THE COST OF AVOIDING INJUSTICE BY GUIDELINE CIRCUMVENTIONS

Jack B. Weinstein* and Nicholas R. Turner**

I. Introduction

Ten years of grappling with the federal sentencing guidelines have borne familiar and frequent lamentations. The following representative samples perhaps deserve a place in the Federal Judicial Center's Benchbook, a manual for federal judges:

> "The court makes these findings with reluctance and regret, because it does not believe that the sentencing range equates with the wrongness of the defendants' actions. . . . It seems to this court that the sentence it must impose on these defendants is unfair . . . overly harsh, overly long and tragic."[1]
>
> "I join [with] . . . the majority, because I think it reaches the correct result under the Guidelines, which I am bound by law to enforce. I write separately, however, to express my profound concerns about the efficacy of the Guideline system."[2]
>
> "I concur in the result . . . the sentence does not violate the Guidelines . . . [but t]his case is another example of rigid guidelines producing inequity and injustice in sentencing, and demonstrates the need for reformation, if not the abolishment, of Guideline sentencing."[3]

Constrained at sentencing by guidelines that more than half of all federal judges would eliminate and that more than two-thirds would modify to be advisory,[4] many judges have uttered these or similar words.

Prognosticators expected that the Supreme Court's June 1996 ruling in *Koon v. United States* would provide a method of restoring justice to federal sentencing. Affirming "traditional sentencing discretion" of district judges and establishing an "abuse of discretion" standard of review,[5] this decision offered hope to those convinced of the judiciary's institutional incapacity to ameliorate. The early reports on *Koon*'s effect, however, are not so promising — according to at least one report, there remains "a continuing willingness by appellate panels to second-guess district court judges."[6] Whether *Koon* will have the hoped-for liberalizing effect on district judges' discretion to depart remains an open question.

* *Senior Judge, United States District Court, Eastern District of New York.*
** *J.D., Yale Law School, 1996; Law Clerk to Judge Weinstein.*

The reasons for *Koon*'s lack of effect to date, we hypothesize, are basically two-fold. First, there may be some judicial attachment to pre-*Koon* constraints. Mandatory rules reduce tensions and the need to reflect—often during the night when sleep refuses its mercy—on what is appropriate. It is convenient for judges, and particularly appellate judges who do not see the real people affected by sentencing decisions, to mechanically follow the guidelines. Some newer district court judges—although able to face and observe defendants and their families—may simply prefer operating within the "safer" confines that mandatory rules provide.

Second, there is the effect of institutional inertia on those judges who did not participate in sentencing before the guidelines. Psychologically they may be prone to assume that the guideline system, as it has developed over the past decade, is the only viable sentencing regime. Since some appellate judges had almost no sentencing responsibility before the guidelines—the number of federal sentencing appeals increased from 225 in 1988 to 8,731 in 1995[7]—it is likely they quickly fell into a habit of stringent sentencing review, from which they have found it difficult to extricate themselves. The transition from *de novo* review to the looser *Koon* standard may be more difficult for the rule-bound than had been anticipated.

Whatever the effect of *Koon*, injustices under the guidelines often have been, and continue to be, avoided by a variety of circumventions and tinkering around the margins. Such measures allow for a modicum of justice in a smattering of cases, but the cost is not insubstantial. It includes creating a somewhat chaotic system that hits some defendants and misses others, and a reduction in the morale of a profession knowingly engaged in unnecessary cruelties and in making bad law. Proper recognition and utilization of *Koon* would lead to a reduction in this harmful circumvention.

II. Ad Hoc Circumvention

When rules become too burdensome or lose their utility, parties tend to find ways of circumvention. The guidelines are no exception. In spite of bromides about, and genuflection in the direction of, "truth-in-sentencing," transacting around guideline-mandated sentences is prevalent. Some prosecutors, defense lawyers and juries are adept at manipulation. For instance, overly-harsh sentences are often avoided through agreement between defense counsel and the Assistant United States Attorney. Defense counsel may make a plea bargain deal which includes a downward departure or a reduction in the adjusted offense level. If the AUSA indicates that she or he has no objection or does not intend to appeal, the court departs or reduces the range to make the punishment better fit the crime and the criminal. Reduced charges

HON. JACK B. WEINSTEIN

NICHOLAS R. TURNER

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are commonly bargained for, as one set of commentators explain:

> [P]rosecutors circumvent the guidelines by negotiating pleas to *below guideline sentences* in about 20-35% of the cases. . . . [I]n 20-35% of the cases resolved through a negotiated plea, the prosecutor *covertly* negotiates a *downward departure* from the guidelines, [a decision] not subject to appellate review.[8]

Similarly, offense characteristics and adjustments can be tweaked. Defense counsel and the AUSA may stipulate to facts that may affect sentencing in order to arrive at a mutually agreeable total offense level.[9] Numbers determinative of sentence, particularly those related to the amount of financial loss or to the quantity of drugs, are subject to negotiation.[10] Private deal-making is encouraged by Rule 11 of the Federal Rules of Criminal Procedure governing plea bargains. Under the case law, a court may accept a plea agreement negotiated by the defendant and the AUSA that calls for a sentence outside the guideline requirements.[11]

In all these situations, avoidance is almost entirely contingent upon the reasonableness of the prosecuting attorney — thereby re-affirming the guideline system's often-discussed and well-documented notoriety as a "prosecutor's paradise."[12]

Where the AUSA's accord is not forthcoming, juries may avoid the effects of the guidelines. Nullification of sentences deemed too harsh is increasingly reflected in refusals to convict. Jurors become aware of the disparate sentences that result from conviction through defense counsel's attacks on a turncoat's credibility, which often establish that the witness's deal with the government was designed to avoid the huge penalties faced by himself and those on trial.[13]

While the ameliorative effects of these modes of circumvention may be desirable in individual cases, they have troubling aspects. Most occur *sub rosa*, making them difficult to identify and undetectable by neophyte counsel, the public, scholars and even the Sentencing Commission. Potential relief is also *ad hoc*, dependent in great part upon the largesse and lenity of the AUSA, the skill and savvy of defense counsel, and the sympathy and perceptiveness of the jury or judge. Thus, relief by circumvention is not available to all defendants. The invisibility and inconsistency make sentencing more haphazard, chaotic and unpredictable — something, ironically, that the guidelines were intended to correct, but that they exacerbate because of their unprincipled severity.

III. Doctrinal Circumvention

The courts of appeals have also winked at or encouraged circumvention in a number of ways, including manipulation of burdens of proof and rules of evidence. This is most visible in the context of the widely condemned "relevant unconvicted conduct" provision of the guidelines.[14] The guidelines' treatment of relevant conduct is notably harsh. Prior to the adoption of the guidelines, the established law was that a defendant's wrongful conduct — unconvicted or otherwise — was considered relevant to sentencing in that a judge was entitled, but not required, to obtain or develop evidence of such conduct, and then could consider that conduct to impose a sentence that reasonably reflected the special circumstances of the case.[15] Under the guidelines, relevant conduct *must* be punished, regardless of special circumstances, at the same rate as if the defendant had been convicted of the activity constituting that conduct. Quantification of, and reliance on, the often arbitrary amounts of drugs involved or money stolen as part of "relevant conduct" creates particularly severe results in many cases.

A. Altering the Burden of Proof

Where a relevant conduct adjustment may increase significantly the severity of a sentence, some courts have avoided the Sentencing Commission's preponderance-of-the-evidence standard for resolving disputed fact issues at sentencing.[16] For example, the Second Circuit has stated that "the preponderance standard is no more than a threshold basis for adjustments and departures, and the weight of the evidence, at some point along the continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures."[17]

Shifting the weight of the burden of proof as to critical factual issues was common in pre-guideline sentencing.[18] As a technique for avoiding injustice it appears to retain vitality and continued utility. Although the Supreme Court in *United States v. Watts* repudiated lingering doubts about consideration of acquitted conduct at sentencing, it acknowledged "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."[19] Noting that the case before it did not present such "exceptional" or "extreme" circumstances, the *Watts* Court declined to address this issue, thus preserving the viability of the approach.[20]

B. Requiring "Specific Evidence"

Guideline treatment of relevant conduct has produced other circumventions. The Second Circuit, for example, has adopted a new rule of evidence — a rule which requires the prosecution to come forward with "specific evidence"[21] of the quantity of drugs alleged to be part of the offense — in order to minimize drug quantity "relevant conduct" enhancement at sentencing. The court's desire to reduce the deleterious effects of relevant conduct upon defen-

dants reflects a laudable sense of compassion. The court's approach, however, because it involves creating a new, restrictive classification of evidence for some sentences, is a notable example of *ad hoc ipse dixit* and is less desirable than shifting the weight of burdens of proof (which is not inconsistent with precedent). And this development reveals another of the detrimental effects of the federal sentencing guidelines: the distortion of well-settled principles of law resulting from courts laboring to avoid the guidelines' most brutal consequences.

The problem with the "specific evidence" approach is that Supreme Court precedent and the United States Code flatly preclude it. Almost fifty years ago, the Supreme Court declared that "[h]ighly relevant — if not essential — to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[22] Section 3661 of Title 18 echoes: "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[23]

Similarly, the Federal Rules of Evidence do not restrict evidence to be considered by the sentencing court. Rule 401 defines relevant evidence as generally as possible in terms of whether a trier would find in it any tendency to affect evaluation of the operative facts. Rule 402 makes all relevant evidence admissible except as otherwise specifically provided by the Constitution, Congress, or rules adopted by the Supreme Court. In fact, in this context the evidentiary rules are explicitly broadened, because they do not limit admissibility in the case of sentencing except as to privileges.[24] The Rules do not categorize — for exclusionary purposes, or for purposes of requiring certain evidence for certain crimes — forms of relevant evidence such as direct, circumstantial, or "specific."

The new vaguely defined classification of "specific evidence" runs counter to our modern theory of forensic evidence, and it thus represents a retrogressive step towards the practice relied upon from the Middle Ages to the late Nineteenth Century, which often limited the use and weight of evidence by category of evidence and type of case.[25] It is a denigration of the modern evidentiary principles of free admissibility and free evaluation of probative force by the trier that are the fundamental tenets of Twentieth Century evidentiary developments based on the work of such leaders in the field as Professors James Bradley Thayer, John Henry Wigmore, Jerome Michael and Edmund M. Morgan — as well as the work of Congress and the Supreme Court in adopting the Federal Rules of Evidence. Exclusion of evidence because it is not "specific," giving such evidence special weight, or requiring such evidence as a basis for a finding, is not appropriate under current federal practice, absent authorization by the rules, statutes or Constitution. Currently, there is simply no such basis for a "specific evidence" rule in sentencing.

IV. Conclusion

In creating new procedural protections in guidelines cases, the courts of appeals are, of course, acting in the highest tradition of the common law in seeking a just result. As Professor Karl N. Llewellyn pointed out, in appellate courts "[t]here exists, and guides and shapes the deciding, an ingrained deep-felt need, duty, and responsibility for bringing out a result which is just."[26] Llewellyn went on to note that "[w]hile the appellate court is bound by any reasonable finding of fact by the trier, the rule is colored in operation by the appellate court's duty to justice. . . . "[27]

Also noteworthy, however, is Llewellyn's related admonition: "'Hard cases make bad law' reminds us that the thrust [toward justice] may be enough to twist an otherwise good rule out of shape."[28] The attempt by courts to provide justice via a specific evidence standard, for example, risks having this effect, distorting the Federal Rules of Evidence and well-settled sentencing principles. In the long run, special rules to circumvent the guidelines may do more harm than good by complicating the sentencing process and denying trial judges full access to information necessary to ensure just sentencing, which will ultimately be protective of society, defendants, and the criminal justice system's symmetry.

The problem remains at the root — the guidelines as designed and interpreted create too much injustice. *Koon* seems to hold out some promise, but may affect only cases where some viable grounds for departure exist. As long as the guidelines exist in their present mandatory form, requiring disproportionate and counter-productive sentences, defense lawyers, prosecutors, the public, juries and trial and appellate courts will continue to endeavor to obtain more defensible and just results, at times by twisting the law.

When the law departs from reality, the pragmatism of our democratic adversarial system tends to bring it back to earth in myriad ways. Is it not time to eliminate much of the mendacity in our criminal justice system spawned by the guidelines? Legal fictions and euphemisms should be only temporary expedients to prevent gross injustice while the law adjusts to the real lives of real people and rules are rewritten to mean what they say.[29] Perhaps only when economic realism sets in — when the public understands the huge costs in unnecessary prisons[30] and broken lives that result from the present mandatory guidelines — will a more equitable and truthful system be established.

NOTES

[1] Toni Locy, *Judge Laments 'Life' Terms for 3 D.C. Officers*, WASH. POST, May 26, 1995, at A1 (quoting U.S. District Judge Thomas Hogan).

[2] *United States v. Harrington*, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring).

[3] *United States v. Baker*, 961 F.2d 1390, 1393 (8th Cir. 1992) (Bright, J., concurring).

[4] Joan Biskupic & Mary Pat Flaherty, *Justice By the Numbers: Loss of Discretion Fuels Frustration On Federal Bench — Most District Judges Want Shift in Sentencing Rules*, WASH. POST, Oct. 8, 1996, at A1 (51% of district court judges responding to survey would eliminate the Guidelines); Federal Judicial Center, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 3-4 (1997) (73% and 69% of district and circuit judges respectively believe mandatory guidelines are unnecessary).

[5] *Koon v. United States*, 116 S. Ct. 2035, 2046-47 (1996).

[6] *See* Harvey Berkman, *Supreme Court Landmark? 10 Months After 'Koon,' Sentence Guidelines Intact*, NAT. L.J., Apr. 14, 1997, at 1 (twenty-one of twenty-nine downward departures reversed). *But see United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997) (affirming downward departure for extraordinary family circumstances under *Koon*; "Because the Supreme Court believes that . . . [sentencing] experience is the best teacher, it instructs that district courts, which have the most, are to be deferred to by appellate courts, which have much less") (2-1 decision). That other panels of the Second Circuit and other Courts of Appeals would likely have voted to overturn the departure, as suggested bythe dissenting judge in *Galante*, once again reveals the *ad hoc* and fortuitous nature of much of guideline sentencing.

[7] *See* Coalition for Federal Sentencing Reform Fact Sheet at 13 (1997).

[8] Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 669 (1993) (quoting letter from former Commissioner Ilene H. Nagel to Frankel and citing other like sources) (emphasis in original).

[9] *See United States v. Rivera*, 821 F. Supp. 868, 870 (E.D.N.Y. 1993) (where weight of narcotics calculated by government is within a reasonable "margin of error" at the cutoff point between two base offense levels, the defendant may be sentenced to the lower of the two levels).

[10] *See Sidebar, A Funny Thing Happened on the Way to the Facts*, WASH. POST, Oct. 7, 1996, at A1.

[11] *See* Fed. R. Crim. P. 11(e)(1)(C); *United States v. Aguilar*, 884 F. Supp. 88 (E.D.N.Y. 1995) (court may accept agreed-upon sentence of 188 months even where guidelines required sentence of 360 months).

[12] Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991). The transfer of excessive power to the prosecutors by the Guidelines is well recognized. *See, e.g.*, THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION, THE REAL WAR ON CRIME 183-84 (Stephen R. Donziger, ed. 1996); *see also* Frankel & Orland, *supra* note 8, at 669 (noting that prosecutors "depart downward in 20-35% of their cases, thereby giving them a downward departure rate 3 to 6 times that of the judges, without any of the same accountability requirements").

[13] *See*, for example, *United States v. Molina*, — F.Supp. — (E.D.N.Y. 1997), where despite strong evidence of guilt, one defendant was acquitted of all charges, and the jury did not reach a verdict on all but one count for the other defendant. *Cf.* Saundra Torry, *When Jurors Choose to Ignore the Law*, WASH. POST, Apr. 7, 1997, at Washington Business 7.

[14] *See* U.S.S.G. § 1B1.3; *see also United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (Bright, J., dissenting) ("If the former Soviet Union or a third world country had permitted this practice [of punishing persons for alleged crimes that have not been the subject of notice, indictment or trial], human rights observers would condemn those countries"); *see also, e.g.*, Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. REV. 1179 (1993).

[15] *See, e.g., Williams v. New York*, 337 U.S. 241, 246-47 (1949).

[16] *See* U.S.S.G. § 6A1.3 commentary.

[17] *United States v. Gambino*, 94 F.3d 53, 56-57 (2d Cir. 1996). *Cf. United States v. Zagari*, 111 F.3d 307, 322-23 (2d Cir. 1997) (suggesting a split within the Second Circuit on proper burden of proof); *United States v. Kikimura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (indicating that in circumstance involving twelve-fold upward departure, "clear and convincing standard is . . . implicit" in 18 U.S.C. § 3553(b)).

[18] *See United States v. Fatico*, 458 F. Supp. 388, 409 (E.D.N.Y. 1978) (sliding scale for burdens of proof in sentencing depending upon the seriousness of a finding's impact), *affirmed*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). It has been widely followed in practice among judges under the Guidelines. *See generally* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 360-63 (1992) (survey of judges in the Eastern and Southern Districts of New York showing that most implicitly raise the burden of proof on critical factual issues).

[19] *United States v. Watts*, 117 S. Ct. 633, 637-38 (1997).

[20] *Id.*; *see also McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (finding preponderance standard constitutionally sufficient where there is no allegation that the sentencing enhancement is "a tail which wags the dog of the substantive offense").

[21] *See, e.g., United States v. Lasanta*, 978 F.2d 1300, 1309 (2d Cir. 1992); *United States v. Rivera*, 971 F.2d 876, 892-93 (2d Cir. 1992); *cf. United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997).

[22] *Williams v. New York*, 337 U.S. 241, 247 (1949); *see also United States v. Watts*, 117 S. Ct. 633, 635 (1997).

[23] 18 U.S.C. § 3661; *see also* U.S.S.G. § 1B1.4.

[24] *See* FED. R. EVID. 1101(d)(3).

[25] *See United States v. Shonubi*, 895 F. Supp. 460, 492-99 (E.D.N.Y. 1995) (discussing in Part IX the general rule favoring admissibility of, and reliance on, all helpful evidence); Jack B. Weinstein, *Some Difficulties in Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 234 (1966).

[26] Karl N. Llewellyn, THE COMMON LAW TRADITION, DECIDING APPEALS 23 (1960); *see also, e.g., United States v. Collado*, 106 F.3d 1097 (2d Cir. 1997) (interpreting statute under rule of lenity to reduce impact of out-of-jurisdiction convictions on second offender laws); *People v. Olah*, 300 N.Y. 96, 89 N.E.2d 329 (1949) (Fuld, J.) (same); *United States v. Concepcion*, 795 F. Supp. 1262 (E.D.N.Y. 1992) (interpreting applicable statutes to increase discretion under guideline regime), *rev'd sub nom. United States v. DeRiggi*, 45 F.3d 713 (2d Cir. 1995).

[27] Llewellyn, THE COMMON LAW TRADITION, *supra* note 26, AT 28.

[28] *Id.* at 121.

[29] *See generally* Julius Goebel, Jr., CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 118 (7th ed. 1946) (describing use of fictive trespass in County of Middlesex to give jurisdiction to King's Bench at Westminster).

[30] *See, e.g.*, Rand Corporation, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? (1997) (mandatory minimums not cost-effective); *see also* Robert Suro, *More Is Spent on New Prisons Than Colleges*, WASH. POST, Feb. 24, 1997, at A12.