ROBERT J. CONRAD, JR.
CHIEF UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NORTH CAROLINA

United States Sentencing Commission
Regional Hearings on the Twenty-Fifth Anniversary
of the
Passage of the Sentencing Reform Act of 1984

February 11, 2009

VIEW FROM THE BENCH

Introduction

On January 21, 2009, the Supreme Court issued what may be its most recent proclamation on federal sentencing; I did not check Westlaw this morning before coming here to see what else has changed. In *Spears v. United States*,[1] the Supreme Court summarily reversed the Eighth Circuit Court of Appeals and held that a district court judge is entitled to reject and vary categorically from the crack cocaine Guidelines based upon the sentencing judge's personal policy preference regarding the appropriate ratio between crack and powder cocaine offenses.

Chief Justice Roberts was troubled by the "bitter medicine of summary reversal" and wrote:

> *Apprendi, Booker, Rita, Gall and Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.[2]

The per curiam majority dished back the culinary metaphor:

> The dissent says that "*Apprendi, Booker, Rita, Gall and Kimbrough* have given the lower courts a good deal to digest over a relatively short period." True enough--and we should therefore promptly remove from the menu the Eighth Circuit's offering, a smuggled-in dish that is indigestible.[3]

If the United States Sentencing Commission Guidelines can cause this much heartburn at the highest court, who am I, a judge of an inferior court, to serve up my own critique. Well, I sit

---

[1] *Spears v. United States*, No. 08-5721, 2009 WL 129044 (U.S. Jan. 21, 2009).

[2] *Spears*, No. 08-5721, 2009 WL 129044 at *6.

[3] *Spears*, No. 08-5721, 2009 WL 129044 at *4.

slightly easier at the table joined in spirit with Judge Michael McConnell of the Tenth Circuit, who, when placed in the same predicament, wrote:

> If that seems a presumptuous thing for an inferior court judge to say about the product of his superiors, I take comfort in the fact that eight of the nine Justices agree with me that either the Sixth Amendment holding or the remedial holding is wrong, and that the two do not fit together.[4]

Personal Background

The Sentencing Reform Act of 1984 and I began our legal careers at roughly the same time. Shortly after graduating from the University of Virginia School of Law in 1983, I began representing criminal defendants in state and federal court as part of my legal practice. In January 1989, I moved over to the prosecution table, serving for twelve years as an Assistant United States Attorney and for the three years as United States Attorney. In June 2005, I began sitting in the judge's chair in federal district court, and from that vantage point have presided over more than seven hundred felony sentencing hearings.

I also stand at the professor's lectern, teaching a Sentencing Law course at the Wake Forest University School of Law as an adjunct professor. I am indebted to Dean Blake Morrant and Associate Dean Ronald Wright for the privilege of trying to explain the intricacies of the federal sentencing Guidelines, and the legal reasoning behind them, to very talented law students. I note Dean Wright is on the panel from Academia following this one.

Observations

The apparent gut-churning in the Supreme Court evidenced by the cases already mentioned evokes a memory of Dr. Peter Venkman, the eminent para-normal scientist played by Bill Murray in the movie *Ghostbusters*. He had been pursuing a beautiful woman throughout the movie, but his moment of opportunity came only after an evil spirit possessed her. Face-to-face with the enigma of desiring what he knew he could not have, he reconsidered, saying:

> I make it a rule never to get involved with possessed people. Actually, it's more like a guideline than a rule . . .

It seems like the Guidelines, which used to be more like rules, are becoming more like guidelines all the time. Of course, the allusion to "possessed people" is in no way intended to be descriptive of the Sentencing Commission.

The *Apprendi, Booker, Rita, Gall,* and *Kimbrough* decisions have indeed given us all "a good deal to digest." Out of my experiences of sitting in different chairs in the federal

---

[4] Michael W. McConnell, The Booker Mess, 83 Denv. U. L. Rev. 665, 677 (2006).

courtroom, let me make a few brief observations regarding the Supreme Court's recent interpretation of the Guidelines.

Heartland

First, I applaud the Sentencing Commission for giving prosecutors, defense attorneys, probation officers, and judges an empirically based "heartland" from which to start the sentencing process.

I have found that the most difficult task for me as a judge is to sentence another human being. Human tragedy is reflected in each hearing. The responsibility to judge wisely and compassionately, while balancing the need to protect society, deter crime, provide just punishment, and aid the effort at rehabilitation, weighs heavily on the heart.

I would feel at a loss in those tough moments of decision if I only had my own idiosyncratic preferences or anecdotal experience to follow. Instead, for the past twenty-five years, judges have had a beneficial resource to consult which reflects, for the most part, the sentencing practices of colleagues across the country and across the years. Thus, I differ with a fellow judge on my district bench who once said publically that the Guidelines would "gag a maggot." No such animal cruelty has occurred.

The systematic approach provided by the Guidelines system has brought order, consistency, and rationality to federal sentencing law. Combined with the appropriate exercise of judicial discretion recognized *Booker*, courts are equipped and empowered to render reasoned sentencing decisions, grounded in past practice and statutory purposes, achieving just sentences in particular cases.

Guideline Goals

Given the potential benefits of the Guidelines, it is healthy to ask whether the goals of transparency, uniformity and proportionality are being achieved.

Here, again, the Commission and Congress are to be commended for achieving the goal of transparency rather significantly. The elimination of parole has provided honesty in sentencing, which is critically important to crime victims and the public. Procedural safeguards, including the preparation of pre-sentence reports, the opportunity to object to information included in them, and full hearings can give defendants greater confidence in the fairness of the sentencing process. Much of the arbitrariness, idiosyncracy, and hiddenness inherent in an indeterminate sentencing scheme has been replaced by an ordered, transparent system.

The goals of uniformity and proportionality are often in tension, and the achievement of them has been complicated largely by the obligation to impose mandatory minimums sentences in certain cases.

Mandatory Minimums

Statutory mandatory minimum punishments, and the Guidelines written to implement them, achieve the goal of uniformity sometimes at the cost of unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the Guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, the presence of a firearm, and use of special skill. The inability to tailor sentences based on these and other factors results in similar sentences for defendants whose actual conduct was dramatically different and disparate sentences for defendants who are actually similarly situated.

The Guidelines themselves are marred by the obligation to impose mandatory minimum sentences. Typically, Guideline ranges increase proportionally with aggravating factors and criminal history. Guideline ranges influenced by mandatory minimums contain large jumps in sentence length or "cliffs" based on small differences in offense conduct or a defendant's criminal record.

In too many cases a sledge hammer is the only tool available to dispatch a fly. Sentencing decisions are always difficult, but the required application of mandatory minimums in cases where they are not warranted is repugnant. Last year, I was forced to impose a life sentence on a low-level drug conspirator in a large-scale drug-trafficking ring. The individual's role was essentially that of a chauffeur for a major drug dealer who cooperated and received a reduced sentence. The chauffeur had two prior state drug convictions for transactions occurring close in time for relatively insignificant amounts, resulting in little or no actual jail time. Since this was his third offense, I imposed the applicable statutory mandatory minimum of life imprisonment. The sentence was not just and served no statutory purpose. I can tell you that I did not sleep well the night before the sentencing hearing knowing what was coming; afterwards, I did not feel that I had contributed to the furtherance of a just society.

Mandatory minimums have the most potential for disproportionate sentencing in the "stacking" of Title 18, United States Code, Section 924(c) charges. The statute requires mandatory minimum sentences to be served consecutively to all other terms of imprisonment, and the minimum increases from five to twenty-five years for a second or subsequent violation. For example, if a low-level conspirator brought a firearm to a series of three undercover deals, he would face fifty-five years in jail for possessing the gun, regardless of whether it was actively used, and regardless of the drug charges.

Understandably, mandatory minimums are created by the Congress, not the Sentencing Commission. Nonetheless, the Commission's decision to depart from empirical data to cluster Guideline ranges around the statutory minimums makes them less reliable as a sentencing guide. Ultimately, the goal of uniformity must yield to the imperative of doing justice in individual cases.

Re-entry Programs

Justice in individual cases is being aided by new techniques and programs being utilized in supervising offenders. As my colleague and friend Greg Forest, Chief United States Probation Officer in the Western District of North Carolina, said yesterday, efforts are being made by Probation Offices to promote empirical measures such as the use of evidence-based practices in the supervision of defendants and offenders.

To this end, the Office of Probation and Pretrial Services at the Administrative Office of the United States Courts should be encouraged to continue grant funding to implement evidence-based supervision practices. Programs such as risk/needs assessment, motivational interviewing, cognitive-behavioral techniques, offender workforce development, and re-entry programs based on drug court models hold out hope for decreasing recidivism. Therefore, they should be promoted by Congress, the Commission, and the Administrative Office of the Courts and considered by sentencing judges.

I welcome such attention as that recently given by the Commission to Alternative Sentencing in the Federal Criminal Justice System through its 2008 Symposium and publication on the same topic. Effective alternative sanctions are important options in the federal criminal justice systems. For appropriate offenders, alternatives to incarceration can provide a substitute for costly confinement. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society. Efforts to assist felons assimilate productively into society under the auspices of "Second Chance" efforts, workforce development initiatives, and re-entry programs should be encouraged.

Sentencing After Booker

An unfortunate by-product of the Guidelines system has been the diminution in passionate sentencing advocacy by defense and government attorneys. In its place, a hyper-technical accounting practice has arisen, focusing battles on sub-sections and application notes, straining out issues such as minor v. minimal participant or organizer v. manager. I often wonder what a criminal defendant, his family, a victim, or the public thinks when exposed to such legal proceedings. As if there are not already enough lawyer jokes. What should not have been lost, and what I hope will be regained following *Booker* and its progeny, is a focus on the statutory purposes of sentencing (just punishment, deterrence, incapacitation, and rehabilitation) and how the Guidelines achieve them, or not, in individual cases.

Yet, the inferior courts have been instructed to first get the Guideline calculations right, which means devoting substantial amounts of time to litigating the applicability of various adjustments. Next, we have been instructed to consider departures under the Guidelines, followed by variances outside the Guidelines, all the while tasting the soup at each stage to see if a "sufficient but not greater than necessary" sentence has crafted. Adding to the complexity of

this multi-course meal are new appellate recipes directing the cooking that is already underway in the kitchen. We must be mindful that district courts are not quaint bistros; a large number of patrons have legitimate expectations of speedy service and we are already operating on a waiting list. Of course, McJustice, a pragmatic, formula-based approach to sentencing without individual consideration, is not a suitable alternative if the goal of proportionality is to be achieved.

The last few years have been a time of tremendous change in federal sentencing practice. Maybe we do need a little time to digest.