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UNITED STATES SENTENCING COMMISSION

REGIONAL HEARING ON THE 25TH ANNIVERSARY OF THE PASSAGE OF THE SENTENCING REFORM ACT OF 1984

SEPTEMBER 9, 2009

VIEW FROM THE PROBATION OFFICE

It is fitting that we use anniversaries as occasions to pause to consider whether there is a gap between where we are and where we want to be. Twenty five years ago, Congress decided that we were not where we wanted to be in terms of fairness and equity in sentencing. Today, it is appropriate to acknowledge that we have come a long way. I will address the eight suggested topics through my general comments. However, there is one topic (i.e., number seven) that I will address specifically at the end.

Last month, I passed my twenty sixth anniversary as a probation officer in this district. I did presentence reports (PSR) under "old law" and participated in the transition to Guideline PSRs. It was a dramatic and challenging change. The probation system not only survived, it thrived. The probation officer became an even more important figure in the sentencing process. We became experts in the guidelines by virtue of specialization. No longer could probation officers both conduct PSRs and also supervise offenders. Our office bifurcated and probation officers had to do one or the other, which created a specialized focus and quickly built our confidence in our expertise through this experience.

Prior to the Sentencing Reform Act, I always thought of the word "guidelines" as akin to a "helpful suggestion", but it quickly became clear that "guidelines" in this new era really meant "mandatory rules". It was not long before probation officers became known as "guardians of the guidelines". This was usually uttered with a sarcastic and derisive tone and was not meant to be flattering. People typically resent change and we were the faces trying to carry out this change. Many people despised the guidelines because they depersonalized the offender and focused more on the offense. Many people felt that the guidelines were too rigid and became outraged at the lack of "wiggle room" in their application. As probation officers, we performed in our role as "guardians of the guidelines" even when we may have felt that they were unnecessarily severe. As professionals, we applied the guidelines dispassionately and never tried to manipulate the outcome. I know the judges appreciate our efforts and over time we have earned the respect of attorneys even though disagreements often were, and still are, passionate.

I was vaguely aware that disparity existed in sentencing throughout the country, but I did

not need any convincing to believe that there were inequities nationally because there was plenty of disparity in our own district. How could there not be? I believe that anyone who worked in the pre-guidelines era would acknowledge that the guidelines represent a huge step toward fairness. And how can anyone be against fairness? Of course, fairness is like perfection in that it never really exists except in the eye of the beholder. The only reason to be against fairness is the cost. Like the *Lexus* slogan, "the relentless pursuit of perfection", the Sentencing Reform Act created the "relentless pursuit of fairness". Every year there have been more amendments designed to increase fairness. Both missions imply the acknowledgment that these goals can only be pursued and never fully attained. They are worthy goals and the mission statement is a good one for a luxury automobile maker because the loftiness of the slogan dovetails with the expensive cost. The Federal Court is like the *Lexus* of the sentencing process, and we should be proud of that, but also mindful that it is expensive and that we can never attain perfect fairness in the sentencing process.

I remember predictions twenty five years ago that sentencing hearings would become impossibly protracted because of all the details that could be argued about and appeals would rise dramatically. These predictions have turned out to be true and I have seen sentencing hearings go on for hours and routinely still get continued multiple times. It is true that the guidelines are actually simple, when you apply them to a simple case. But when you apply them to a complicated case, they become extremely complex. In Illinois, it seems we mostly have large, complex cases and a disproportionate number of political corruption and organized crime cases that pose many unique scenarios that are hard to reduce to guideline numbers. Therefore, sentencing hearings are routinely long, complicated, and contentious.

It is my opinion that the Sentencing Reform Act has been a resounding success in taking a huge leap toward achieving the elusive goal of fairness. Fairness is usually defined as treating similar cases similarly. This sounds simple enough, but in complicated cases it is clear that "similar" does not mean "the same". By treating similar cases as if they are exactly the same, some critics see the guidelines as cutting out the "heart and soul" of sentencing. Since the Booker Decision, however, we have restored the "heart and soul" of sentencing so judges and probation officers can start with the guidelines, and then exercise their discretion to sentence people as unique individuals and not feel that their hands are tied when they believe that the guidelines do not result in fairness. The Booker Decision has allowed the system to take the next step in our evolution towards sentencing and considering fairness as well as the unique individual circumstances of each case.

The sentencing commission set standards for the entire country for what the severity of punishment should be for every offense. This accomplished the goal of fairness, but in our district, it dramatically increased the severity of sentences, especially for drug offenses. So we gained equity and increased severity at sentencing.

My view from the probation office is that the base offense levels for most of the drug offenses are simply too high. People who were sentenced to twenty year prison terms in 1989

have finally come to us on supervised release. Was twenty years necessary for deterrence? Would ten years have sufficed? Would five years have been enough? I believe that most guideline sentences for drugs have been more than enough to accomplish individual deterrence. Then, we must ask, how much time is necessary to achieve general deterrence? It is hard to measure or determine to what extent others have been deterred from distributing drugs by these long (and costly) sentences. It seems as though the number of drug cases have continued to increase over the past twenty five years, which would suggest that any measure of general deterrence has not been achieved. Thus, I would say that guideline sentencing has been a resounding success in the attainment of equity, but the results have been an extremely costly quest for deterrence of drug distribution with questionable results. I would submit that the same goal of equity could have been achieved by setting a standard that was less severe for drug cases.

TOPIC #7 - WHAT, IF ANY, RECOMMENDATIONS SHOULD THE COMMISSION MAKE REGARDING THE FEDERAL RULES OF CRIMINAL PROCEDURE?

I would now like to turn my attention specifically to topic number seven, which is important from the view of the Probation Office. I am aware that the American Bar Association has requested that Rule 32 be amended. The probation office recommends that no changes be made. The reasons have been comprehensively articulated by my colleagues at prior commission hearings earlier this year and I will not recount them again, except to reference the fourteen distinct reasons listed by Chief Probation Officer Chris Hansen in his testimony before the Commission on May 29, 2009.

Whenever there is anything in the PSR that any of the parties have questions about, there has always been a very efficient process in place to address those questions. The individual judges are always in the best position to determine the ramifications of disclosure of any of the information that we gather. The judge decides at that time whether the interest of justice related to disclosure of certain information is critical in the particular situation to take precedence over safety, confidentiality, and the time and expense associated with the typically voluminous documents and files that would need to be duplicated. The judge is in the position to decide if such effort and risk is purposeful and worthwhile.