1992

Procedural Due Process in Guidelines Sentencing

Susan Herman

COMMENTARY

PROCEDURAL DUE PROCESS IN GUIDELINES SENTENCING

Susan N. Herman*

The federal sentencing guidelines may have reduced judicial discretion over some aspects of the sentencing process, but the experience a criminal defendant has in sentencing still depends on the luck of the draw. District courts have discretion to decide what procedures to use in determining the facts on which sentences are to be based, limited only by the appellate law in their circuits, and their own understanding of the meaning of due process in sentencing. Some district judges exercise their discretion by holding full and careful adversarial sentencing proceedings and employing a sufficiently demanding standard of proof when significant facts are disputed. Others rely reflexively on the hearsay assertions of the presentence report, or invent ingenious ways to find facts.[1]

Having surveyed the reported case law on sentencing procedure under the guidelines, my conclusion is that the district courts have not received sufficient guidance from the Sentencing Commission or from most courts of appeals on the issue of how sentencing proceedings under the guidelines should differ from pre-guidelines proceedings. The Commission's commentary and most of the appellate law on procedural issues are too vague to help a sentencing court in determining what procedures to require in each case.

The Sentencing Commission explicitly and correctly recognized that although informality had characterized sentencing before the guidelines, more formality is "unavoidable" under the guidelines if sentencing is to be accurate and fair.[2] The Commission was not very specific about what this greater formality might entail. The Commission did note that adversarial sentencing hearings would be required in some cases, and that reliance on hearsay would not always be precluded. The Commission initially considered addressing the issue of what burden of proof should be used in sentencing proceedings under the guidelines, but ultimately decided not to do so.[3] Nor did the Commission point out that although the rules of evidence do not preclude the use of hearsay in sentencing hearings, that does not mean that the use of hearsay in sentencing is always constitutional. Most importantly, the Commission did not note that its concern that sentencing proceedings be adequate and fair is more than hortatory—it is a matter of a defendant's right under the Due Process Clause to be sentenced on the basis of accurate information.[4] Because what is fair varies depending on the circumstances of each case, it would have been difficult for the Sentencing Commission to spell out procedural rules to govern all sentencing proceedings.[5] In the end, the Commission limited its role in settling procedural issues to some general comments and left it to the courts to define the requirements of due process under the guidelines.

Most of the appellate law of sentencing procedure fails to give sentencing courts any better guidance. Sentencing judges are rarely reversed if they do not hold evidentiary hearings to determine disputed facts.[6] If anything, the law of most circuits encourages district courts to believe that the requirements of due process in sentencing proceedings under the guidelines can be reduced to a brief, treatise-like list of rules, and that reversal can be avoided if those rules are followed in each case. Virtually every court of appeals appears to have decided, for example, that "the" burden of proof required at sentencing proceedings under the guidelines is preponderance of the evidence.[7] Few courts of appeals have recognized that even if this is an acceptable statement as a general rule, there will certainly be exceptions to that rule, in cases where the preponderance standard will not comport with the requirements of due process.[8] Similarly, few courts of appeals have recognized that in some cases, the use of hearsay might violate principles of the Due Process or Confrontation Clause.[9]

The root of the problem in the courts of appeals seems to be that some courts are overreading or misapplying the principal Supreme Court cases on procedural due process in sentencing: *Williams v. New York*[10] and *McMillan v. Pennsylvania*.[11] These cases are simply not as broad as they are being interpreted to be. Furthermore, moving from the context in which these cases were decided—state indeterminate sentencing systems focused on offender characteristics—to the context of the Federal Sentencing Guidelines should cause any court to hesitate before deriving broad rules from those cases and uniformly applying those rules to proceedings under the guidelines.

I. THE REQUIREMENTS OF PROCEDURAL DUE PROCESS AT SENTENCING

When the defendant in *Williams v. New York* complained in 1948 that he had been denied due process because he had not been afforded an opportunity to cross-examine adverse witnesses,[12] the Supreme Court found that although there is a right to confront witnesses at the conviction phase, sentencing is a different matter. The Court's principal reason for distinguishing sentencing proceedings was that rules of evidence, fashioned to find facts concerning defendant's participation in the offense, would unduly restrict the judicial inquiry into whether punishment would "fit the offender and not merely the crime."[13] The Court praised New York's progressive attempt to transform the sentencing proceeding into a more administrative, offender-oriented, rehabilitative model, and declared its reluctance to impose procedural requirements which might prevent

* *Professor, Brooklyn Law School.*

COMMENTARY

the states from using types of information at sentencing—like defendants' prospects for rehabilitation—which cannot appropriately be determined by trial-type procedures.

Trial-type procedures are clearly not inappropriate to determine most of the facts on which sentencing is based under the guidelines. Most of these factors concern the nature of the offense itself, and defendant's role in the offense. Therefore, many of the assumptions on which *Williams* was based do not carry over to guidelines sentencing proceedings. More significantly, *Williams* cannot today be read as a holding that the Due Process Clause may be ignored at sentencing. Despite its general antipathy to assertions of procedural rights at sentencing, *Williams* did not overrule the Court's earlier holding in *Townsend v. Burke*[14] that defendants do have due process rights at sentencing, particularly the right to be sentenced on the basis of accurate information.[15] Later cases have undermined *Williams* by establishing that the Due Process Clause guarantees defendants a right to counsel at sentencing,[16] and even by cutting into the actual holding of *Williams* by finding that it may indeed deny due process for a defendant to be sentenced on the basis of undisclosed information in a presentence report.[17]

Most importantly, the law of procedural due process itself has undergone some major revisions since *Williams* was decided in 1949, in ways which suggest that neither the holding of *Williams* nor that opinion's grudging approach to due process analysis should apply to guidelines sentencing. Under the Supreme Court's current doctrine, the requirements of the Due Process Clause in a particular proceeding are determined through a two-step analysis. As a threshold inquiry, the Court determines whether the individual claiming a right to certain procedures has a "property interest" or "liberty interest" within the meaning of the Due Process Clause. Generally speaking, the right to be free from incarceration constitutes a liberty interest within the meaning of the Due Process Clause, so before the state may deprive an individual of that freedom, it must afford that individual due process of law. However, the Court has held that convicted and sentenced prisoners do not share this constitution-based "liberty interest" because, once the state has fairly found an individual guilty of a particular offense and imposed a sentence, that individual forfeits his or her right to be free for the entire period of time represented by that sentence.[18] Therefore, if the state wishes to "return" some part of that period of freedom, in the form of release on parole, or good time credit, for example, the state is free to decide what procedures to employ because the state is not "depriving" those individuals of liberty, but is, in fact, restoring a portion of that person's liberty. There is an exception to this doctrine, under which prisoners may nevertheless claim a right to due process in decisions concerning their freedom. If the state has created an entitlement through its positive law, by limiting the discretion of the decisionmaker who will grant or deny parole, for example, then the state has created a "liberty interest" and places itself within the ambit of the Due Process Clause once again. Therefore, the state must comply with whatever procedures the Court finds to be constitutionally required before depriving an individual of an entitlement to liberty.[19]

The Supreme Court has never actually discussed whether its approach to the freedom of those already convicted and sentenced would in fact apply to those who have been convicted but not sentenced. Is the right to liberty forfeited at conviction, to the full extent of the statutory maximum sentence, or at the sentencing proceeding, to the full extent only of the sentence actually imposed? *Williams* antedated the creation of current due process doctrine and so did not need to address this question; the later case of *McMillan* does not discuss this issue either. It is arguable that under the structure of the federal sentencing guidelines a defendant has not actually been deprived by conviction of a period of freedom equivalent to the statutory maximum sentence, and that the actual deprivation of freedom cannot be measured until after the defendant is sentenced. Therefore, a defendant claiming procedural rights at sentencing might not have to demonstrate the creation of an entitlement, because that defendant may be more comparably situated to an unconvicted person than to a person who has already been sentenced.

In any event, defendants sentenced under the guidelines have a strong claim of right to due process protections at sentencing no matter what the Court might decide about the role of the sentencing proceeding. Three Justices of the Supreme Court have already expressly concluded that the guidelines create an entitlement to liberty because they limit sentencing discretion by language of a mandatory nature. In *Burns v. United States*,[20] a majority of the Court found that Rule 32 of the Federal Rules of Criminal Procedure requires notice of an intended upward departure under the guidelines, and therefore did not question whether such notice was required by the Due Process Clause. In a concurring opinion, Justices Souter, Kennedy and O'Connor, who disagreed with the majority's interpretation of Rule 32, reached the constitutional question and therefore needed to consider whether the guidelines do create a liberty interest. Their conclusion that the Due Process Clause governs sentencing proceedings under the guidelines was apparently doubted only by Justice Rehnquist, who did not join that section of the opinion. It seems probable that at least two members of the majority in that case would agree that a liberty interest exists under the guidelines.

Therefore, courts ought to address the second step of classic due process analysis in deciding what procedures to employ in sentencing proceedings under the guidelines: determining what process is due by balancing "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or

substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[21]

If sentencing courts take seriously the conclusions of the Sentencing Commission and the requirements of the Due Process Clause (as expressed in *Townsend v. Burke* and the string of cases applying *Mathews v. Eldridge*), sentencing proceedings will indeed be more formal in cases where significant facts are disputed. Adversarial hearings are likely to be required more often, whether a district court would have exercised its discretion to hold a hearing or not. Hearsay will not always be acceptable, because reliance on hearsay which may significantly enhance a sentence may violate due process principles even if the Confrontation Clause is not directly applicable to sentencing proceedings.[22] And the requisite burden of proof will vary, depending on the context of the particular case and the impact the sentencing factor at issue will have.[23]

II. McMILLAN AND THE BURDEN OF PROOF

The Court of Appeals cases which seem to suggest that preponderance of the evidence is always the appropriate burden in guidelines sentencing have overread the Supreme Court's decision in *McMillan v. Pennsylvania*. In *McMillan*, the Court held that Pennsylvania did not deny due process to a particular defendant by providing that he be given a mandatory minimum sentence if the sentencing court were to find by a preponderance of the evidence that he had visibly possessed a weapon at the time of his offense. The Court did not hold that the preponderance standard would always satisfy due process.

McMillan took place in a state indeterminate sentencing system. Federalism concerns were reflected in the Court's desire to defer to a state legislature's decisions about how to construct that state's criminal justice system. I would question whether the courts owe equal deference to the Sentencing Commission, which is in some respects simply another arm of the federal judicial branch. *McMillan* also involves a very particular context in which a particular type of sentencing decision was being made. Because what was at stake in *McMillan* was a minimum period of imprisonment, Pennsylvania could easily have allocated that decision to the parole authorities who would ultimately be deciding McMillan's release date. Allowing the sentencing judge to find the facts on which this minimum sentence would depend actually enhanced the procedural safeguards to which McMillan would be entitled. The same cannot be said in guideline sentencing, where sentences are not subject to later review by parole authorities.

The second holding of *McMillan* is also subject to being overread. McMillan had charged that the sentencing factor at issue—visible possession of a weapon during the offense—could and should have been an element of the offense with which he was charged and therefore subject to the standard of proof beyond a reasonable doubt. The Court rejected this argument, holding that the state legislature does have discretion to decide when a certain factor should be a sentencing factor and when an element of the offense. However, Judge Rehnquist's opinion for the majority also noted that there must be constitutional limits on the legislature's ability to decide to make factors relevant only at sentencing. This limit was expressed in a colorful metaphor: if the "tail" of the sentencing wags the "dog" of conviction, the defendant has been denied due process. If this is the case, merely escalating the procedures of sentencing will be inadequate—defendant will be entitled to proof beyond a reasonable doubt and right to trial by jury on all elements of the offense charged.

The Third Circuit case of *United States v. Kikumura*,[24] while not deciding the question (because the claim had not been raised by counsel), thought that the tail of defendant's sentence might well have wagged the dog of conviction in a case where a defendant was convicted of interstate transportation of explosives and sentenced to 360 months (instead of the presumptively applicable guideline range of 27 to 33 months) based on the government's proof at sentencing that defendant was a member of the notorious Japanese Red Army and had intended to use his explosives to commit multiple murder. While not deciding the question of whether defendant Kikumura had been denied due process by having these allegations raised at sentencing rather than at trial, the Third Circuit did decide that Kikumura had been denied due process by having facts on which so many years of his freedom hinged decided at a proceeding where the evidence consisted in large part of hearsay affidavits from unnamed informants, and where the burden of proof was no higher than preponderance of the evidence. Requiring proof by clear and convincing evidence, and additional guarantees of reliability of hearsay evidence, the Third Circuit began to forge an intermediate law of due process at sentencing. While the calculus will not be precisely the same in every case, the approach of analyzing what due process requires in each case should be the same, even in cases where the impact on sentence is not as dramatic as the period of decades Kikumura had at stake.

CONCLUSION

It is impossible to tell to what extent the district courts have already accepted the expansion of sentencing proceedings required by the guidelines and the individualized decisions about procedure required by the Due Process Clause. Most district court judges report that they are already spending more time on sentencing than they did before the guidelines.[25] But no information is being collected that would show how much more time sentencing judges are spending, or how they are spending that time. Other than the cases reflected in reported opinions, we do not know when sentencing judges are deciding to require hearings, disallow hearsay, or require a heightened

COMMENTARY

standard of proof. This information would be valuable in assessing the performance of the district courts as well as the consequences of the guidelines. Ideally, the Sentencing Commission, or perhaps the Judicial Conference, should undertake some more formal survey of the procedural implications of the guidelines so that we can determine whether the picture presented by reported appellate decisions actually represents what is happening at sentencing. If the appellate law of sentencing does accurately reflect what district courts are doing, then measures need to be taken—by the Commission, the Judicial Conference or the appellate courts themselves—to fulfill the Commission's observation that the guidelines require greater formality of procedure in sentencing.[26]

It is not surprising that the courts of appeals are reluctant to require greater attention to procedure from the district courts. The guidelines have increased the amount of time appellate courts must spend considering sentencing matters as well. In an era when the federal courts are hard pressed to reach their civil dockets at all, it would be surprising if the federal courts were anxious to commit time to conducting what sometimes seems like a second trial in each case. My own view is that the redundancy of factfinding in the conviction and sentencing phases under the guidelines is an unfortunate byproduct of Congress's decision to delegate authority over punishment to the Sentencing Commission. Many of the factors now being decided at sentencing could easily be incorporated into the conviction phase. The Sentencing Commission had no power to decide whether or not certain of what are now sentencing factors should have been made elements of the appropriate offense.

Significant facts on which punishment is to be based should be determined fairly, no matter whether they are decided at a proceeding called a trial or a proceeding called a sentencing. If sentencing proceedings have become unwieldy duplications of what happened, or could have happened, at trial, the solution is for Congress to consolidate factfinding about the nature of the offense in one proceeding—the trial. It is not a solution to have years of an individual's freedom depend on haphazard factfinding procedures simply because facts are being found at sentencing rather than trial, or because cases from earlier decades perceived sentencing and conviction to be more different in substance, process and effect than they are today.

FOOTNOTES

[1] In one case where quantity of drugs was an issue, for example, the sentencing judge made a determination of the quantity involved from testimony by a witness at the earlier trial of defendant's brother. *See United States v. Beaulieu*, 893 F.2d 1177, 1179-81 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990). *See also United States v. Turner*, 898 F.2d 705, 712 (9th Cir.), *cert. denied*, 495 U.S. 962 (1990) for a lesson about the difficulties inherent in calculating a precise quantity of drugs on the basis of vague or inconsistent testimony.

[2] *See* Commentary to §6A1.3.

[3] Commentary in the preliminary draft of the guidelines promulgated in 1986 had specified that a preponderance of the evidence standard should apply, *see* 51 Fed. Reg. at 35,085, but the Commission apparently decided to omit this prescription from its final draft. *See* Thomas W. Hutchison & David Yellen, Federal Sentencing Law and Practice 406 (1989).

[4] *See Townsend v. Burke*, 334 U.S. 736 (1948).

[5] The Commission may also have doubted its authority to promulgate procedural rules, since the Sentencing Reform Act does not authorize the Commission to undertake procedural reform. However, the Sentencing Reform Act does confer a residuary power for the Commission to do whatever is necessary and proper to fulfill its mandate. *See* 28 U.S.C. §995(b). This power could reasonably be interpreted to cover necessary and appropriate procedural adjustments.

[6] The Sentencing Commission had recognized that evidentiary hearings may sometimes be the "only reliable" way to resolve disputed issues. *See* Commentary at §6A1.3 [citing *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979)].

[7] *United States v. Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 250 (2d Cir. 1989), *cert. denied*, 494 S. Ct. 1090 (1990); *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989), *cert. denied*, 493 U.S. 1004 (1990); *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990); *United States v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2055 (1991); *United States v. Fonner*, 920 F.2d 1330, 1333 (7th Cir. 1990); *United States v. Malborough*, 922 F.2d 458, 464 & n.6 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2907 (1991); *United States v. Restrepo*, 903 F.2d 648, 654 (9th Cir. 1990), *modified on other grounds on rehearing en banc*, 946 F.2d 654 (1991), *cert. denied*, 1991 WL 284580 (U.S. Mar. 30, 1992); *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990); *United States v. Castellanos*, 904 F.2d 1490, 1494-95 (11th Cir. 1990); *United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989).

[8] *See, e.g., United States v. Kikumura*, 918 F.2d 1084, 1099-1102 (3d Cir. 1990), discussed *infra*.

[9] See *United States v. Beaulieu*, 893 F.2d 1177, 1179-81 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990); *United States v. Sciarrino*, 884 F.2d 95, 97 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989) (confrontation clause "not applicable" at sentencing proceedings). A few appellate panels have held that the Confrontation Clause may be applicable at sentencing, at least when a fact at issue may materially increase sentence, see *United States v. Silverman*, 945 F.2d 1337 (6th Cir. 1991), *opinion withdrawn and rehearing en banc granted* (Dec. 4, 1991); *United States v. Wise*, 923 F.2d 86, 87 (8th Cir. 1991), *vacated and rehearing granted*, 1991 U.S. App. Lexis 4326, Mar. 15, 1991; *United States v. Fortier*, 911 F.2d 100, 103-05 (8th Cir. 1990) but, as the subsequent histories show, these holdings have not met with easy acceptance.

[10] 337 U.S. 241 (1949).

[11] 477 U.S. 79 (1986).

[12] The sentencing judge relied on a presentence report which stated that Williams had committed thirty other

burglaries (although he had not been convicted of any of them) and that he had a "morbid sexuality" which made him a "menace to society." *See* 337 U.S. at 244.

[13] *Id.* at 247.

[14] 334 U.S. 736 (1948).

[15] *See* 337 U.S. at 252 n.18 (citing *Burke* for the proposition that sentencing is not wholly immune from due process scrutiny).

[16] *See Mempa v. Rhay*, 389 U.S. 128 (1967).

[17] *See Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion).

[18] *See, e.g., Meachum v. Fano*, 427 U.S. 215 (1976); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979).

[19] *See id.* I have previously criticized the Court's positivist approach to liberty on a number of bases. *See* Susan Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U.L. Rev. 482 (1984).

[20] 111 S. Ct. 2182, 2186 (1991).

[21] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[22] *See United States v. Kikumura, supra* note 8.

[23] Judge Jack B. Weinstein's exemplary pre-guidelines opinion in *United States v. Fatico*, 458 F. Supp. 388, 396-412 (E.D.N.Y. 1978), *aff'd on other grounds*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), provides a valuable model for analyzing what burden of proof to apply with respect to a particular finding of fact even in post-guidelines cases. *See also* Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. Chi. L. Rev. 1387 (1990), for an excellent discussion of how to apply the *Mathews v. Eldridge* balancing test to the decision of what burden of proof to adopt at sentencing.

[24] *See* note 8 *supra*.

[25] *See* Report of the Federal Courts Study Committee 137 (Apr. 2, 1990) (Ninety percent of judges responding to survey believed that the guidelines had made sentencing more time-consuming, with more than half estimating that they were spending 25% more time and one-third estimating an increase of 50% or more).

[26] These and related issues are more fully explored in my article, *The Tail That Wagged the Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. __ (1992) (forthcoming).