Roberts’ Sentencing Rules of Order

The history of liberty has largely been the history of procedural safeguards.

Justice Felix Frankfurter, McNabb v. United States, 318 U.S. 332, 347 (1943)

As the dust settles around the Supreme Court’s landmark jury sentencing decisions in Apprendi, Blakely, and Booker, it is becoming clear that the Court’s work toward ensuring fairness in sentencing has only just begun. The constitutional right to jury sentencing determinations cannot be meaningful without commensurate procedural due process—especially pretrial notice and discovery of sentencing factors. Although sentencing jurisprudence surely will evolve in this direction in the coming years, there is a quicker, easier way. As head of the federal judiciary and the Administrative Office of the Courts, Chief Justice John Roberts can charge the advisory committees and the Sentencing Commission with making the process fairer immediately. Put simply, it is time to enact Roberts’ Sentencing Rules of Order. The Chief Justice should begin by advocating fair disclosure in the sentencing process and evenhanded advice and representation within the Sentencing Commission and advisory committees.

Perhaps the most important step in achieving fairness in sentencing is to require that information to be used in setting the sentence be disclosed to all parties early in the process. This is the only way to ensure full and fair litigation of the relevant facts. Although this point may seem obvious, in the current system information that may greatly impact sentencing is regularly withheld until after the guilty plea or verdict. Drug quantity, loss amount, and other specific characteristics of an offense frequently remain a mystery to the defense prior to the disclosure of the Presentence Report just weeks before sentencing. None of the pertinent Federal Rules of Criminal Procedure—Rule 16, which governs discovery; Rule 11, which sets forth the requirements for a guilty plea; Rule 32, which concerns the presentence report—require sharing with the defense the facts that will be used to calculate the sentencing range. This puts the defense at a significant disadvantage in a system in which, at sentencing, the guidelines permit the use of “relevant conduct,” cross-references, and a mere preponderance standard of proof.

The decision to go to trial or to plead guilty (as occurs in over 90 percent of cases) should be made with full knowledge of all the consequences, including what evidence may be presented at sentencing. The sentencing hearing itself should be a time for serious and reasoned weighing and balancing of sentencing factors. There should be no occasion for surprise as new disclosures are unveiled. To its credit, the Sentencing Commission has acknowledged this and U.S.S.G. § 6B1.2 encourages greater disclosure. Unfortunately, the Commission lacks the power to require that disclosure. The Supreme Court should endorse amendments of the discovery and sentencing rules to allow for discovery of sentencing evidence during the pretrial phase, including disclosure of witness statements and evidence that may pertain solely to sentencing.

The Court should also encourage fairness in sentencing by insisting that the administrative bodies that make sentencing policy have balanced membership. Currently, members of the defense bar participate in only a very limited way in the work of these bodies, which include the Sentencing Commission and numerous committees that advise on federal rules and procedure, such as the Standing Committee on Rules of Practice and Procedure, the Advisory Committee on Appellate Rules, the Advisory Committee on Criminal Rules, and the Advisory Committee on Evidence. As a result, the interests of defendants and the practical perspectives of defense attorneys receive little consideration.

The most egregious example is the Sentencing Commission, the supposed expert body that creates the guidelines which are the starting point for all federal sentencing proceedings. The Commission consists of members of the judiciary and the private bar but also includes ex officio positions for the Department of Justice and the Parole Office, which maintains its position even though parole was abolished in the late 1980s. There is no role on the Commission for federal defenders who, together with CJA counsel, represent the vast majority of defendants. This lack of ex officio presence deprives the Commission of advice and input at crucial stages. It also creates the appearance that the Commission is unduly
influenced by the Department of Justice and is content to shy away from robust internal debate and dialogue.

Recognizing that defenders lack parity with other institutional stakeholders, the Judicial Conference has recommended ex officio membership on the Commission for federal defenders. This is a fair and sensible policy position. Lodged as it is in the judicial branch, and holding itself out as an “expert” body, the Commission should include defenders as principal and principled stakeholders. Chief Justice Roberts should take the Judicial Conference’s recommendation to Congress and exert the high court’s influence to make inclusion of a federal defender a priority. As a corollary, the Court should seek concomitant diversity in the committees as to background and practice. Just as on the Commission, appointment of committee members who have represented indigent defendants will afford important insights as the process of developing procedural rules to accompany the sentencing revolution begins.

Although rules of procedure are sometimes perceived as obstructing the operation of the law, in reality, the converse is true. Chief Justice Roberts should make explicit what judges, scholars, and practitioners of criminal law understand: Procedures that allow for early disclosure will make the sentencing process more transparent and less subject to manipulation by any party. In developing appropriate rules and procedures, it is essential that the Commission and the committees receive complete information in a timely fashion and consider that information in a forum that allows for serious dialogue and deliberation. This requires that their membership reflect the full range of experiences, including the defense perspective. In so advocating, the Chief Justice can go a long way toward ensuring that procedural safeguards are promptly fashioned to meet the challenges of the ongoing sentencing revolution and the requirements of the Constitution and the Sentencing Reform Act.