of the court or the official policy of the Judicial Conference of the United States.

foreseen by the original drafters of the Sentencing Guidelines. The Guidelines were designed to be a comprehensive set of rules, binding on federal sentencing judges, to improve uniformity and avoid unwarranted disparities. Congress expected that mandatory guidelines would eliminate the wide sentencing disparities occurring during the punishment phase for defendants who committed similar crimes but were prosecuted in different districts. Indeed, I can recall wide variations in sentences announced by different judges within the same district for similarly situated defendants.

Once the Supreme Court upheld the constitutionality of the Guidelines in *Mistretta v. United States*,[2] we all assumed that sentencing as we knew it had changed forever. I remember hearing predictions that the floodgates would nonetheless be opened to sentencing appeals from both defendants and the government to a degree unknown pre-Guidelines. There was also concern that a great deal of authority was being given to the writer of the presentence report, the contents of which would prove fertile ground for disputes at sentencing. Those prognostications have proven true. In the wake of *Mistretta*, sentencings became more complex and took longer to complete than ever before. But the mandatory regime did not last forever. Along came *United States v. Booker*,[3] which as we all

[2] 488 U.S. 361 (1989).
[3] 543 U.S. 220 (2005)

now know, invalidated the provisions that made the Guidelines mandatory. The series of cases following *Booker* have addressed how to apply the now-advisory Guidelines to a regime intended to be binding.

There has always been a great deal of discomfort in sentences imposed above or below the properly calculated Guidelines range. The narrower Guidelines ranges replaced the virtually unfettered pre-Guidelines law permitting a judge to impose anything from straight probation up to the statutory maximum. Federal Rule of Criminal Procedure 32(h) was nonetheless adopted to address the parties' understandable desire to have advance warning that the district court was contemplating a departure "on a ground not identified . . . either in the presentence report or in the party's prehearing submission." In *Irizarry v. United States*,[4] the Supreme Court held that, post-*Booker*, a judge is not required to give both parties advance notice before imposing a criminal sentence that departs from the Federal Sentencing Guidelines. But even after *Booker*, the *Irizarry* majority opinion noted that were the Guidelines still mandatory, advance warning might be required.[5]

One question that now arises before appellate panels is whether the *Irizarry* decision applies to variances as well as departures. Under the Guidelines, a "departure" was a change to the final range, determined by factors set forth within

[4] – U.S. –, 128 S.Ct. 2198 (2008).
[5] *Id.* at 2202.

the Guidelines themselves. It was frequently said to apply to criminal conduct "outside the heartland" contemplated by the Sentencing Commission when it drafted the Guidelines for a typical offense. A "variance," by contrast, occurs when a court goes above or below the otherwise properly calculated final sentencing range based on application of the statutory 18 U.S.C. § 3553(a) factors.[6]

Many scholars, judges, and practitioners have serious doubts whether, under *Booker*'s advisory sentencing framework, the departure/variance distinction is still a meaningful one. *Irizarry* treated the two as distinct. However, the Court relied at least in part on the language of Rule 32(h), which only includes the word "departure." Therefore, some hypothesize that a change in the Rule's language might end any remaining distinction between variances and departures.[7] The Criminal Rules Committee is now considering changes to Rule 32(h) that would require notice before making any change from the suggested Guidelines sentence, regardless of whether the change would have been categorized a departure or a variance under the mandatory Guidelines. We have also been considering whether to repeal subsection (h) entirely. The Committee had hoped to move quickly in resolving this issue, but after our April 6, 2009, meeting we decided to defer action

[6] *See United States v. Autery*, 555 F.3d 864, 873 n.7 (9th Cir. 2009).
[7] *See United States v. Evans-Martinez*, 530 F.3d 1164, 1169 (9th Cir. 2008); *United States v. Vega-Santiago*, 519 F.3d 1, 3 (1st Cir 2008) (en banc); *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007).

to study further the issue while courts grapple with it on a case-by-case basis. For now, the Rules and the case law are not quite in synch. Rule 32(h) remains on the books. We see many challenges on appeal to sentences where the outcome depends on how the deviation would have been labeled under the old mandatory framework.[8] The question of when notice must be given represents just one challenge among many to applying mandatory Guidelines in a discretionary world.

Finally, the Criminal Rules Committee has received several comments from sentencing judges noting that the process of fashioning an appropriate sentence in any one case is both dynamic and rapidly changing. The final decision may well be influenced by what the defendant says at the sentencing hearing if he chooses to allocute, or even by what a crime victim says during the proceeding. Indeed, I heard an appeal recently where a defendant assaulted another co-defendant inside the Marshal's lockup as retaliation for testifying against him at trial. The assault occurred while both men were being readied for transport to the courthouse for their respective sentencings. The sentencing judge considered the perpetrator's conduct in imposing an enhanced sentence beyond what the Guidelines otherwise had suggested.

2. Disclosure and Discovery in Preparation of Pre-Sentence Reports

[8] *See, e.g.*, *Vega-Santiago*, 519 F.3d at 2–5; *Mejia-Huerta*, 480 F.3d at 722–23; *United States v. Vampire Nation*, 451 F.3d 189, 195–98 (3d Cir. 2006).

The second issue we are currently confronting is how much disclosure parties are entitled to have during the pre-sentence report preparation process. In August 2009, the American Bar Association House of Delegates passed a comprehensive Resolution urging expanded access to the presentence report writing process.[9] Probation officers gather and analyze an extraordinary amount of information in creating a pre-sentence report. We were informed—while taking public testimony on April 6, 2009, in conjunction with the Rule 32(h) issue—that probation officers typically spend an average of thirty-five hours on each report and interview up to twenty witnesses or sources for information about the defendant. From my own experience reviewing hundreds of presentence reports, it is not uncommon in complex cases for the reports to exceed fifty or sixty pages of single-spaced typewritten text. This is particularly true when the offense was complex, multiple defendants were charged in the case, and the subject of the report has a lengthy criminal history.

Both prosecutors and defense attorneys often complain that they should have been given notice of or access to certain information considered by the probation officer, even if that information never found its way into the final report.

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[9] *See* American Bar Association, Criminal Justice Policy 2008-104A (Improving Procedural Fairness in the Federal Sentencing Process), *available at* http://www.abanet.org/crimjust/policy/am08104a.pdf.

Prosecutors suspect defendants are slipping in otherwise irrelevant or debatable mitigating information, or information regarding a defendant's psychological assessment for which no notice or opportunity to rebut is given. Defendants suspect that prosecutors plant evidence of prior bad acts to support enhancements based on alleged relevant conduct evidence that could not be proven beyond a reasonable doubt, and without giving notice to the defendants. We have heard empirical evidence that prosecutors sometimes give their entire case file to the probation officer—or ask their case agent to brief the probation officer—so that the government is able to offer inculpatory information never provided either to the court in establishing guilt or to the defense during pre-trial discovery.

Under our more discretionary sentencing regime, the inclusion or exclusion of certain information may well influence the sentencing judge to go above or below the advisory Guidelines range. Both parties want more influence—or at least more notice—before information is memorialized in the report. It is this pre-sentence report on which the district court typically relies in fashioning the ultimate sentence imposed. [10] It is also used by the Bureau of Prisons for classification to particular institutions or for purposes of separating inmates for

[10] There may also be other sources as well, including crime victim impact statements or letters sent directly to the court which, depending on local practice, may be unavailable to either side.

security reasons. The presentence report also tracks the inmate throughout his prison term and subsequent supervised release.

Though both parties may have legitimate reasons for wanting to examine all the information gathered by the probation officer, providing both greater notice and expanded access creates a whole new set of significant challenges. First, it will inevitably result in an even greater burden on probation officers to disclose and memorialize every bit of information that is recovered while compiling facts for their report. These officers already sift through huge amounts of information, much of which turns out to be either irrelevant or too insignificant to include in the pre-sentence report. Disclosing this information, memorializing what the presentence writer learned during the investigation of each lead, or even providing access to the data, would multiply their burden.

Second, creating and enforcing a workable rule establishing the details of access—e.g., who gets access to sensitive information, what must be provided, and what notice must be afforded to the parties and when—will also inevitably require continuing oversight by the sentencing judge. District judges will essentially be placed in the position of overseeing a second round of "discovery." In addition to the administrative burden this will impose on everyone involved in sentencing, it will also place the judge in the odd position of reviewing much of the information

and trying to determine its significance *before* he receives the final pre-sentence report. The report will no longer arrive as a clean, comprehensive document from a neutral third part, because the judge will have played umpire during its creation. Perhaps this is no different from overseeing the preparation of a pretrial order in a civil case, or in hearing the substance of the proof to be offered at trial while conducting an evidentiary hearing on pretrial motions to suppress incriminating evidence. But it will certainly require more time from already stressed district judges and prolong the timeframe between a guilty plea and sentencing. Lengthier sentencing proceedings and requests for continuances to meet this information seem all but inevitable.

3. Crack/Powder Cocaine Disparity

The shift to discretionary sentencing has added a new dimension to the ongoing debate about the crack/powder cocaine sentencing disparity. For years we have seen Eighth Amendment and Equal Protection challenges to the ten-to-one ratio mandated by the Guidelines. In *Kimbrough v. United States*,[11] the Supreme Court explicitly permitted district court judges the discretion to reduce that disparity. The Court held a district judge "may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the

[11] –U.S.–, 128 S.Ct. 558, 570 (2007).

objectives of sentencing," and, "[i]n making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." The Court reaffirmed this holding earlier this year in *Spears v. United States*, stating "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."[12] The result is that a judge may impose a sentence lower than the suggested Guidelines range, either because he finds it unnecessary in a particular case, or because he generally disagrees with the crack/powder disparity.[13]

Now, instead of seeing challenges to the mandatory ratio, we're seeing more challenges to a district court's exercise of discretion on that subject, or complaints that the district court did not know it *could* exercise discretion. If a defendant-appellant can show that his sentencing judge was unaware of his authority to depart downward to alleviate the crack/powder disparity, we grant relief, even if it is unlikely his sentence will be any different. For example, we recently remanded for re-sentencing where "the district court did not feel free to consider whether 'any

[12] – U.S. —, 129 S.Ct. 840, 843–44 (2009).

[13] Of course, the judge is still constrained by mandatory statutory minimums. If the suggested Guideline range is above the statutory minimum, the judge may reduce the sentence as low as the statutory minimum. However, he cannot sentence below the minimum, even if some disparity remains, because Congress has set the statutory minimums. *See United States v. Samas*, 561 F.3d 108, 110 (2d Cir. 2009); *United States v. Branch*, 537 F.3d 582, 594–95 (6th Cir. 2008); *United States v. Leon-Alvarez*, 532 F.3d 815, 818–19 (8th Cir. 2008).

unwarranted disparity created by the crack/powder ratio produced a sentence 'greater than necessary.'"[14] By now, our district courts presumably know that *Kimbrough* gives them discretion on the crack/powder disparity. However, because of our case backlog in the Ninth Circuit, we will likely see failure-to-exercise-discretion challenges for some time to come.

We also see many cases indicating ongoing confusion with the Supreme Court's holding in *Kimbrough*. The *Kimbrough* Court merely reaffirmed that the Guidelines are discretionary, and explained that imposing a below-Guidelines sentence based on disagreement with the crack/powder disparity is not per se unreasonable. However, defendants still raise *Kimbrough* challenges where *Kimbrough* cannot help them. For instance, we have rejected arguments based on a prior drug conviction as the basis for a career-offender enhancement. The fact that the defendant might have received a lesser sentence on his prior conviction for crack distribution does not affect a career offender enhancement in the present sentencing scheme.[15] Similarly, we also hear arguments that a judge should have

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[14] *United States v. Medina-Castaneda*, 511 F.3d 1246, 1249 (9th Cir. 2008).

[15] *United States v. Crawford*, 520 F.3d 1072, 1075 (9th Cir. 2008) ("*Kimbrough* does not help Crawford's case because he conceded during his re-sentencing hearing that the disparity does not actually affect his sentencing level. The judge asked during the hearing, '[a]ssuming the court is correct that[Crawford] qualifies as a career offender, if the conviction had been for powder instead of crack, wouldn't we be in the same place?,' to which Crawford's counsel responded by acknowledging that the base offense level calculation would be the same regardless

departed even below the statutory minimum. Statutory minimums, unlike Guideline range minimums, remain mandatory, and *Kimbrough* provides no relief in such cases.

We are also beginning to see many inmates seeking to reduce their sentences under Amendment 706 to the Sentencing Guidelines. Amendment 706 decreased the base offense levels specified by the Guidelines § 2D1.1 drug quantity tables for crack cocaine offenses. Amendment 706, which applies retroactively, also seeks to reduce the powder/crack disparity by adjusting the base offense levels assigned to various quantities of crack cocaine downward by two points. As of March 2009, over 19,000 inmates moved for sentence reductions under Amendment 706; approximately 70% of these motions were granted. A successful inmate can expect a sentence reduction between 13-20%.[16]

The challenge in some of these cases, however, is determining whether Amendment 706 applies. 18 U.S.C. § 3582(c)(2) allows a court to modify a term of imprisonment, but only "in the case of a defendant who has been sentenced . . . *based on a sentencing range* that has subsequently been lowered by the Sentencing Commission." Is a sentence *based on* the crack cocaine drug quantity tables if an

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of the powder cocaine versus crack cocaine distinction.").

[16]U.S. Sentencing Commission, Preliminary Crack Cocaine Retroactivity Data Report (March 2009), available at http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Report_Mar2009.pdf.

inmate was convicted of a crack cocaine offense but was sentenced as a career offender? What if the inmate's sentence was determined according to a combined offense level, such that the two-level reduction effected by Amendment 706 has no effect on his *sentencing range*?

Another interesting question in these Amendment 706 cases involves inmates who waived various appellate rights as part of a plea agreement. The issue here is whether a sentence modification proceeding under 18 U.S.C. § 3582(c)(2) is an appeal pursuant to 18 U.S.C. § 3742, a collateral attack, or something else entirely. Criminal lawyers would be well advised to consider this issue in negotiating plea agreements for crack-cocaine offenders.

4. Sentencing Enhancements and the *Taylor* Categorical Analysis

The last sentencing issue I would like to address arises in several contexts. It is based on a cardinal principle in sentencing recidivists: those who reoffend are punished more severely than first timers. In *Taylor v. United States*, the Supreme Court set forth the categorical analysis for evaluating the reliability of establishing the fact of a prior offense.[17] Challenges to findings on the establishment of a prior conviction are among the most common sentencing issues we see on the Ninth Circuit. The approach is used, for example, to enhance punishment for offenders

[17] 495 U.S. 575, 600 (1990).

subject to the Armed Career Criminal Act,[18] in immigration cases,[19] and for crimes of violence within the Sentencing Guidelines.[20] The question in each context is the same: Does the prior state offense reach conduct beyond the generic federal definition of an analogous crime?

Resolving that question is not as simple as it sounds. The Ninth Circuit takes a highly academic approach to answering the question, examining virtually every hypothetical situation to determine whether it is possible that a state court could convict someone under the state statute for conduct that would not fit within the generic definition of the crime. This often requires extensive consideration of state court cases and a healthy dose of legal conjecture. Never mind the difficulty of determining what the "generic" definition might be in some cases.[21] We often end up with results that, while technically correct under our reading of *Taylor*, seem utterly absurd to sentencing judges and lay people reviewing our answers to these questions.[22]

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[18] 18 U.S.C. § 924(e).
[19] 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43).
[20] U.S.S.G. §§ 2L1.2, 4B1.2.
[21] *See United States v. Esparza-Herrera*, 557 F.3d 1019, 1023–25 (9th Cir. 2009) (surveying various definitions of "aggravated assault" because we "derive the meaning of an enumerated Guidelines crime not from the offense's ordinary meaning but rather by surveying the Model Penal Code and state statutes to determine how they define the offense.").
[22] *See id.* (holding prior conviction for "aggravated assault" under Arizona Revised Statutes section 13-1204(A)(11) was not a conviction for a "crime of violence"

In contrast to the Ninth Circuit's stance, the Fifth Circuit employs a "common sense" approach.[23] Rather than debating whether every possible state conviction would fit within the generic definition, that court considers whether the state statute "is equivalent to the enumerated offense of aggravated assault as that term is understood in its ordinary, contemporary, and common meaning."[24]

I must confess that I favor an approach to jurisprudence that relies heavily on applying reason and common sense. That can prove difficult to achieve in the sometimes cloistered world of the appellate courts. I personally believe the Fifth Circuit's approach is more faithful to congressional intent in enumerating certain crimes of violence worthy of enhanced punishment for recidivist offenders. However, the rule in our circuit is that "common sense is out."[25] My hope is that the Supreme Court will revisit *Taylor* to give us additional guidance in carrying out Congress's policy toward repeat offenders. Perhaps the Sentencing Commission might also review the issue as well in revising the language of enhancement Guidelines.

In the last year or so, I have personally dealt with difficult cases alleging that

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under section 2L1.2 of the Guidelines).

[23] *See, e.g.*, *United States v. Mungia-Portillo*, 484 F.3d 813, 816–17 (5th Cir. 2007).

[24] *Mungia-Portillo*, 484 F.3d at 816 (internal citations omitted).

[25] *Esparza-Herrera*, 557 F.3d at 1026.

our application of *Taylor* is too rigid, that it is too loose, and that it should operate differently in certain contexts.[26] Multiply my personal experience by the fifty judges on our court alone, and you get some idea of how pervasive *Taylor* problems are proving to be as they multiply on our appellate sentencing dockets.

5. Conclusion

I would like to conclude with one observation. For many years after the Guidelines were adopted we heard tireless complaints that sentencing was too rigid and was nothing more than mathematics. No formula could capture the subtle questions of determining guilt, protecting our communities from crime, acknowledging the ability of wrongdoers to repent and turn their lives around, and gauging how to most effectively curb recidivism that a trial judge must weigh in crafting a just sentence. The result was *Booker* and its progeny, and more discretionary power returned to the district courts.

But now we are seeing a new wave of complaints. Defendants who look the same on paper receive inconsistent sentences for similar crimes. Some judges fail to consider a particular factor a defendant believes is important. Others give greater weight to a prosecutor's concerns. Sometimes, the sentence surprises both sides. In short, perhaps judges now have too much discretion. I predict with some

[26] *See, e.g.*, *United States v. Mayer*, 560 F.3d 948 (9th Cir. 2009).

confidence that this continuing swing of the sentencing pendulum will keep us all in business awhile longer.