12-8-2011

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THE RECORDER
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No Change in Sight for Sentencing Guidelines

In the post-Booker era, the commission must reinvent itself to provide a useful tool for the courts in determining punishment, explains Wes Reber Porter of Golden Gate University School of Law.

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2011-12-08 01:40:20 PM

The past decade has brought dramatic and progressive change to criminal sentencing in federal court. The continued utility of the United States Sentencing Commission and its sentencing guidelines miraculously survived this change. The Supreme Court, in its 2006 decision in *U.S. v. Booker*, rescued the guidelines from obscurity in order to continue to promote the sentencing policy goals of uniformity and proportionality. However, the next important change needed is the least likely to occur — the Sentencing Commission itself must steward the "evolution" of its guidelines.

District judges routinely reject certain provisions of the guidelines as unhelpful. The Sentencing Commission must reinvent itself by reshaping its guidelines post-*Booker*. To start, the commission should remove the provisions in the guidelines that courts regularly exercise their discretion to disregard. And examples of routinely disregarded guideline provisions are not hard to find.

For example, the guidelines still require district judges to calculate and consult artificially enhanced punishments based upon often uncharged — and sometimes acquitted — conduct called "relevant conduct." The guidelines still require courts to consult its recidivism (re-)classifications such as the "career offender" provision. Here, the judge has all the details of the defendant's criminal history and resulting (already severe) sentencing range, yet the guidelines require the court to consider a more severe sentence because of its recidivism label. The guidelines still require parties to litigate, and judges to find, whether conduct qualifies for other guideline-created labels, such as whether it is "serious," "violent" or "sophisticated."

HOW THE GUIDELINES SURVIVED

Congress passed the Sentencing Reform Act of 1984 to promote uniform and proportional sentences imposed throughout the country. This legislation created the Sentencing Commission that then created the sentencing guidelines. For more than two decades, the sentencing guidelines were mandatory. During this time, Congress also enacted legislation that made punishments under the guidelines harsher.

The court in *Booker* restored district judges' discretion to fashion fair and just sentences for individual defendants. Due to the almost 20 years of case law, however, the *Booker* court also artfully rescued the guidelines from obscurity. The court labeled the guidelines "advisory." It then set forth a process that required the district court to calculate and consult the applicable guideline range during sentencing. The Sentencing Commission would continue to regulate federal sentencing and serve the original goals of the SRA.

In the five years after *Booker*, district judges generally have embraced the sentencing policy goals, consulted the guidelines and imposed "reasonable" sentences. Congress fortunately has not attempted to legislate a fix to a sentencing process that is not yet broken. The federal sentencing process has played out as intended by the Supreme Court and as well as could have been expected for the Sentencing Commission. Yet, with respect to these unhelpful guideline provisions, district judges are required to make findings about them and consult the resulting calculation, but they then may exercise their discretion to ignore the provisions when imposing a sentence.

Congress always intended the guidelines to evolve. And they did evolve during the almost 20 years when the guidelines were binding upon the courts (1998 to 2006 — "the guidelines era"). Because the court rendered the guidelines "advisory," Congress no longer has an incentive to enact legislation that affects the guidelines. District courts with sentencing discretion similarly have no continued interest in shaping the guidelines. The Sentencing Commission instead must reinvent itself and it can start by removing the provisions in the guidelines that courts regularly disregard.

A LOOSE 'ANCHORING' CALCULATION

District judges enjoy the discretion they sought during sentencing. With any exercise of discretion comes a need for information. In federal sentencing, providing the district judges with information to exercise their discretion is not the problem. District judges receive, in most criminal felony cases, a pre-sentence report which contains an enormous amount of information to guide the sentencing court's discretion. In fact, federal district judges receive far more information about the individual defendant, his criminal history and the offense conduct than other courts imposing sentences in our country.

Many provisions in the guidelines do not provide any helpful information to the court at sentencing. Only the resulting calculation is helpful to the court as an "anchoring" reference for its sentence. In consulting the guideline calculation, the district judge learns what the likely sentence for a similar defendant committing a similar offense would have been during the guidelines era (1988 to 2006). Consulting the guideline calculation can still assist district judges in exercising their discretion. The court in *Booker* rendered an all-or-nothing decision when it saved the guidelines; yet, not all provisions in the guidelines were worthy of saving.

Every year since 2006, the sentences imposed by district judges have drifted further below the "anchoring" guideline calculation. Among different offenses, geographic regions and individual defendant's demographic data, federal sentences slide lower each year. The commission dismisses the trend as insignificant. But the anchor of the guideline calculation is loosening and becoming less helpful to the sentencing court.

There are many explanations for the lower sentences since *Booker*. Many believe that the guidelines were skewed too high. Others argue that district judges, particularly guideline-era judges, have gained greater comfort with sentencing discretion and accounting for individual circumstances. The explanation, however, also may reflect the district judges' exercise of their discretion to disregard unhelpful provisions in the guidelines. The sentencing commission should review these trends and remove generally disregarded provisions of the guidelines to promote continued uniformity and proportionality.

THE CUTTING ROOM FLOOR FOR THE GUIDELINES

Information guides judicial discretion. The district court routinely receives all the information it needs. For example, the court already considers all the conduct "relevant" to an offense and all of the details of a defendant's "criminal history," whether it contributes to the calculation or not. It is already included in the PSR. Thus, with or without the guidelines' calculations, district court judges have the information to exercise their discretion.

Many provisions in the guidelines involve wholly unhelpful manipulations and recategorizations of information already available to the court. In fact, certain problematic provisions skew the "anchoring" guideline calculation and mislead the district court's sentencing decision. The Sentencing Commission should endeavor to weed these provisions out of the guidelines.

The patently unhelpful "relevant conduct" guideline provision may be the best example. It requires district judges, in some cases, to consider a different (and harsher) punishment based upon often uncharged — and sometimes acquitted — conduct. Because, again, the district court already considers this information, an artificially inflated calculation based upon so-called "relevant" conduct is not helpful, and is instead misleading.

No one would miss the "relevant conduct" provision of the guidelines if it disappeared tomorrow. Instead, the district judge must calculate, consult and then disregard a calculation elevated by relevant conduct to arrive at a fair and just sentence. The Sentencing Commission can end this circularity by removing it.

Other unhelpful and misleading guideline provisions are not difficult to identify. Critics and district judges have demonstrated them to the Sentencing Commission for decades. District judges cite for appellate courts their own "disagreement" with certain provisions as justification for imposing a sentence below the anchoring guideline range.

NEW ROLE FOR THE SENTENCING COMMISSION

The Sentencing Commission should appreciate that only a meaningful guideline calculation assists the court when exercising its discretion, and that only a meaningful anchoring reference continues to promote uniform and proportional sentences in federal court. The anchoring guideline calculation could have sustained meaning in the post-*Booker* sentencing process if the Sentencing Commission evaluated trends and trimmed the guidelines back. Without a dramatic change, the post-*Booker* sentencing process will become increasingly inefficient and largely a waste of time and resources.

The much needed stewardship is not likely to happen. The Sentencing Commission should review its guidelines with an eye toward informing the sentencing court's discretion. The commission should reconsider certain guideline provisions understanding that the underlying information is already made available to the district court. It should start by rooting out all potentially misleading and routinely disregarded provisions — like "relevant conduct."

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