FEDERAL SENTENCING LAW IN THE
SUPREME COURT'S 1992-93 TERM

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Sentencing cases moved toward the mainstream of the Supreme Court's criminal procedure docket during the 1992-93 Term. Unlike the previous two Terms, the Court this year granted certiorari in two cases of general importance, potentially affecting many defendants in the federal system. In Stinson v. United States,¹ the Court considered the weight to be placed on official commentary to the sentencing guidelines. In United States v. Dunnigan,² the issue was whether the Constitution permits a trial court to enhance a defendant's sentence for committing perjury during trial testimony. Each of these cases raised questions about the relative importance and power of the trial court in sentencing, in contexts that will recur often. In deciding them, the Court accepted a continuing role in shaping common practices and responsibilities in the sentencing system, just as it has in other corners of criminal procedure.³ This may come as a surprise to readers of the Court's federal sentencing cases from the last few years. Before this year, the Court seemed determined at times to downplay its involvement in sentencing.⁴

The cases this year resembled mainstream criminal procedure cases in another respect. Having accepted the task of offering direction, the Court gave necessarily incomplete guidance. The two sentencing opinions set out some general observations and principles, followed quickly by a series of potential limitations or exceptions. It is not yet clear how the exceptions will affect the most interesting and most common cases. This is a familiar formula for keeping the Supreme Court and other federal courts involved in an area, and the formula has started to operate in sentencing cases. While early predictions pointed to a decline in sentencing appeals as the lower courts resolved ambiguities in the guidelines, declining appeals now seem just as unlikely for sentencing as for other areas in criminal procedure.

STINSON V. UNITED STATES

After Terry Lynn Stinson pled guilty to charges of bank robbery, the prosecutor argued that Stinson should be sentenced as a "career offender" under § 4B1.1 of the guidelines. He qualified for treatment as a career offender only if his prior conviction for possession of a firearm by a convicted felon amounted to a "crime of violence" within the meaning of the guidelines.

Soon after the Court of Appeals had affirmed the trial court's decision to treat Stinson as a career offender, the Sentencing Commission issued commentary dealing with precisely this issue. The new commentary stated that "the term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."⁵ As with many other amendments to the Guidelines Manual, this change in the commentary went into effect without any substantive explanation to accompany it.⁶ In light of the new commentary, Stinson sought rehearing at the Court of Appeals, but that court declined to follow the commentary and persisted in its own interpretation of the guideline provision.

A number of lower courts had refused to give "binding" authority to official commentary because commentary (like a policy statement) is created through a less exacting process than guidelines. While amended guidelines must be submitted to Congress for review six months before they become effective, amended commentary need not go through congressional review.

Despite the Government's suggestion that it pass over the question, Justice Kennedy's opinion for a unanimous Court treated the weight of commentary as the decisive issue. Kennedy began with the proposition that the commentary (or at least some of it) is indeed binding (at least sometimes): "Commentary which functions to 'interpret [a] guideline or explain how it is to be applied,' . . . controls."⁶ This proposition does not seem to address commentary accompanying a policy statement, as opposed to commentary attached to a guideline.⁸ Moreover, Kennedy quickly added that commentary would not bind a court's interpretation of a guideline if the commentary and the guideline are "inconsistent in that following one will result in violating the dictates of the other."

Kennedy also put forward an interesting analogy to elaborate on the type of inconsistency necessary before a court could ignore commentary in interpreting a guideline. Commentary, he stated, should be "treated as an agency's interpretation of its own legislative rule." Traditional principles of administrative law instruct courts to accept an agency's interpretation of its own rule, unless an alternate reading of the rule is "compelled" by the regulation's plain language or by other indications of the agency's intent at the time of promulgation.⁹

It is indeed proper for courts to keep in mind that the Sentencing Commission is more like an agency promulgating rules than a legislature enacting a statute. The Court emphasized this point when it rejected the Government's proposed analogy between guideline commentary and the legislative history of a statute.¹⁰ Yet, to invoke the administrative law analogy is only the starting point in developing a proper relationship between an agency and the courts. Lower federal courts will now need to

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develop the nuances suggested by administrative law doctrines.

For instance, although a court should be slow to override an agency's reading of its own rule, some agency interpretations do carry less weight than others. Agency interpretations of rules are assigned greater weight if those rules deal with procedural matters, or technical subjects within the agency's expertise, or if the rules interpret a new statute. On the other hand, interpretations adopted long after promulgation of the rule, especially as a litigating position, receive less weight. Similarly, interpretations that reverse the direction of the agency, or interpretations that do not evidence thorough and reasoned consideration, will receive less weight.12

The chosen analogy between the Sentencing Commission and other administrative agencies highlights the need for courts to give reasonable deference to those empowered to develop policy, and it gives the Commission some flexibility to adjust its policy over time. But the analogy should also make it clear that there are limits to administrative discretion. Commentary for sentencing guidelines still cannot resolve whether a court should depart from the guidelines under the statutory standard. Indeed, departure from a guideline, as interpreted by commentary, may be especially appropriate where the commentary appears as an unsupported assertion, as with the commentary dealing with §4B1.1. Moreover, commentary will not save a guideline if that guideline, as interpreted in the commentary, is inconsistent with the Constitution or a statute. Despite the authoritative (if uncertain) weight given to the Commission's commentary in Stinson case, questions such as these remain in the hands of judges.

UNITED STATES V. DUNNIGAN

The government called six witnesses during a trial on charges of drug trafficking against Sharon Dunnigan. Dunnigan took the stand in her own defense, and flatly contradicted the government witnesses. She denied taking certain trips to purchase drugs, and denied making statements attributed to her. After the jury returned a guilty verdict, the District Court increased her offense level by two under guideline §3C1.1 for obstructing the proceedings. The judge found that Dunnigan was "untruthful at trial with respect to material matters in this case" and that her testimony was "designed to substantially affect the outcome of the case."13

Dunnigan challenged this enhancement of her sentence, because it improperly abridged her constitutional right to testify in her own defense. The Supreme Court, in another unanimous opinion by Justice Kennedy, disagreed. The defendant's constitutional right to testify does not include a right to commit perjury. The Court said that even though a trial court might mistakenly enhance a sentence in a case where there was no actual perjury, this risk does not unduly influence a defendant's decision to testify. It is a risk inherent in any system that punishes false testimony, whether at sentencing or through separate perjury charges. Thus, concluded the Court, the Constitution allows enhanced sentences based on a finding that the defendant perjured herself during testimony at trial.

This holding allows the government to punish a defendant for conduct (perjury) without charging the defendant and proving the charges beyond a reasonable doubt. Thus, there are strong parallels between this question and the use of relevant conduct to enhance a sentence even after a jury has acquitted the defendant of the conduct. In both cases, the difficulties of a "real offense" sentencing system become especially acute when they devalue traditional protections of the criminal process (at least those other than the burden of proof and rules of evidence). When the sentencing court relies on acquitted conduct, it questions the integrity of the jury's verdict; when the sentencing court relies on perjury, it heightens the risk to a defendant of testifying at trial.

Although the Court was not willing to impose a blanket prohibition on sentencing enhancements for false testimony, neither was it ready to make the enhancement automatic for any defendant testifying at trial. The enhancement for trial perjury would not be available against any and all defendants who testify at trial. Instead, the trial judge must make findings that the primary elements of the statutory perjury offense are present: 1) a false statement, 2) concerning a material matter, 3) made with the willful intent to provide false testimony.

The sufficiency of such findings in future cases could provide much grist for the federal appellate courts. The Dunnigan opinion addresses two easy categories of cases where a court easily might conclude that a testifying defendant who is convicted had no intent to provide false testimony. No enhancement could occur if the judge believes that the testimony was a product of confusion, mistake, or faulty memory. Similarly, there could be no enhancement if the judge is convinced that the testimony was truthful. A defendant might testify truthfully and still be convicted if the testimony is insufficient to establish a defense such as insanity or self-defense.14

There are other circumstances, not addressed by the Dunnigan opinion, where a trial court might refuse to enhance a sentence for obstruction under §3C1.1. For instance, the judge might uphold a jury's verdict, yet still believe that another rational finder of fact might have believed the defendant and acquitted her. In such a setting, the uncertainty about the defendant's alleged perjury could lead the court not to enhance the sentence.

Finally, the judge might believe that the defendant intentionally testified falsely about a material
matter, but that the effort was futile and ultimately harmless. Given that the adversary process is designed to weigh competing factual assertions against one another, federal courts interpreting both the contempt statutes and the obstruction of justice statutes have held that false testimony alone is not enough to support a conviction under those statutes. Earlier versions of the Guidelines Manual allowed the court discretion not to enhance in a case where no harm flowed from any attempted obstruction. Amendments to the commentary in 1990 appear to disapprove of such an exercise of discretion.

Thus, even though the Dunnigan opinion empowers sentencing courts to enhance a sentence based on intentionally false trial testimony, it also charges trial and appellate courts to differentiate among various types of testifying defendants. The work of setting these boundaries could occupy federal judges for some time.

**SMITH V. UNITED STATES**

One other case deserves brief mention among the Court's federal sentencing cases this Term. Although the Court did not interpret the meaning of a guideline in *Smith v. United States,* it did address peripherally the power of the Commission to interpret sentencing statutes. John Argus Smith had exchanged a gun for cocaine, and the trial court enhanced his drug conviction under 18 U.S.C. §924(c)(1) for "use" of a firearm during and "in relation to" a drug trafficking crime. The Supreme Court, in an opinion by Justice O'Connor, held that a criminal who trades his firearm for drugs "uses" it within the meaning of the statute.

Justices Scalia, Souter and Stevens dissented, because they believed that the plain and ordinary meaning of the phrase "uses ... a firearm" is restricted to those settings where a defendant uses a firearm for its intended use, as a weapon. After a perusal of the statute's language and structure, the dissenters supported their argument by suggesting that the Sentencing Commission seemed to restrict any enhancements for the use of a weapon to those instances where it is used for its purpose as a weapon. The guidelines provide for enhanced sentences when firearms are "discharged," "brandished, displayed, or possessed," or "otherwise used." The majority considered it a "dubious assumption" that the sentencing guidelines were relevant to the meaning of this statute. Even if they were relevant, the majority argued that the "otherwise used" language of the guidelines was broad enough to include use of a gun for bartering.

One should not place too much weight on Justice O'Connor's passing remark about the irrelevance of the guidelines in interpreting sentencing statutes. Still, the statement may show a reluctance to treat the Sentencing Commission like an ordinary federal administrative agency. Normally, a court interpreting a statute will give great weight to the views of an agency charged with administering the statute. Perhaps in this case, the Court minimized the importance of the Commission's views because it had not, strictly speaking, interpreted the statute at issue. The Commission had only used the statutory language at several points in the guidelines.

**CONCLUSION**

The importance of the cases decided this Term, combined with the number of guideline cases the Court has decided over the last three Terms, suggest that the certiorari process in sentencing cases is starting to resemble the process for other criminal procedure areas. The Solicitor General's office appears to be exercising its customary influence in the selection of sentencing cases for review.

Justice Scalia has resisted this trend. He has argued that the Court should be especially reluctant to accept sentencing cases, because the Sentencing Commission is available to resolve conflicts among the circuits. Despite Justice Scalia's urgings, the Court is selecting and resolving federal sentencing cases as if they were an ordinary component of criminal procedure.

**FOOTNOTES**

1. 113 S.Ct. 1913 (1993).
2. 113 S.Ct. 1111 (1993).
3. This is not to say that the Supreme Court has taken the preeminent role in developing sentencing policy; nor has it consistently granted certiorari in every important case in the area. See Sewell v. United States, 113 S.Ct. 1367 (Justices White and Blackmun, dissenting from denial of grant of certiorari in case dealing with treatment under guidelines § 2D1.1 of drug waste products that are not ingestible or marketable).
7. 113 S.Ct. at 1917-18 (quoting USSG § 1B1.7).
8. Unfortunately, some dicta in the opinion seriously overstated the authority of policy statements: "The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." 113 S.Ct. at 1917. An opinion from the 1991-92 Term had addressed only the authority of policy statements that interpret a guideline, and not those policy statements standing alone on subjects not addressed at all by guidelines. Williams v. United States, 503 U.S. ___ (1992).
9. 113 S.Ct. at 1918-19.
systematic research, and assist with the interpretation of those data to produce valid and reliable findings. Representatives at the conference recognized the importance of dialogue among criminal justice professionals through such vehicles as workshops, emphasizing that these discussions are essential to shaping meaningful research and implementing findings.

The Sentencing Commission intended this conference to serve as an introduction to research issues and available data under current federal sentencing practices. Several themes emerged from the conference proceedings that suggest possible subjects for future sessions, panels, or public forums. First, participants requested training sessions on the federal sentencing guidelines tailored to the research community. Second, panels could be convened to focus on specific topic areas such as departure research (with a call for papers that would be published as conference proceedings). Third, a hands-on training session for actual users of Commission data could be set up in conjunction with an ICPSR workshop session. Fourth, a workshop could be conducted about data collection procedures at the point of origin in the federal justice system. Finally, focus groups of federal practitioners or other techniques that would provide basic descriptive information on sentencing processes could be conducted.

The Sentencing Commission continues to look to the research community as an important source of independent information to assist in assessing and amending federal sentencing policy. The research conference served as an important first step in furtherance of that goal, i.e., bringing researchers with diverse interests and expertise together to get to know each other, seek potential collaborative efforts, learn about potential data sources, and start to set an agenda for future discussion. Future conferences will narrow the focus and explore issues and data in greater detail.