



MEMORANDUM

TO: U.S. Sentencing Commission

FROM: Edith H. Jones
Chief Judge
Fifth Circuit Court of Appeals

DATE: November 20, 2009

Thank you for inviting me to speak to the Commission. I commend you and your predecessors for your conscientious efforts to streamline and rationalize the federal sentencing process. It would be an understatement to say that these efforts have been complicated by *Booker* and its progeny. A reasonable person might conclude that because the “guidelines” are now subject only to “reasonableness” and a duty of trial court articulation that a sentence fulfills the general statutory mandates, the rationale for tinkering with nuances of sentencing rules has diminished. On the other hand, some jurisdictions, such as those of the Fifth Circuit, continue to apply the guidelines pretty faithfully.

Their adherence suggests that the Commission should continue to pursue its goals, albeit perhaps on a more generalized scale than in the past. On the assumption that you will not declare yourselves irrelevant because of the trial court flexibility mandated by *Gall* and *Kimbrough*, I have a few observations.

1. As you know, the Fifth Circuit continues to be responsible for a very large share (about 18% a year or two ago) of the entire federal criminal docket. While the docket gains heft from the prosecution of border crimes—illegal reentry, drug trafficking, immigrant smuggling—we see a wide variety of federal criminal prosecutions because of the circuit's size and diversity. Our federal district judges and appellate judges are well equipped to comment on the application and perceived effects of the guidelines. The first suggestion I would make is that the Commission continue to seek advice from our Fifth Circuit colleagues, taking advantage of what I believe is our particular sentencing expertise.

2. Second, I would update my prior testimony to the Commission. Shortly after I became chief judge, and not long after *Booker* was issued, I appeared at a Commission hearing in San Antonio. Two issues that I raised then involved the unsatisfactoriness of enhancements under Section 2L1.2 for illegal reentry, when the precipitating crimes were sex offenses or assaults on

law enforcement officers. The Commission redefined the sex offense enhancements at least once following my testimony, and I am pleased that the previous undercounting and differential treatment of such offenses has been substantially eliminated. Thank you for your actions in this regard.

With respect to assaults on law enforcement officers, this appears to be a less common type of prior crime used to enhance an illegal reentry charge. I found only one example of this type of prior crime in our published and unpublished caselaw since January 1, 2008. Consequently, I think this problem may justifiably not be at the top of your amendments list.

3. Looking at our appellate review responsibilities, I ascertained, with help from our Staff Attorney's office, that from 2008-09, 73% of direct criminal appeals (659) decided on the merits in this circuit involved challenges ONLY to the sentence. The remaining 27% (242) challenged the conviction alone or together with the sentence imposed. Among nearly 100 direct appeals currently being processed through the Staff Attorney's office, the proportions are about the same. This sheer volume indicates, initially, that with 18 judges participating in the full scope of the court's work (16 active and 2 senior judges), each of these judges will work on well over 100 sentencing appeals per year. What lessons have we drawn from this continual exposure? Sadly, very few.

According to the *Gall/Kimbrough* decisions, we are to determine whether the guidelines have been substantively followed, and whether the district court that chooses not to follow the guidelines has articulated a sufficient rationale for the sentence, and in either case we are to conclude whether the sentence is “reasonable.” The former two tasks are not difficult in light of our growing body of circuit caselaw. The “reasonableness” determination, however, defies appellate explanation. I recently sat on an oral argument calendar where two sentences, for quite different crimes, were shown to vary by multiples of four and more from other sentences for the same offense. We have no principled way to disagree with, much less overturn, such disparate sentences. Reasonableness review has essentially become no appellate review. Moreover, the fact that this circuit is inundated with and generates numerous published and unpublished opinions on sentencing decisions does not yield a database for assessing “reasonableness.” If you have the resources to enable courts to compare sentences in some way to determine reasonableness, it would be most helpful.

4. Justice Alito has written two excellent critiques of the Supreme Court’s approach to interpreting the “residual clause” in the Armed Career Criminal Act, which, along with a somewhat different such clause in the immigration law, has created difficulty for courts and the Commission in

attempting to decide what unenumerated “crimes of violence” deserve enhanced punishment. *Begay v. United States*, ___ U.S. ___, 128 S. Ct. 1581 (2008). *Chambers v. United States*, ___ U.S. ___, 129 S. Ct. 687 (2009). In his *Chambers* concurrence, Justice Alito’s second footnote listed five inter-circuit conflicts over the application of this enhancement. 129 S. Ct. at 492 n.2. The Fifth Circuit was a party to several of the conflicts. Perhaps the Commission is equipped to step in by amendment and resolve these conflicts, assisting both lower courts and the Supreme Court.

5. My colleague Judge Benavides asked our fellow Fifth Circuit members to comment specifically for this hearing. Not having canvassed the court myself, I conclude with a personal observation that the guidelines currently seem to me most uneven in application in the matter of child pornography and white collar offenses that turn on proof of loss. The rubrics used to measure culpability and enhancements in those offenses yield broad sentencing ranges. I would urge the Commission to look again at the basis for those sentences.

Thank you for your time and kind attention.