TESTIMONY OF ROBERT B. MANN[1]

PUBLIC HEARING BEFORE THE
UNITED STATES SENTENCING COMMISSION

"THE SENTENCING REFORM ACT OF 1984: 25 YEARS LATER"

NEW YORK, N.Y.

JULY 9, 2009

I want to thank the Commission for giving me this opportunity to address you. I have reviewed much of the testimony you have recently heard in other regional hearings. The very thorough written comments by federal public defenders, Thomas W. Hillier and Davina Chin in May, 2009, and by federal public defenders Alan Dubois and Nicole Kaplan in February, 2009, do a phenomenal job of spelling out the issues from the perspective of defendants and defense counsel. I endorse wholeheartedly their comments.

I hope that I can highlight certain points to further support the changes they have recommended. I want to emphasize three fundamental points:

1) The federal criminal justice system appears to have a disproportionately harsh impact upon minorities.

2) Federal sentences are too long and alternatives to incarceration are not used enough;

3) Federal sentencing is too complex;

I. The Disproportionate Impact of the System on Minorities

Much has been written on this subject.[2] I do not presume to add to the wealth of research that has already been completed. I respect the fact that most participants in the federal criminal justice system seek to consciously avoid even the appearance of racism. The fact remains, however, that, "… minorities dominate the federal criminal docket

[1] Robert B. Mann is a partner with the law firm of Mann & Mitchell in Providence, Rhode Island. He is the CJA Panel Representative for the District of Rhode Island. He has been practicing in Federal Court for over 30 years.

[2] See, e.g., *USSC, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, Chapter 4 (Nov. 2004) (hereinafter "Fifteen Year Review" and the many sources cited therein; the written statement of public defenders Hillier and Chen at pp. 7 and 17 et. seq.

today."[3] The second inescapable fact is that many sentencing rules clearly have an adverse impact on minorities.[4] The extraordinarily high rates of incarceration for minorities (not just in the federal system) create an appearance of racism. The issue needs to be addressed. At least some of the remedy for this issue could come from the repeal of the kinds of statutory rules that have an adverse impact on minorities.

I also think that much of what happens in the federal system is a function of prior state court adjudications. Those adjudications are necessarily often a function of local enforcement efforts. I am not confident that the analyses of the federal criminal sentencing capture the import of racism that may exist in local law enforcement and then gets imported into the federal system by use of state court adjudications.

II. Federal Sentences Are Too Long and Alternatives to Incarceration Are Not Used Enough

The growth in the federal prison population over the last few decades is well documented. With only a very occasional exception, such as the change in the crack/cocaine sentencing guideline, and the 2007 changes in the use of misdemeanor and petty offenses in criminal history computations, the guideline changes over the years have resulted in increased criminal penalties. Statutory changes in the criminal code have also generally ratcheted federal sentences higher. Making the guidelines advisory, has provided a vehicle to at least reduce some of the sentences which are imposed.

From my perspective, federal sentences seem way too long in lots of different areas and I will seek to address some of these areas later in these comments.

III. Federal Sentencing Is Too Complex

Other testimony received by the Commission has already made the claim that federal sentencing is often too complex. There are three parts to this issue. What makes the sentencing so complex? What are the consequences of such a complex sentencing process? What remedies are possible to address this issue?

A. What Makes Sentencing So Complex?

Every federal sentencing now has to consider both the sentencing guidelines and the 18 U.S.C. §3553(a) factors. The details of the guidelines and the wealth of litigation spawned by the guidelines make many guideline analyses complex. That complexity is enhanced by the need to place the guideline analysis in the context of the 18 U.S.C. §3553(a) factors. The incredible detail of sentencing guideline law can make many guideline assessments a labor intensive effort. For private practitioners who often have the opportunity to assess their clients' cases before the client is charged, the consideration of alternative guideline calculations, based on different combinations of potential charges further complicates the issue.

All of the above factors then have to be considered in the context of a host of statutes that superimpose themselves on the above systems. These include mandatory

[3] Fifteen Year Review at 114.
[4] Fifteen Year Review at 131-134.

minimum sentences, particularly in the drug and firearms fields, career offender provisions, (USSG §4B1.1 and 28 U.S.C. §994(h)) armed career criminal provisions (USSG §4B1.4 and 18 U.S.C. §924(e), and other specific statutes, such as 18 U.S.C. §924(c) and 21 U.S.C. §841 and §851.

B. The Consequences Of A Complex Sentencing Scheme

There are obviously a plethora of consequences of a complex sentencing process, but I want to highlight a few of them.

i) Client Understanding

The more complex the sentencing process is, the more difficult it is for clients to understand. One of the public defenders in their comments to the Commission noted that they were often in the position of trying to assist panel attorneys with the details of guideline analyses because of the complexity of the guidelines. If the system is hard to explain to lawyers, explaining it to clients so they fully understand it is even more difficult. When the explanation is done through an interpreter, still another level of difficulty is added to the equation. Many clients in the federal system are incarcerated prior to trial and they often receive jailhouse advice about the guidelines or do their own research. In my District there are inmates from three different districts in two different Circuits, all in the same facility. The clients' often gain an understanding or misunderstanding of the system from other inmates or their own research. Given the complexity of the system, including different law in different circuits, very often this pro se research or jailhouse lawyer advice is not accurate, and getting a client to understand the sentencing process involves not only explaining the system to them, but disabusing them of the misinformation they have acquired. When the system is complex, this whole process is much more difficult

ii) Effort May Be Diverted From Other Issues

In most cases, there is a practical limit to the amount of time and money that can be invested in the sentencing process. While the limits are elastic, rarely is there a case in which counsel is not faced with some constraints in terms of the resources that can be expended on sentencing. The necessity to devote considerable effort to complex guideline issues may take time away from focusing on items related to some of the factors identified in 18 U.S.C. §3553(a), such as identifying appropriate programs for a client as an alternative to incarceration.

iii) Cost

A complex sentencing system adds cost to the process. The guidelines are a very critical component of this cost figure. Significant time is required to address the guidelines issues and often appeals focus on guideline issues. For CJA

attorneys and for the system which administers the CJA program, cost is an omnipresent factor. Simplifying the system should reduce some of these costs.

There is an additional component to the cost question. The time required to handle a federal sentencing is a significant deterrent to clients being able to retain private counsel. A complex and labor intensive process increases the cost of retaining counsel, even for relatively routine cases, likely forcing at least some of these cases into the public defender/CJA category of cases.

C. Remedies for a Complex System

I agree with the recommendations of other witnesses that the simplification of the guidelines would be one major step in reducing the complexity of the system. Another step would be the repeal of many of the statutes, some of which I identified above, which create mandatory minimums or otherwise require the imposition of sentences without affording the Court discretion to vary. I would also expect that the simplification of the guidelines would significantly reduce the number of sentencing appeals.

IV. Some Particulars About the Length of Federal Sentences

A. The Use of Prior Drug Convictions To Enhance Penalties

One of the most pernicious statutes in the federal criminal code provides for increased penalties for drug offenders who have prior felony drug convictions.[5] The statute operates in a simple way. If the defendant has a prior felony drug conviction the maximum penalties are significantly increased. If there is a mandatory minimum sentence it is significantly increased. If a person has two or more prior convictions the penalties are further increased.

The statute vests virtually total control in the hands of the prosecution, at least in the cases where there are mandatory minimums and/or mandatory sentences. The statute is unnecessary. If a person is facing a mandatory minimum sentence of 5 years for possession of 5 or more grams of cocaine base, without the invocation of the enhanced penalty provision, the sentencing range would be 5 to 40 years, assuming no death or permanent injury. The Court would retain the discretion to impose a sentence up to 40 years, even for 5 grams of cocaine base or a 100 grams of heroin, etc. What the statute does is remove the sentencing decision from the Court and place it in the hands of the prosecutor. By simply filing the information, assuming the prosecution can prove the prior felony drug conviction, the mandatory minimum penalty jumps to 10 years, trumping any guideline analysis or 18 U.S.C. §3553(a) analysis. By increasing the maximum offenses, if the career offender provisions are triggered, the penalties are further enhanced.

There are many troubling aspects of this statute. It divests the Court of authority and places the real control of the sentencing in the hands of the prosecution. It makes

[5] 21 U.S.C. §841 and 21 U.S.C. §851.

review of a sentence virtually impossible. The opportunities to challenge a prosecution charging decision are extraordinarily limited. There appear to be no published criteria that govern when an enhanced penalty will be sought. The impact of this kind of sentencing power on plea bargaining is enormous, and I suspect that demonstrating that impact with studies will be very difficult. How does the researcher identify cases that have been pled to avoid the filing of an enhancement under 21 U.S.C. §851?[6]

Finally, I note that the Government's ability to obtain lengthy sentences in serious drug cases does not require this statute. Even without the statute, the maximum penalty for 5 grams or more of cocaine base is 40 years and for 50 grams or more of cocaine base, the penalty is life.

B. Mandatory Minimums

I have little to add to the already voluminous commentary on the adverse effects of mandatory minimum sentences. I would simply note anecdotally that explaining to a client in a prison that there are advisory federal sentencing guidelines that will be the subject of a detailed presentence report and have to be carefully calculated, and that there are various sentencing factors that have to be considered pursuant to 18 U.S.C. §3553(a), but that all of these matters are trumped by a mandatory minimum sentence understandably makes a person suspicious about the whole system.

C. Other Statutes and Guidelines

There are a host of other statutes and guidelines including the career offender and armed career criminal provisions that remove or limit the discretion of the Court in making sentencing decisions. These statutes make sentencing much more complex and time consuming, make sentences longer, and yet fail to improve the process.

V. The Bureau of Prisons

Most criminal defendants in the federal system eventually end up in the custody of the Bureau of Prisons. I wish the Bureau of Prisons could become more responsive to defendants and defense counsel. The classification and placement policies of the BOP are not easily understood. Similarly, there is a lack of information about what programs are available for inmates, particularly when predicting the institution to which an inmate will be designated is so difficult. I fear that there is a misconception about the value of programs inside the BOP, compared with programs outside the prison, particularly in areas like job training and mental health counseling. Dealing with medical issues and the BOP is another often difficult and frustrating task because often there is great mystery as to how the BOP will treat a medical problem.

[6] I am aware that at least some plea agreements specifically provide that one of the inducements for the plea is that the Government will not file an information pursuant to 18 U.S.C. §851, but that fact does not solve the problem of getting accurate data as to the use of this statute.

VI. Defendants Who Are Immigrants

Others have commented on the particular problems presented by current practices with respect to cases involving violations of the immigration laws. I want to note a particular problem that exists when immigrants are defendants in criminal cases, regardless of whether the charge relates to an immigration offense. Sometimes, to give good advice to an immigrant about a pending criminal charge the person needs advice and/or representation with respect to their immigration status. Privately retained attorneys always have the option of recommending their clients retain separate immigration counsel. For CJA panel lawyers, there is a special problem. They do not have the authority to hire separate counsel for their clients; yet the need for advice and/or representation in this area is just as great. I do not suggest an easy remedy exists for this dilemma though there has been argument that there should be a right to counsel in at least some immigration proceedings.

Conclusion

While I have highlighted the apparent unfairness of the system to minorities, I want to be clear that the unfairness is not limited to minorities. Older clients, many with medical problems, find the lack of special consideration of their age baffling. White collar defendants, who are often first time offenders and who are often older, do not understand why as a non-violent, first time offender they must be incarcerated. They also don't understand why when they are incarcerated sentences often are so lengthy. Immigrants find the system punitive and unforgiving.

The destruction of relationships between parents, primarily fathers, and their children is a story whose social cost mounts every day. Immigrant fathers are deported and citizen fathers are placed in prisons that are often too far away to facilitate any meaningful visitation, particularly with young and poor families. How many children must grow up hardly knowing their incarcerated and or deported parent?

I wish I had more time to try to explain the anguish and pain prison sentences cause. There are some prisoners for whom a long period of incarceration is required, but I submit that the system incarcerates too many people for too much time. Prison should become the last resort, not the presumptive option.