

REMARKS FOR CJA SESSION, 10-3-08.
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The central challenge for a judge in the sentencing process is not to express or imply criticism of the lawmakers and opinion writers. It is to master the role of rules in the legal system when persons are taken into account. Rules are indeed indispensable, but the sentencing regimen that was with us from 1987 when the U.S. Sentencing Guidelines came into place until January 12, 2005 when the Supreme Court held the Guidelines to be unconstitutional as mandatory rules left patterns of thinking that were deeply imprinted in the minds of those involved in the justice system and they did not want to change. We acquired bad habits that are very hard to break.

While the first order of business following *U.S. v. Booker* was to implement the advisory Guideline regime, what followed for the sentencing process was ill-defined and awkward. Appellate courts, including our own, struggled with the usual tools of judicial craftsmanship such as presumptions, burdens of proof, great weight, substantial deference and even a few nonsensical formulae such as the one that dictated what I call measurement by mixed metaphor. That is, that the further away from a Guideline sentence the proposed sentence was, the heavier the burden to justify it would be. It seems as though the courts were clinging to the wreckage of the mandatory Guidelines, cast adrift in the currents of opinion instead of saying good riddance and building a seaworthy vessel.

Many trial judges, who had never sentenced anyone in the pre-Guideline era, sought the safe harbor of doing what they had always done — sentencing according to the Guidelines because they would say they found no reason for

departing from them. Indeed, a certain amount of caution, if not fear, was expressed that Congress would return with a vengeance to slap down judges as the sole obstacle to a uniform and appropriately punitive sentencing regime. Prosecutors chimed in with their theme that the Booker decision reduced the leverage they had to exact pleas of guilty. Their press reports were filled with allusions to terrorism and organized crime, but the dockets were and are filled with the illiterate, the marginally functional and the impoverished.

Before Booker, there was little expectation of any major shift in the dominant sentencing paradigm and so sentencing rhetoric had become formulaic at all levels from the drafting of the Pre-Sentence Report and the objections of counsel to the final sentencing statements of counsel and even, on occasion, the defendant. The court itself was not immune to this mind-numbing jumble of arcanity fostered by the Guidelines. Sentencing statements consisted of Orwellian jabberings of numbers, scores and grids — utterly divorced from human emotions. Political comment was limited to efforts to eliminate the last vestiges of judicial discretion. Throughout this period, mainly voiced by academics at different levels of abstraction, the failure of the mandatory Guidelines to achieve their vaunted purpose of uniformity of sentencing became obvious even to the most recalcitrant and obdurate opponents to judicial discretion and responsibility in sentencing. More importantly, I assert, the Guidelines regime was coupled with mandatory minimum sentences so as to infect the system with racial and gender bias and result in dramatic increases in the imprisonment of minorities and women. The mandatory Guideline sentencing scheme was deeply flawed and for eighteen years failed to achieve the stated goal of sentencing uniformity, caused increased racial and gender disparity and apparently caused an ever-increasing upward ratcheting

of prison terms.

As workers in the criminal justice vineyards tried to fashion a viable system in the post-Booker world or adhere to the Guidelines as though they were still mandatory, the Supreme Court in 2007 issued its decision in *Gall v. United States*. The Court reiterated that the Guidelines were no longer mandatory and issued some very sensible directions of its own: namely, the Guidelines are advisory, but the sentencing judge must first consult, then correctly ascertain the total offense level and the advisory range for imprisonment that the Guidelines offense level yields. That is still a problem because those who began their careers in the pre-Booker era are conditioned to believe that calculation is the end of the process rather than the beginning.

In the federal criminal system, the most litigated question is the defendant's sentence. [It is properly and accurately called "a condign sentence" the meaning of which is "deserved, appropriate and decent." Interestingly enough its root is the Latin "dignus" meaning "worthy" and from which we get the word "dignity."]

Most defendants plead guilty to one or more charges and the great majority of those who go to trial are convicted without much difficulty. What time they will serve is argued to the trial judge and on appeal. In determining a condign sentence, the criminal history of the defendant is a factor; so is all the defendant's conduct, both relevant and distant. So is the damage and suffering endured by the victim. What is being sought is the character of the act and the people involved as opposed to a nameless and faceless set of numbers. In these ways, at a minimum, not the law but the persons before the court determine the sentence.

In the post-Gall world, if no one moves the Guidelines obtain, but if sentencing judges can be moved beyond the automated sentence, they must focus, not on the Guidelines, but on the factors set out in 18 U.S.C. Section 3553 (a). A certain ritual is then inaugurated. Findings must be made. First that the Guidelines are not mandatory; Second, the facts provided in the Pre-Sentence Report have been submitted to the parties and either no objection has been made or the objections have been resolved; third, both parties have been advised the sentence to be imposed will not be a Guideline sentence and, finally, both parties are given a full opportunity to argue their positions regarding an appropriate sentence. With respect to this last mentioned requirement, I hasten to point out the court can provide that opportunity for counsel to make such arguments either in briefs or other writings before the sentence itself.

It remains, however, a time-honored ritual that the defendant has the right of allocution which means the final opportunity to speak before sentence is pronounced. It is possible, I suppose, for a judge to say, "I have consulted the Guidelines; they are advisory only and I am following their advice." I think, however, that such a sentence could be subject to intense review for failure to consider Section 3553 (a).

The post-Gall decisions of the 10th Circuit point out that once the legal hoops are stepped through, the 3553 analysis of the sentencing judge is an exercise in reason, hence a matter of discretion and it is reviewed not on the basis of whether the appellate court agrees with the sentence, but on whether the trial judge has articulated a rational basis within the ambit of discretion. I strongly advise

you to read and study both civil and criminal cases describing and defining just what an abuse of discretion is. In my experience, most people have no idea what the term means and its use has become little more than a slogan.

So, to get to the chase, what do I think lawyers should be doing in the sentencing process? First, the Government, and the Guidelines state the sentence imposed in months ---- say 120 months. A decent respect for the persons affected, the defendant, the victim, relatives and loved ones should lead you to state the sentence in years — and to lead the judge to think in terms of years rather than months. I can't explain cogently why, but "Ten Years" rather than "120 months" conveys with solemnity and awe what is being exacted. The government prefers to speak of the person before the court as "the Defendant." You should not fall into that trap of depersonalizing your client. He or she has a name and you should start by calling him or her Mister or Ms. so and so. I would also suggest that you never infantilize your client or trivialize yourself by referring to your client only by the first name. Adequate respect is shown by noting the defendant's full name and referring to him or her regularly by the last name and not misspelling it. In the famous Cardozo case, *Palko v. Connecticut*, the Supreme Court consistently misspelled the name of Frank Palka, whose execution was being permitted by the Court.

Attention to the person in these modest ways is an exercise in empathy and empathy, not sympathy, should be the guide. It should extend to the spouse and other relatives of the person being sentenced and the awful effects of the sentence on those persons should be clearly presented. Recall from English history that

Henry II, in his barbarous desire to punish Thomas a' Becket, exiled all of Becket's relatives from England. Our system punishes the immediate family of a criminal not by exile but by impoverishment and by humiliation and the denial of a parent's or spouse's comfort and company.

What can you do about it? Make the judge suffer. Make sure he is not galvanized and rendered insensitive to the consequences of the sentence. Sentencing should never be easy for a judge. It should never be cryptic and it should never be mechanistic. You need to disrupt the judge's comfort with the Guideline system and lead him to the criteria set out in Section 3553.

In sentencing, a judge should be informed of the narratives of the defendant and the victim. A judge's job is to synthesize and harmonize the competing narratives of the persons involved in the events of the crime with the specific intent of inclusiveness and that job stands in stark contrast to the singularity of punishment approach embedded in the Guidelines regime. What you must make crystal clear is that since Booker and Gall, the judge no longer must impose sentences that he or she doesn't believe in. Booker and Gall have restored a meaningful role to judges at sentencing. They no longer have to be wooden bureaucrats. Judges are now enabled to craft sentences appropriate to the circumstances of the case. And there is no excuse for failing to do just that. Your responsibility is to make sure that we don't fail.

It is perhaps helpful for you to think of your role in sentencing in this way: The classical Greek word for "injustice" is translated literally as "out of balance."

Doing justice is the act of restoring balance. The particular circumstances of each case present constituent factors in varying degrees and therefore each case must be evaluated on a discrete basis. In other words, there is no template that can be determinative of the outcome in a specific case. This process of individuation is at the heart of the adjudicative function and thus separates it from the pattern driven process exemplified in the extreme by the once mandatory Sentencing Guidelines.

By making the Guidelines advisory, the Supreme Court has restored the judicial function to sentencing, but as defense attorneys you must seize the opportunity to move the judge to a decisional rather than a rote process using the provisions of 3553 (a). It is unrealistic to expect that every judge will do so in every case. Human nature discourages venturing into this area without a template that allows one to fill in the blanks — and so to follow the rote responses of bureaucracy. In sum, your job in the sentencing process, as I see it, is to thwart the powerful convenience that encourages a laconic adherence to a thoughtless and passionless process.