

5-2-2000

## Sentencing Guidelines: Where We Are and How We Got Here

Jay P. McCloskey

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Jay P. McCloskey, *Sentencing Guidelines: Where We Are and How We Got Here*, 44 St. Louis U. L.J. (2000).  
Available at: <https://scholarship.law.slu.edu/lj/vol44/iss2/12>

This Panel Remarks is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

JAY P. MCCLOSKEY\*

Let me start out by saying that in the District of Maine, where I have been United States Attorney for seven years and an Assistant U.S. Attorney for thirteen years, that we do, in fact, meet the standards of the Guidelines and rarely deviate from the strictures of the Guidelines as found in this little brown book. At least in the District of Maine, there are exceptions, but there are relatively few.

Kate Stith had asked me to speak on the role of the prosecutor pre-Guidelines and post-Guidelines and I think I will start out by briefly summarizing those differences. Prior to the Guidelines, under the old system, prosecutors had discretion to charge the most appropriate offense, to negotiate plea agreements, and to make sentence recommendations that reflected their judgment of the serious and specific facts of the criminal conduct, taking into account the goals of punishment, general and specific deterrence, protection of the public, and rehabilitation of the defendant.

The judges in that system had the discretion to sentence anywhere within the statutory range. Although as we approached 1987, an increasing number of minimum mandatory sentences had started to erode the judges' discretion on sentencing.

Appeals of sentence were relatively uncommon. And prosecutors under the old system spent very little time on sentencing issues, preparing for sentencing, and certainly on sentencing appeals. That is the way it worked from a prosecutor's prospective under the old system.

Under the Guideline System, beginning in November of 1987, this all changed. Prosecutors now spend a great deal of time on sentencing issues, preparing for sentencing, and goodness knows on sentencing appeals. Now, under the Sentencing Guidelines, if the prosecutors are doing it right, they have a responsibility to assure that their charging and plea bargaining decisions do not undermine the Sentencing Reform Act.

---

\* Jay P. McCloskey is the United States Attorney for the District of Maine, a position he has held since 1993. Since 1993, Mr. McCloskey has served as chair of the Attorney General's Advisory Committee on Sentencing Guidelines. Mr. McCloskey is a graduate of the University of Maine and of its law school. He has worked closely at different times with several leading national figures from Maine, including the late Senator Edmund Muskie, former U.S. Senator, George Mitchell, and then U.S. Senator William Hathaway. For thirteen years prior to his appointment to his current position by President Clinton, Mr. McCloskey served as an Assistant U.S. Attorney in Maine.

Pursuant to the Justice Department Policy set forth in the United States Attorney's Manual, federal prosecutors should charge the most serious offense that is consistent with the defendant's conduct and is likely to result in a sustainable conviction. They should seek a plea to the most readily provable charge under that first prescription, and prosecutors are not free to recommend or agree to a sentence that is outside the applicable guideline range unless it is based on an appropriate departure from the Guidelines. Prosecutors are supposed to stipulate only to facts that accurately reflect the defendant's conduct, and they should provide all reasonably relevant information to the probation office, who is supposed to check the prosecutor in terms of what is the appropriate guideline.

Department of Justice policy also provides that there must be supervisory approval, either by the United States Attorney, which I do in my office for negotiated pleas, or a Criminal Chief or Division Chief. Every single plea that is negotiated in my office, I approve and sign off on. A decision to drop readily provable charges must also be approved at the supervisory level, obviously in larger offices it is not the United States Attorney, but it might be the Criminal Chief or a Division Chief. But if you are going to drop, for example, a 924C charge, it has to be approved at the supervisory level. Contrary to the position of the *Washington Post*, which accused me of dropping gun charges, we do not do that in the District of Maine.<sup>1</sup>

If you, as a prosecutor, are going to seek a departure outside Chapter 5, you need supervisory approval. And if you are going to move for a substantial assistance departure, there is a DOJ policy that says the individual assistant cannot do that without supervisory approval.<sup>2</sup>

There are exceptions to these rules as far as DOJ policy goes. The United States Attorney's Manual provides that, for example, if there were a strain on office resources and proceeding to trial would significantly reduce the number of cases in your office, then you could make exceptions to these rules.

When I came in as U.S. Attorney in 1993, I had a conversation with the Attorney General that ultimately resulted several months later in what is known as the Reno Amendment, which also provides for DOJ policy that allows a prosecutor to make exceptions to the general policy that I just set forth. The Reno Amendment provides:

It should be emphasized that charging decisions and plea agreements should reflect adherence to the sentencing guidelines. However, a faithful and honest application of the sentencing guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized

---

1. See Mary Pat Flaherty & Roberto Suro, *Reno Criticizes Manipulation of U.S. Sentencing Guidelines*, WASH. POST, Oct. 11, 1996, at A4.

2. Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 FED. SENTENCING REP. 352 (1994).

assessment of the extent to which particular charges fit the specific circumstances of the case are consistent with the purposes of the federal criminal code and maximize the impact of federal resources on crime.<sup>3</sup>

So, the Reno Amendment allows prosecutors, in certain cases, to make exceptions to what the Guidelines might otherwise require. But the Reno Amendment also provided that in order to do this, the prosecutor again had to get supervisory approval and that the approval had to be documented and made part of the record, so that, to assure consistency and accountability, charging and plea agreement decisions must be made at the appropriate level of responsibility and documented with an appropriate record of the factors applied.<sup>4</sup>

The way that it is supposed to work is that in some instances, under the Reno Amendment, the prosecutor could get an exception to following the Guidelines – say, not charging the highest provable offense – and charge somebody in such a way that the sentence ultimately arrived at is more appropriate for that particular person’s role in the conspiracy or role with respect to that particular conduct. This is, I think, what prosecutors were generally concerned about. That is, prosecutors were concerned about the way drug offenses brought very high levels of incarceration, which in certain instances might not be justified.

So, generally speaking, prosecutors had unlimited discretion prior to the Guidelines to charge as they saw fit, to plea bargain as they saw fit, and to make sentencing recommendations as they saw fit.

Under the Guidelines, that role has been greatly restricted but, at least as I read it, there are exceptions to those rules which allow you to fit the particular circumstances of that conduct into a guideline that is more appropriate for that defendant.

---

3. *Id.*

4. *Id.*