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Observations from the Pilot Sentencing Institute for the Fifth and Eleventh Circuits

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With the advent of guideline sentencing, and the proliferation of statutory mandatory minimum sentences, the role of federal judges and probation officers in the sentencing process has changed significantly. Sentencing Institutes, conducted since the late 1950s, had been the primary forum for discussion of sentencing procedures. The 1984 Crime Control Act, by abolishing the indeterminate sentence and the U.S. Parole Commission, creating the U.S. Sentencing Commission to establish sentencing guidelines, and enacting the first in a series of mandatory minimum sentences for drug offenders, raised the question whether Institutes still had a place in an era of greatly reduced judicial discretion. This was the question that led to convening a pilot Sentencing Institute (the first since the advent of the Guidelines) September 4–9, 1990, in Fort Worth, Texas.

Sentencing Institutes were conceived by former Bureau of Prisons Director James Bennett during the heyday of indeterminate sentencing when judges had substantial discretion to determine sentences. In 1958 Congress endorsed Bennett's idea by authorizing the Judicial Conference "[i]n the interest of uniformity in sentencing procedures . . . to convene such institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing . . . " (28 U.S.C. § 334(a)).

The pilot Institute was attended by 178 participants, including district and circuit judges, probation officers, members and staff of the U.S. Sentencing Commission and U.S. Parole Commission, and staff from the Federal Bureau of Prisons, the Federal Judicial Center, and the Administrative Office of the U.S. Courts.

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The agenda, following that of previous Institutes, consisted largely of panel discussions of sentencing issues and small-group discussions of illustrative cases. One day was spent touring the Fort Worth Federal Correctional Institution and holding small-group discussions with prisoners.

Several impressions were formed from reports at the Institute. One is that judges from the Fifth and Eleventh Circuits, despite some concerns, have accepted the guideline system and are doing their best to conform their sentencing practices to further the implementation of the Sentencing Reform Act. There is much more concern about mandatory minimum sentences, which the participants view as hampering their ability to implement the new system.

The Institute revealed the existence of a number of problem areas, which are discussed in the following sections.

The Plea Process

The role of the judge in reviewing plea bargains

One concern was the extent to which judges should take responsibility for ensuring that prosecutors do not bargain away the most serious, readily provable offense conduct, without intruding on legitimate areas of prosecutorial discretion. Some judges ask prosecutors at plea taking if stipulations accurately reflect the relevant conduct in the offense; others have an informal discussion with assistant U.S. attorneys if they suspect that the facts stated are misleading.

Prosecutors sometimes enter into bargains for valid reasons that do not relate to sentencing in the individual case (for example, to obtain information on more culpable members of criminal organizations or to secure convictions while freeing resources to concentrate on more dangerous offenders). Faced with a plea bargain that may not reflect the most serious conduct, judges may:

- Accept the plea and sentence for the "convicted offense" conduct alone; this creates a potential for sentencing disparity, depending on how prosecutors exercise their authority.
- Accept the plea but sentence on the "real offense" conduct; this could result in uniformity of sentencing at the cost of perceived procedural fairness and a diminished quality of justice. Many participants were uneasy about imposing a sentence on the basis of facts established by a preponderance of the evidence rather than beyond a reasonable doubt. This was particularly true when

the facts constitute an element of a more serious offense that would have had to be established beyond a reasonable doubt had the more serious offense been charged.

- Reject the plea, but this could lead to extensive burdens on the system and, depending on the type of plea, was viewed by some participants as an inappropriate intrusion into executive branch functions.

Procedures for taking pleas

Judges differ in the procedures they use for taking pleas, including the colloquy they conduct to ensure that defendants understand the post-conviction consequences of their pleas. Some judges let defense counsel bear the burden of informing defendants, while others are concerned about the lack of qualification of some attorneys to advise adequately on sentencing matters.

When should a judge defer acceptance of a plea agreement pending receipt of the presentence report, and when should a judge offer a defendant the opportunity to withdraw a guilty plea, whether or not formally required by Rule 11? For example, is it appropriate to accept a bargain with stipulated facts, advise the defendant (as required by Rule 11(e)(3)) that the court will embody in the judgment and sentence the disposition provided for in the plea agreement, and then sentence on different facts without allowing an opportunity to withdraw the plea? The lack of consensus on these issues led to suggestions that Rule 11 should be reexamined to take into account the impact under the Guidelines of factual stipulations on sentencing computations.

The Probation Investigation and Presentence Report

How much independent investigation of the offense behavior is expected from the probation office? Judges, for the most part, felt no need for information on offense behavior beyond that submitted by the parties. If a judge accepts a bargain with factual stipulations and plans to sentence accordingly, should probation officers reinvestigate the stipulated facts independently? Should probation officers be second-guessing prosecutors on their judgments about readily provable facts? A probation officer noted that if the sentencing court does not have a need for certain additional offense information, it is a waste of time and resources—and a source of conflict between officers and the court and attorneys—to provide it. On the other hand, directives from the Judicial

Conference, the Administrative Office, and the Sentencing Commission have emphasized the need for an independent investigation of the offense facts for the presentence report.

Another question that arose was the extent to which the presentence report of the offense conduct should represent the probation officer's conclusions about what occurred or simply provide the raw information for the judge's independent review. Again, there was no consensus.

Guidelines Issues

Role in the offense

Judges said they continue to have difficulty determining adjustments for role in the offense (U.S.S.G. § 3B1), especially in multiple defendant cases, and are concerned with codefendant disparity. Some judges reserve imposing sentence until the presentence reports for all codefendants have been prepared and reviewed. Others, however, consider delay in sentencing to have adverse consequences for the offender, if detained, or for the community, if the offender is not detained.

Substantial assistance

There was concern that the downward departure for providing substantial assistance to authorities (U.S.S.G. § 5K1.1, p.s.), as a practical matter, rarely benefits lower level offenders who are in no position to offer valuable information. The participants felt that this leads to disparity in that the less culpable may receive longer terms. Some judges suggested setting limits on the amount of the permissible reduction; others thought that the Guidelines should permit rewards for lesser forms of cooperation.

Acceptance of responsibility

Discussion indicated that there is disparity in how the acceptance of responsibility adjustment (U.S.S.G. § 3E1.1) is applied. Some judges routinely grant the two-level reduction if a defendant pleads; other judges require substantially more evidence of either cooperation or remorse. Suggestions included allowing the court more discretion in how much adjustment to provide (from 1 to 4 levels) or creating separate guidelines to address the multiple purposes now served by this guideline.

Criminal history category

A number of judges noted that the distinctions in the criminal history category are not fine enough, leading to a potential for unfair sentencing based on similar treatment of offenders with dissimilar prior records. Suggestions included creating more categories and establishing a "true first offender" category.

Drug guidelines

Most participants believed that the drug Guidelines, and the mandatory minimum sentences on which they are based, are higher than necessary to meet the enumerated purposes of sentencing at 18 U.S.C. § 3553(a)(2). It was suggested that the Commission might develop drug guidelines independent of the mandatory minimum terms set by Congress.

Bank robbery

A number of judges believed that the bank robbery Guideline is lower than appropriate to punish a crime of violence. It is not clear, however, if this assessment takes into account the November 1, 1989, amendment that increased the offense level for robbery.

Resolving Disputed Facts

The presentence report is used in post-sentencing decision making: the Federal Bureau of Prisons uses it to make designation and security level decisions; the probation service uses it to develop supervision plans. They *assume* that the report is correct. There was consensus that it is important for courts to ensure that differences between facts as resolved at sentencing and those stated in the presentence report be noted for post-sentence users. Further, the transmitted report should flag any statements that, although disputed, were not resolved by the court.

Use of Sentencing Options

There appeared to be a lack of knowledge about available sentencing options. This is of concern because the statute (18 U.S.C. § 3553(a)(3)) requires judges to take into account "the kinds of sentences available" before they impose sentence.

Of the sentencing options authorized by the Sentencing Commission as substitutes for imprisonment, home confinement was the least well understood. (The other substitutes for imprisonment recognized by the Guidelines are community confinement and, for probation cases, intermittent confinement.) Although many judges viewed home confinement as a viable option in appropriate cases, it continues to be underutilized. One reason appears to be the perception that it is a "soft" sentence. Participants who have used or observed the use of the sanction, however, reported that offenders consider it punishment—sometimes even more punitive than halfway houses. They suggested that other judges should work with their probation offices to investigate how best to implement this option, noting that there need not be a formal electronic monitoring contract in place in the district to enforce such conditions. Home confinement can be enforced without the use of electronics, or offenders can pay for their own electronic monitoring by local vendors.

Judges and probation officers also expressed the need for more information on fines, restitution, and community service. How should restitution schedules be set? Should the primary focus of community service be to make it distasteful to the offender or to provide some benefit to the community? How should fines and their schedule of payments be set? The realistic setting of fines was considered particularly pressing. Imposing an essentially uncollectible fine as a condition of supervision places probation officers in the untenable position of stressing to offenders the importance of complying with the conditions of release and then having to make an exception.

Correctional Treatment

Bureau of Prisons treatment programs are generally available to offenders in the last 18–24 months of their sentence as they prepare for release and reintegration. Short-term offenders will rarely receive treatment in prison. Yet, some judges continue to look to prisons as the source of correctional treatment. A number of judges noted that the need for treatment would sway them *toward* a sentence of imprisonment so that "offenders can avail themselves of the Bureau's programs." Other judges indicated that they might impose a longer sentence of imprisonment so that programs can be completed. These rationales are not permissible under 18 U.S.C. § 3582.

Some participants noted that excellent community treatment programs are available and can be incorporated into a sentence by impos-

ing special conditions of drug, alcohol, or mental health treatment as long as the condition is reasonably related to the offender's criminal conduct.

Quality of Lawyering

Reports from judges and prisoners indicate that there is still a significant shortfall of competence in sentencing matters among the bar—particularly panel attorneys and retained defense counsel. There is a need for continuing training of the bar, including assistant U.S. attorneys. A number of judges noted that many of the procedural fairness questions arising from the plea and the presentence report process stem from inadequate understanding on the part of counsel of the impact of the plea, given guideline concepts such as relevant conduct, multiple count grouping, and acceptance of responsibility.

Opinions of Institute Participants

All participants were sent a questionnaire asking them to evaluate the various sessions at Fort Worth and whether Sentencing Institutes should be continued. Of these 178 surveys, 164 (92%) were returned.

Overall, the responses were favorable, with 97% of the participants expressing the opinion that Sentencing Institutes should be continued or continued with modifications.

By far the most successful sessions were the small group discussions of sentencing in illustrative cases. These sessions were rated as very valuable by over 60% of the participants, a proportion similar to the ratings given similar sessions at the three pre-guideline Sentencing Institutes in 1985, 1984, and 1983. Less than one third of the district judges rated any other activity as very valuable.

On the negative side, this Institute attracted far fewer district judges than in the past (47% versus an average 67% attendance rate at the three pre-guidelines Institutes). Attendance by appellate judges, however, was higher than in the past (43% versus an average 32% at the three previous Institutes). Responses to a survey of district judges who did not attend indicated that most (34 of the 41 expressing an opinion) believed that Sentencing Institutes should either be continued or continued with modifications. The reasons commonly given for the judges' nonattendance were timing, location, or duration of this particular Institute.

Conclusion

The pilot Sentencing Institute at Fort Worth identified many important issues that need to be addressed to improve sentencing procedures. It was clear from discussions that unwarranted disparity continues to be a problem under the Sentencing Guidelines. The Institute provided evidence that Sentencing Institutes still serve the statutory purpose of seeking to promote "uniformity in sentencing procedures."