

MYRON H. BRIGHT  
UNITED STATES SENIOR CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS  
EIGHTH CIRCUIT

POST OFFICE BOX 2707  
FARGO, NORTH DAKOTA 58108

October 31, 1990

The Hon. William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Re: Sentencing Guidelines

Dear Judge Wilkins:

I respond to your letter of September 7, 1990, asking that I give the benefit of my thoughts on three Guidelines sections or policy statements that I believe need review, amendment, or clarification. I deem it necessary to make a more general statement than focusing on only a few Guidelines sections. I should like to give you the benefit of my observation of the Guidelines, both generally and specifically, as I have seen them from the cases that have come before the Eighth Circuit, the court on which I predominantly sit.

First of all, the Guidelines unfortunately require the expenditure of a great deal of appellate judicial time, far more than we ever expended in limited review of sentences prior to the Guidelines. At least in the Eighth Circuit, we reviewed district court sentences only for gross abuse of discretion. Woosley v. United States, 478 F.2d 139, 147 (8th Cir. 1973) (en banc).

What is the present situation? The clerk of the Eighth Circuit advises me that in the past fiscal year we reviewed 527 criminal appeals. This represented a total of 19.7% of all of our appeals (2,681 new appeals, 527 criminal appeals). The breakdown of these criminal appeals show 88 pre-Guidelines cases, 176 pure Sentencing Guidelines cases, 71 cases solely on the merits, and 192 cases dealing with merits and the Guidelines. Thus, a total of 368 cases or nearly 70% of all criminal appeals in the Eighth Circuit presented Guidelines issues. That amounts to a tremendous additional workload for the courts of appeal.

According to the Statistics Division of the Administrative Office of the United States Courts, 9,493 criminal appeals were filed nationwide in the twelve United States Courts of Appeals during the past fiscal year. The breakdown of these appeals includes 2,174 pre-Guidelines cases, 1,745 pure Sentencing Guidelines cases, 948 cases solely on the merits and 3,641 cases dealing with merits and the Guidelines. Another 985 cases remain undesignated. Thus, at least 5,386 cases, or 56.7% of all criminal appeals presented Guidelines controversies. My own records show that nearly 22% of the cases that I heard as a federal appellate judge on the Eighth Circuit raised Guidelines issues.

The Guidelines cases are not necessarily easy cases. As you know, the Guidelines consist of an extensive manual amounting to a code plus Sentencing Commission commentary. In addition, the number of cases discussing Guidelines issues must, by now, number in the thousands.

For your information, I would like to review some cases that I think clearly demonstrate the deficiencies of the Guidelines as applied in the real world. Contrary to their Congressional mission, see 28 U.S.C. § 991(b)(1)(B) (1988), the Guidelines do not provide for certainty, fairness and equality. Nor do the Guidelines avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct, as the cases discussed below indicate.

1. United States v. Timothy John O'Meara, 895 F.2d 1216 (8th Cir.), petitions for cert. filed, No. 90-5215 (July 20, 1990) and No. 90-5468 (Aug. 13, 1990). In this case, the two defendants, Kost and O'Meara, could not have been more similarly situated. According to the Government's version, they both conspired to obtain the same amount of drugs from the same DEA agent, gave the same story to the police on the arrest, used the same defense at trial, were convicted of the same crime by the same jury, and admitted the same relevant conduct to the same probation officer following conviction. Yet, the probation officer computed Kost's sentence at 57-71 months, more than double than that for O'Meara at 27-33 months. O'Meara, however, was a far more dangerous criminal, his record showing eight previous infractions including three drug offenses and a juvenile conviction for sexual assault. By contrast, Kost's prior record consisted of an expunged drug possession charge and a \$50 fine for a bad check. In my view, this happened because the probation officer, throughout the

ascertainment of the sentence, made judgments generally unfavorable to Kost and other judgments generally favorable to O'Meara. The subjective nature of these judgments allowed the more experienced offender, O'Meara, to manipulate the system to obtain a favorable result.

In a dissent, I said: "This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines," id. at 1221, and that the sentence "belies both common sense and reality," id. at 1222. The dissent further pointed out that if Kost's conduct had been evaluated in the light most favorable to him, that he would have received a far less severe sentence. Id. In that dissent, I also wrote:

Whether the disparity in this case rests upon some inadvertent preference for personalities or because a more sophisticated offender successfully manipulated the system to his advantage, the end result is no less unsettling. Guideline sentencing "by the numbers" was supposed to eliminate such improper influences. As this case demonstrates, however, the Sentencing Guidelines do not reduce disparity and in my judgment have failed in that regard.

The essential lie of the Sentencing Guidelines is that, by establishing "neutral criteria" which vastly restrict the district judge's discretionary powers, they will eliminate disparity in sentencing. In reality, the present guideline system merely replaces one system of subjective sentencing with another. Indeed, the Guidelines are an intricate and complex code of sentencing and, as such, require extensive construction. Needless to say, this construction is not conducted by computers -- much less by gods. Instead, the implementation of the present guideline system is highly dependent on the judgment calls of fallible human actors, who are no less susceptible to errors in judgment and differences in interpretation than their pre-Guidelines predecessors. Hence, where sentencing judges once applied their legal knowledge and life experiences to the facts of a given case, we now call on them to evaluate the defendant's circumstances according to the dictates of a complex and cumbersome code.

Guideline sentencing is perhaps most disturbing, however, not because it continues to require subjective decision-making, but because these still-subjective determinations are in large part no longer conducted by the federal judiciary. Rather, due to the difficulty of mastering this complicated and ever-evolving guideline system, it seems to me that district courts have come increasingly to rely on the recommendations of the probation officer who prepares the presentence report. Consequently, it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers to whose technical knowledge overworked district judges understandably, but all too often, uncritically defer. I cannot help but feel that we have lost something in this substitution of technical proficiency for the thoughtful exercise of discretion by the federal judiciary.

Accordingly, I would remand this case to the district judge with instructions to reduce Kost's sentence using some common sense and an eye for consistency and just results.

Id. at 1222-23. Following publication of this opinion and dissent, a prominent district judge wrote the following to me:

Enclosed please find a copy of an article from the Minneapolis Star Tribune of Wednesday, March 14, 1990. Hopefully, it is the first of many relating to the subject.

Your dissent in the Kost - O'Meara case is the spark that ignited the same. Thank you. Sometimes a voice crying in the wilderness is heard.

2. United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989). In this case, Darla June Yellow Earrings pled guilty to assault resulting in serious bodily injury. According to the presentence report, the Guidelines dictated a sentence of 41-51 months. But the trial judge departed downward and imposed a sentence of 15 months, noting that the problem of the victim was brought upon at least in some part by his own sexual misconduct. The government appealed, asserting that the trial judge should

not have departed from the Guidelines. We rejected the appeal. Id. at 652-55. Thus, Yellow Earrings, a single parent with a small child to care for, will serve a sentence appropriate for her conduct and circumstances. Yet, a panel of this court recently heard another case where the district court, in a similar situation, refused to depart downward despite uncontroverted evidence of the victim's contributory sexual misconduct. See United States v. Sayers, No. 90-5056 (heard Aug. 14, 1990) (decision pending).

3. United States v. Creed, 897 F.2d 963 (8th Cir. 1990). In this case, the district court imposed a consecutive sentence for an escape conviction resulting from Creed's failure to return to custody while on a furlough due to a drinking binge. The district court refused to depart downward notwithstanding that the prison authorities had failed to follow Bureau of Prisons' recommendations to place Creed in an alcoholic treatment program. A panel of this court affirmed. Id. at 964-65. In another similar case, however, a different district judge imposed a concurrent sentence and departed below the Guidelines range. See United States v. Whitehorse, 909 F.2d 316, 317 (8th Cir. 1990). A panel of this court also affirmed. Id. at 317-20.

4. United States v. Miguel Cardenas, 896 F.2d 317 (8th Cir. 1990). Cardenas pled guilty to possession of an unregistered firearm and received a 21-month sentence under the Guidelines. On appeal, the sole question was whether the district court erred by denying Cardenas' request for a two-level reduction for acceptance of responsibility. Both the prosecutor and defense counsel agreed that the reduction for acceptance of responsibility was appropriate. The probation officer, however, made his own interpretation and recommended that the downward adjustment be rejected. The district court summarily denied the downward adjustment, and an Eighth Circuit panel affirmed under the standard of deference owed to district courts. Id. at 320-21. In my view, however, most district courts would have accepted the stipulation of the parties and, in all likelihood, most probation officers would have found the facts in conformity with the recommendation of the United States attorney. Moreover, for another court, the fact of Cardenas' guilty plea alone could have sufficed to warrant the reduction for accepting responsibility. Cf. United States v. Russell, 913 F.2d 1288, 1295 (8th Cir. 1990). Notably, the vast majority of defendants who plead guilty receive credit for acceptance of responsibility.

See United States v. Knight, 905 F.2d 189 app. at 194-95 (8th Cir. 1990).

5. United States v. Goebel, 898 F.2d 675 (8th Cir. 1990). The issue presented was whether the court should have granted a two-level reduction in the offense level for a defendant who claimed to be a minor participant. This proved to be a factual issue in which the probation officer made a determination, approved by the district judge, that the defendant did not serve as a minor participant. Our review of the record produced no clear evidence of error, and thus we affirmed. Id. at 677-78. Yet, in exactly the same situation, another probation officer and another judge could very well have reached a contrary conclusion. My concurrence in that case stated:

I once again observe that the Sentencing Guidelines can and do produce disparate and unfair sentencing results among similar offenders where, as in this case, an essential factor in the application of the Guidelines rests upon a probation officer's subjective interpretation of a Guidelines section, which the sentencing court summarily adopts.

Id. at 679.

6. United States v. James O. Williams, 902 F.2d 675 (8th Cir. 1990). Williams received a more severe sentence because the district court determined that he acted as a leader or organizer of the underlying criminal conduct. We affirmed, noting that the issue was a fact-finding matter for the district court reviewable only under the clearly erroneous standard. Id. at 678. Nevertheless, another district court might have reached the opposite conclusion, in which case a lower sentence would have also been affirmed as not clearly erroneous.

7. United States v. Dobynes, 905 F.2d 1192 (8th Cir.), cert. denied, 111 S. Ct. 206 (1990). In this case, another aspect of disparity appears. Dobyne's cooperated with the government's investigation of drug trafficking and sought a reduction of sentence for providing substantial assistance to authorities under § 5K1.1 of the Guidelines. The district court refused to depart from the Guidelines and did so properly. But the disparity appears in that if the government had moved for a

departure under that section, a defendant in similar circumstances probably would have received a downward departure.

8. United States v. Boulton, 905 F.2d 1137 (8th Cir. 1990). In this case, Boulton received a heavier sentence because of the vulnerability of the victim. However, another court interpreting the same set of factual circumstances might have declined to apply the vulnerable victim enhancement. Cf. United States v. Cree, No. 89-5611, slip op. at 3-5 (8th Cir. Sept. 25, 1990) (evidence fails to show that defendant knowingly exploited victim's vulnerability).

9. Finally, in two cases, United States v. Bolton, No. 89-2674 (8th Cir. June 6, 1990) (unpublished decision), petition for cert. filed, No. 90-5624 (Sept. 4, 1990), and United States v. Lawrence, No. 89-2602 (heard May 16, 1990) (decision pending), the sentence related to the inclusion of additional drug amounts under the Guidelines' relevant conduct provisions. In each case, the drugs had been counted by the probation officer and the probation officer made a judgment that the drugs were, for the most part, related to the offense. The question of what constitutes relevant conduct includable for the purposes of enhancing sentence, however, is frequently subject to differences of opinion. Cf. United States v. Lawrence, No. 90-1103, slip op. at 11-14 (8th Cir. Oct. 9, 1990) (evidence insufficient to support inclusion of drug quantities); United States v. North, 900 F.2d 131, 133-34 (8th Cir. 1990) (same). In my experience, these differences in interpretation can translate into large sentencing disparities.

The world of sentencing under the Guidelines is indeed a topsy-turvy world. Judges are critical of it. See, e.g., Eisele bucks federal sentencing guidelines, Arkansas Gazette, Oct. 12, 1990. I recently read that United States District Judge J. Lawrence Irving announced his resignation because he believes the Sentencing Guidelines are too harsh. Criticizing Sentencing Rules, U.S. Judge Resigns, N.Y. Times, Sept. 30, 1990, at 16. In addition, the Report of the Federal Courts Study Committee 135-39 (1990) notes that the Sentencing Guidelines are causing serious problems according to many judges, public defenders, private defense counsel, the organized bar and others. The Committee concluded that Congress, the courts, bar associations and scholars should give serious and close attention to the

Guidelines with a view to a careful and in-depth re-evaluation by Congress of federal sentencing policy and, in particular, the Sentencing Guidelines. Id. at 139-40.

I believe that the Sentencing Guidelines approach to sentencing has failed. It has not provided for fairness or equality in sentencing, nor has it reduced disparity. What it has done is substituted in large measure the probation officer for the sentencing judge. Since there are 2,067 probation officers but only 753 district judges, United States Sentencing Commission, Annual Report app. A (1989), this means that there are at least three times as many decision-makers as under the previous sentencing system. It also means that the "real" decision-maker likely possesses no legal training.

Moreover, the Guidelines represent a mishmash of rules and commentary constituting an intricate, complex and in some instances confusing code for federal sentencing. As a result, these decision-makers, whether probation officers or judges, will predictably differ in the construction and interpretation of the Guidelines and in the application of facts of the case to particular Guidelines sections. Thus, we have a world of sentencing where so much law exists that even the most erratic and unreasonable decision-maker can find support in this complex code.

In short, I think we have changed the sentencing procedures to a worse system than existed before promulgation of the Guidelines. I am now convinced that the prior method of sentencing might have been far more satisfactory. At least under the previous system, defendants were often entitled to have a parole commission periodically review their sentences, taking into account the offender, the offense and subsequent conduct within a jail or correctional institution. In any event, the Guidelines are far too complex. They need to be simplified, and they ought to serve as a recommendation, not a binding obligation on the district judges.

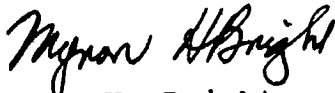
The Sentencing Commission ought to recognize the fallacy of the Guidelines' claim to reduce sentencing disparity. Popular opinion notwithstanding, we simply cannot continue to cloak our rulings in the false security that we are "objectively" sentencing offenders so long as we embark upon a course of "sentencing by the numbers."

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Accordingly, the Commission should recommend to Congress a change in legislation so as to create a sentencing world in which fairness and reason predominate. That is not the situation under the Guidelines.

I urge the Commission to recognize the immense failure of the present system of sentencing in the federal courts and urge the Commission to take immediate action.

Sincerely,

A handwritten signature in cursive script, reading "Myron H. Bright".

Myron H. Bright

MHB/ljs

CC: All Eighth Circuit Judges  
U.S. Senator Quentin Burdick  
U.S. Senator Kent Conrad  
U.S. Congressman Byron Dorgan