ADAPTING THE GUIDELINES TO *BOOKER*

Frank H. Easterbrook[*]

The Sentencing Guidelines were designed a generation ago to carry out a legislative policy of determinate sentences with a minimum of judicial discretion. The Supreme Court's decisions in *Booker*, *Kimbrough*, and *Spears*, which make the Guidelines advisory, call for a change in their structure.[1] Every system of regulations should be matched to its purpose. Yet the Commission has not revised the general structure of the Guidelines since *Booker*, and it seems to me that doing this is the most important current task.

If the Supreme Court had eliminated the Guidelines from the district court's obligatory tasks at sentencing, as some of the Justices contended that it should, then structural revision would not be important. The Commission could maintain the Guidelines as recommendations. But instead the Court held that district judges *must* calculate the Guideline Range correctly, after which they can impose any reasonable sentence. And the court of appeals must review the Guideline calculations as well as the reasonableness of the sentence.[2] But district judges are forbidden to presume that a Guideline sentence is reasonable.[3] This means that both the district court and the court of appeals may be required to carry out an exercise that has a limited, if any, effect on the sentence. It is a make-work prescription. If work is to be made, there should be less rather than more. That will conserve judicial time for more pressing tasks and other litigants in the queue.

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[*] Chief Judge, United States Court of Appeals for the Seventh Circuit. This testimony was prepared for a hearing of the Sentencing Commission on September 9, 2009.

[1] United States v. Booker, 543 U.S. 220 (2005); Kimbrough v. United States, 128 S. Ct. 558 (2007); Spears v. United States, 129 S. Ct. 840 (2009).

[2] Rita v. United States, 551 U.S. 338 (2007); Gall v. United States, 552 U.S. 38 (2008).

[3] Nelson v. United States, 129 S. Ct. 890 (2009); Rita, 551 U.S. at 351.

The Guidelines ought to be designed so that they provide information to district judges about how comparable cases are handled across the nation, to fulfill their principal function of curtailing unwarranted disparities, 18 U.S.C. §3553(a)(6), without engaging in needless detail. When the Guidelines were mandatory, detail was vital, and the statute called for ranges to be no more than 25%. Now that the Guidelines are advisory, two principal changes can and should be made.

First, the ranges should exceed 25%. Second, the overlap in the ranges should be increased. These two changes together will reduce the need to make precise findings that do not affect the outcome, and thus save time for both district and appellate judges without sacrificing any of the statutory goals.

Current doctrine has it that, unless the district judge says something along the lines of "my sentence is unaffected by how I resolve issue x," there must be a remand even when the sentence is within a zone where the ranges overlap. After *Booker* there's little point to this fastidiousness; the Commission can end it at a stroke by adopting a presumption that the resolution of any issue is irrelevant when the sentence is within an area where the ranges overlap no matter how issue x is resolved. That plus somewhat wider ranges would do a lot to avoid wastes of legal and judicial time.

My court has recommended that district judges practice self help in the interim. We have urged them to say that resolving one or another disputed point just does not matter to the final sentence—not only when ranges overlap, but also when they don't, if the judge has decided to use the power bestowed by *Booker* and its successors.[4] Our advice was directed to district judges, but its spirit is equally applicable to Guideline design.

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[4] United States v. Sanner, 565 F.3d 400 (7th Cir. 2009); United States v. Aguilar-Huerta, 2009 U.S. App. LEXIS 17213 (7th Cir. Aug. 3, 2009). See also United States v. Dhafir, 2009 U.S. App. LEXIS 18419 (2d Cir. Aug. 18, 2009).

Let me give you an example, prompted by a case now under advisement in my court. I won't mention the name of the case, or the precise details, since the opinion has not been released. But it illustrates a kind of problem that is common, yet avoidable.

Smith (I'll call him) is charged with distributing drugs to Jones. The evidence at trial shows that Smith has been a commercial distributor for at least a year and has many customers in addition to Jones. The district judge needs to determine Smith's "relevant conduct" in order to decide how many offense levels to add under the drug-quantity table in U.S.S.G. §2D1.1. The judge takes testimony from Jones and two other customers, all cooperating as part of plea bargains. The judge must decide whether they are to be believed—and, if they are telling the truth, whether their memories are accurate. Let us suppose that the three customers together narrate sales that come to 1.95 kilograms of cocaine. The drug-quantity table distinguishes between 2 kilograms or more (level 26) and 500 to 1,999 grams of cocaine (level 24). This is not a statutory break point (the mandatory minimum changes at 5 kilograms, not 2), but the prosecutor wants the higher offense level. So he introduces evidence that, when Smith was arrested, he was carrying $3,000. The prosecutor argues that this money must have come from drugs and should be converted to a cocaine equivalent, which will push Smith over the 2-kilo threshold. The need to resolve this argument about the source of the funds requires a 2-day hearing in the district court and is the subject of an appeal, and potentially a remand to do it over.

Why was this at issue in the first place? It is because of the sharp line in the Guidelines: two levels can mean several extra years in prison. But why should such a distinction be drawn? A dealer whose business entails 2,000 grams is no different in social dangerousness from one who has sold 1,999 grams. Indeed, as a practical matter there's little reason to distinguish 2,500 grams from 1,500 grams. Not only is dangerousness

about the same, but measurement error in these cases is so great that the court's effort to separate them is not reliable. Are the witnesses honest? Did they remember accurately? People don't document their illegal transactions with the detail that Merck keeps records of its pharmaceuticals.

The Guidelines should recognize that approximations are inevitable—a court is lucky to get quantity correct within a factor of five—and that lines thus must be blurred. This implies overlapping the quantity tables, and the sentencing ranges produced by these tables, or both. The goal should be a reasonable approximation rather than illusory exactitude.

The example I have given also illuminates another problem: the quest to measure with precision what is measurable, at the expense of the larger picture. If we want to know how big Smith's operation was, we need to know what Smith peddled to *all* customers over the course of a year or more, not what he sold to the three customers who can be persuaded to testify. Trying to make precise decisions about a subset of the defendant's business means devoting days of judicial time to the wrong question. The Guidelines should urge district judges to stop pretending that the social concern with crime stops with the person on the witness stand, and start making estimates of the defendant's whole business. These estimates will of course be imprecise, but if the sentencing ranges are made wider, and overlapped more, the imprecision will be less important. My point is that the Guidelines should urge district judges to measure *what matters*, even at the expense of reduced precision, rather than what can be established with live testimony.

Let me now move from drugs (and other crimes that come within the relevant-conduct rules) to recidivist sentencing. Congress required the Commission to provide that repeat offenders who have three convictions for violent crimes or serious drug offenses must be sentenced at or near the statutory maximum. 28 U.S.C. §994(h). The Commission's career-offender guideline, §4B1.1, goes beyond the statutory

list. This has certain consequences that my court's *Knox* opinion discusses.[5] I'm not troubled by the Commission's decision to establish its own list of prior offenses that justify recidivist treatment. My concern, rather, is that the Commission did not do a thorough job.

Instead of producing its own definition of violent felony or serious drug offense, the Commission copied language from the Armed Career Criminal Act, 18 U.S.C. §924(e). That has led my circuit, and most others, to hold that the Guidelines must be understood in the same way as the Supreme Court has understood §924(e) and a similar definition in 18 U.S.C. §16. And that decision has unnecessarily complicated sentencing.

There are two sources of complication. First, the Supreme Court has adopted what it calls a "modified categorical" approach under which a court looks at the statutory definition of a prior conviction in order to classify it. When that statute covers multiple offenses (though not otherwise), the court may examine the charging papers and plea colloquy, but nothing else (police reports are out).[6] Second, the Guideline (like the statutes) has a "residual" category under which certain crimes that are dangerous in fact count as violent felonies, even if the elements of that offense do not include an aggressive act. The Supreme Court's decision in *Begay*[7] has made application substantially more difficult. I won't get into the tedious details, though my circuit's opinions in *Woods* and *Evans* explore them at length.[8]

I can't think of any reason why all the complexities of the statutes—which can set mandatory minimum sentences and dramatically raise maximum sentences—should apply to

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[5] United States v. Knox, 573 F.3d 441 (7th Cir. 2009).

[6] Shepard v. United States, 544 U.S. 13 (2005).

[7] Begay v. United States , 128 S. Ct. 1581 (2008).

[8] United States v. Woods, 2009 U.S. App. LEXIS 17490 (7th Cir. Aug. 5, 2009); United States v. Evans, 2009 U.S. App. LEXIS 17994 (7th Cir. Aug. 13, 2009).

Guideline calculations, which affect neither minimum nor maximum sentences. And my circuit said in *Woods* that a district judge, after applying §4B1.1, is free to use the discretion it enjoys under *Booker* and its successors to raise the sentence to reflect the defendant's real conduct.[9] This means that a judge must first ignore the actual conduct underlying the prior convictions, classify the offense under the residual category, and then return to the subject and do it all again under a different and discretionary approach.

I say: Take Ockham's Razor and slice off the complexity. If the judge is eventually—at the discretionary stage—authorized to look at the actual facts of the prior offense behavior, then the Guidelines should allow this at the outset. In other words, the Guidelines should say that the "modified categorical approach" does not apply to §4B1.1. Second, the Guidelines should get rid of the "residual category" (with all the difficulties that *Begay* has introduced) and either set out a list of crimes that are so dangerous that they justify a special recidivist enhancement, or permit the district judge to use the pre-*Begay* approach of determining the prior crime's dangerousness.

I prefer the list; it is simpler and curtails dispute. And if lists have loopholes and oversights, so be it. After *Booker*, the judge remains free to impose a reasonable sentence even if the Guidelines have lacunae. Instead of trying to perfect the Guidelines to cover every contingency, you should simplify them to get the main themes right, and rely on sound discretion in the district courts to address the unusual details.

I could go on, but I have given enough illustrations to make my point. Simplification is much to be desired. It will yield gains for litigants, judges, and society at large.

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[9] See Woods at *7 n.2.