United States Sentencing Commission

Public Hearing - "The Sentencing Reform Act of 1984: 25 Years Later"

Phoenix, Arizona

January 20-21, 2010

Statement of Hon. John M. Roll, Chief Judge, District of Arizona

Introduction

Thank you for the opportunity to testify at this public hearing. In the past 12 months, the United States Sentencing Commission has held hearings throughout the United States, including San Francisco, Chicago, Austin, Atlanta and Denver. The work that the Commission does is extremely important. On behalf of all of the participants in this hearing, thank you for holding this hearing in the District of Arizona.

You have heard from many distinguished jurists and probation chiefs, as well as prosecutors and defense attorneys. I suspect that you have received countless suggestions, not all of which were easily reconcilable.

Although I am currently the chief district judge in the District of Arizona, I do not purport to speak for the District Court. Except as otherwise noted, I speak only for myself.

District of Arizona felony caseload

As to federal felony sentences, the District of Arizona remains among the most

active of the 94 district courts. In FY-2008, the District of Arizona experienced an aberrational decline in felony case and defendant filings. In FY-2008, the District of Arizona had approximately 1,200 fewer felony case filings and approximately 1,450 fewer felony defendant filings than in FY-2007. This decline was a direct result of under-staffing of Assistant U.S. Attorneys ("AUSAs") in the U.S. Attorney's Office. Nevertheless, even with the felony case and defendant declines in FY-2008, the District of Arizona ranked 5th in felony case filings and 4th in felony defendant filings. As District of Arizona Probation Chief Mario Moreno points out in his written statement, approximately 80% of the District of Arizona's criminal caseload were immigration (illegal reentry and alien-smuggling) and drug-trafficking prosecutions - with 58% felony immigration prosecutions and 21% drug-trafficking prosecutions.

As a result of nearly 50 AUSAs being added to the U.S. Attorney's Office in the District of Arizona as of January 2009 (some were replacement hirings but many were the filling of new positions), the District of Arizona's FY-2009 felony statistics will closely approximate the District's FY-2007 statistics. In FY-2009, the District of Arizona had 4,299 felony case filings, an increase of nearly 27% over FY-2008 and 5,127 felony defendant filings, an increase of nearly 28% over FY-2008. The impact of these increases are keenly felt by Pretrial, Probation, the Clerk's Office and Judges and staff.

I believe that you will be hearing testimony from Tucson division Magistrate Judge Jennifer Guerin regarding Operation Streamline (more commonly referred to as Arizona Denial Prosecution Initiative), in which certain petty and misdemeanor defendants are arraigned, plead guilty and are sentenced in a single day. In FY-2009, magistrate judges in Tucson division heard 19,617 petty offenses, 16,031 of which were Operation Streamline

cases. Recently, the Ninth Circuit ruled that additional precautions are necessary in order that Operation Streamline defendants receive all of the rights to which they are entitled under the Federal Rules of Criminal Procedure. *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009). In addition to presiding over an enormous number of petty offenses, District of Arizona magistrate judges accepted 4,173 felony changes of plea in FY-2009 - an increase of 22.3% over FY-2008.

Impact of United States v. Booker

The Commission has expressed interest in the impact of *United States v. Booker*, 543 U.S. 220 (2005) and its progeny.

The Ninth Circuit has stated that a district judge's mere indication that a guideline sentence is "probably going to be considered reasonable" constitutes error. *United States v. Dallman,* 533 F.3d 755, 759, 761-62 (9th Cir. 2008). The Ninth Circuit recently ruled that a guideline sentence constituted an abuse of discretion. *See United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009). In *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008)(en banc), the Ninth Circuit ruled that a guideline sentence is not presumed, on appeal, to be reasonable.

Notwithstanding *Booker* and the Ninth Circuit precedent in its wake, I believe that the District of Arizona has retained significant uniformity and certainty in sentences, due to the prevalence of Rule 11 (c)(1)(C) plea agreements. Since nearly 80% of the District of Arizona's felony sentencings involve immigration or drug-trafficking crimes, offense specific plea agreements, with stipulated sentencing ranges, are commonplace.

Historical prior convictions and offense levels

On March 6, 2006, when the Sentencing Commission invited me to testify in San Diego regarding proposed amendments to the immigration guidelines, I urged you to not significantly change the method by which prior convictions are counted for offense level purposes in illegal reentry cases. At that time, it had been proposed that sentencing guideline calculations be based upon the *length of sentence* imposed for predicate prior convictions rather than the *nature of the prior conviction*. This proposal has resurfaced. Once again, I respectfully urge that great caution be used before adopting any such approach. It continues to be my experience that many of the most serious state convictions have involved minimal terms of imprisonment followed by lengthy terms of probation or supervision. Transcripts from these hearings often refer to imminent deportations. I believe that such sentences reflect the belief of many state judges that prompt deportation is preferable to the state bearing the cost of lengthy incarceration. The current fiscal difficulties faced by many states seem likely to increase the number of such sentences. While such an approach could free the prosecution from the task of presenting information pertaining to prior convictions, it would eliminate the systemic weighting of serious criminal conduct. District Judge Cindy K. Jorgenson has authorized me to inform you that she joins in my comments on this point.

Early disposition fast-track program

In the District of Arizona, the government continues to offer downward departure for early disposition in certain cases.

"The fast-track program allows federal prosecutors to offer shorter sentences to defendants who plead guilty at an early stage in the prosecution and agree to waive appeal and other rights." *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 739 (9th Cir. 2009)(citing *United States v. Marcial-Santiago*, 447 F.3d 715, 718 (9th Cir. 2006). Historically, in border districts confronted with a high volume of illegal reentry cases, this program has been an invaluable incentive for reasonable pleas. In *Gonzalez-Zotelo,* the Ninth Circuit rejected the argument that, post-*Kimbrough v. United States*, 128 S.Ct. 586 (2007), the district court could base a sentencing decision "solely on disparities between a defendant who did not receive a fast-track plea offer and a defendant who did." *Id.* The Ninth Circuit stated that it joined "the Fifth and Eleventh Circuits in holding that *Kimbrough* did not undercut our precedent holding that fast-track disparities are not 'unwarranted' so as to permit their consideration under §3553(a)(6)." *Id.* at 740. Judge Jorgenson, who serves as a member of the Advisory Committee on Criminal Law, concurs in the importance and value of the fast-track program.

Recommendations regarding the Federal Rules of Criminal Procedure

Judge Jorgenson and I join in District of Arizona Probation Chief Mario Moreno's opposition to the proposal that Fed. R. Crim. P. 32(h) be amended to require that the parties be provided with disclosure of written summaries of information provided to probation officers and disclosure of documentary information.

The practice in the District of Arizona, as required by the Ninth Circuit, is that any information received by the district court that is not contained within the presentence report must be disclosed to the parties before sentencing or may not be considered by the

sentencing judge. The proposed amendment, while well-intentioned, would result in enormous waste of time because most of the information received by probation officers regarding criminal history is not in dispute, and is always available for inspection upon request.

The proposed change would affect all 94 districts. Clearly, one size does not fit all. In criminal cases, reciprocal discovery is the rule in the District of Arizona. When the probation office prepares presentence reports, it primarily relies upon the discovery material shared by both sides.

This proposal is yet to be approved by the Advisory Committee on Criminal Law and the Advisory Committee on Criminal Rules. It is opposed by the Chiefs Advisory Committee, which represents the considered opinion of both probation and pretrial services, as well as the Probation Officers Advisory Group, which represents the opinion of probation officers.

a. Written summaries

The proposal would require that probation officers prepare written summaries of all oral information received. Although the impact of this requirement would vary from case to case, every case involves some oral communications received by federal probation officers. They are entrusted with conducting objective investigations and submitting reports with verified information.

To my knowledge, no district judge actually reviews the entire probation office file on a defendant prior to sentencing. District judges rely upon the information contained in the presentence report. The probation officer identifies the relevant information, oftentimes

from an enormous amount of material, and includes that information in the presentence report. Both the prosecution and the defense have the opportunity to challenge any assertions in the report. That presentence report *is* the summary of all relevant oral communications.

Under Ninth Circuit case law (and the prevailing practice in the District of Arizona long before that case law was announced), district judges are required to disclose all relevant factual information to the defendant. *See, e.g* ., *United States v. Warr* , 530 F.3d 1152, 1162 (9th Cir. 2008)("We have interpreted Rule 32 'to require the disclosure of all relevant factual information to the defendant for adversarial testing.'" (quoting *United States v. Baldrich* , 471 F.3d 1110, 1114 (9th Cir. 2006))). In short, the lawyers know exactly what the judges have been told concerning the case.

The preparation of written summaries of all information received orally by the probation officer would be time-consuming and merely duplicative of the summaries currently contained in the presentence report.

b. Documentary information

The ABA proposal would also require disclosure to the parties of any documentary information submitted to or received by the probation officer in connection with the presentence investigation.

This proposal would place enormous demands on this District's Probation Department while obtaining minimal benefit.

For example, in FY-2008 (FY-2009 statistics are not yet available), over 1,700 felony illegal reentries were prosecuted in the District of Arizona - approximately 50% of the

District's felony caseload. The probation office accumulates a large volume of documentary information concerning prior convictions and arrests. While it is not uncommon for defendants to object to one or two criminal history entries in presentence reports, seldom if ever is *every* arrest and/or conviction questioned. Nevertheless, this proposal would require the probation department to provide all documentary information concerning every prior conviction and arrest. It is not uncommon for criminal defendants in Tucson division to have 10 or more criminal history entries. The ABA proposal would result in an enormous waste of resources to no sound end.

In addition, some arrest information is provided by law enforcement under an assurance of confidentiality. This documentary information is summarized for presentence reports and counsel are free to question the summaries. However, if disclosure of the actual material provided by law enforcement is required, probation would thereby be prevented from including this information, and the sentencing judge would be deprived of receiving all available information.

c. Southwest border districts

Although the ABA proposal would affect all 94 districts, the 5 southwest border districts presently hear almost 1/3 of the nation's federal felony litigation. Presentence reports will be prepared in each of the more than 5,100 felony cases filed against defendants in the District of Arizona in FY-2009. This proposal would immeasurably increase the work of the District of Arizona Probation Department with slight, if any, benefit.

Sentencing enhancements and the Taylor categorical analysis

In Ninth Circuit Judge Richard C. Tallman's testimony before the Sentencing Commission on May 28, 2009, he described difficulties encountered in applying the categorical analysis of *Taylor v. United States*, 495 U.S. 575 (1990), in determining whether a prior conviction qualifies as a crime of violence for purposes of offense level calculations under the sentencing guidelines. As he indicated in his testimony: "The question in each context is the same: Does the prior state offense reach conduct beyond the generic federal definition of an analogous crime?" (Hon. Richard C. Tallman, Testimony Before the United States Sentencing Commission, Stanford, California, May 28, 2009, at p. 14). In his testimony, he urged adoption of the Fifth Circuit's "common sense" approach, described in *United States v. Mungia-Portillo*, 484 F.3d 813, 816-17 (5th Cir. 2007). In *Mungia-Portillo*, the Fifth circuit looked to whether the Tennessee aggravated assault statute was "equivalent to the enumerated offense of aggravated assault as that term is understood in its ordinary, contemporary, and common meaning." *Id.* at 816 (internal quotation marks omitted)(citation omitted). In applying the common sense approach, the Fifth Circuit stated that "a prior statute of conviction need not perfectly correlate with the Model Penal Code; 'minor differences' are acceptable." *Id.* at 817 (citation omitted). Ninth Circuit precedent interpreting the sentencing guidelines presently precludes application of the Fifth Circuit's common sense approach. In *United States v. Esparz-Herrera*, 557 F.3d 1019, 1023-25 (9th Cir. 2009), a panel of the Ninth Circuit reluctantly followed the Ninth Circuit's categorical approach, but then underscored the importance of this issue by unanimously joining in a concurring opinion describing why the Fifth Circuit's common sense approach is preferable.

Having presided over many sentencing hearings in which the Fifth Circuit's common

sense approach would have been very helpful and just, I concur in Judge Tallman's testimony on this matter. Judge Jorgenson also concurs.

Conclusion

Thank you for the opportunity to participate in this hearing and for considering my comments.