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SENTENCING

Panel Coordinator: Judge Maxine Chesney, San Francisco Superior Court (Juvenile Division), San Francisco, California

Panelists: Judge Lois G. Forer, Court of Common Pleas, Philadelphia, Pennsylvania

Judge Joseph Mattina, Surrogate's Court, Buffalo, New York

Judge Michael Greer, San Diego Superior Court, San Diego, California

INTRODUCTION

Of all the decisions facing trial judges, those surrounding sentencing are the most difficult. Public opinion focuses on the sentencing of criminal defendants—particularly those defendants whose trials have received media attention—and public outrage results from what is perceived as a “light” sentence.¹ Judges are called upon to be “tougher” on criminals, and women judges in particular are perceived as being too lenient. The NAWJ, in recognition of the difficulty faced by all judges in the area of sentencing, presented the panel on Sentencing to share and discuss viewpoints on this issue.

The panel included Judge Lois G. Forer of Pennsylvania, who has been on the Court of Common Pleas in Philadelphia since 1971 and is the author of *Criminals and Victims*,² Judge Joseph Mattina of the Surrogate's Court of Buffalo, New York, who has lectured at the National Judicial College in Reno, Nevada on sentencing theory, philosophy, and practice; and Judge Michael Greer, who has been a superior court judge in San Diego, California since 1977 and has published a compendium of felony sentencing laws in California.³

The topic of sentencing has many different aspects, and the panelists acknowledged this fact. The panel discussion, however, focused on what was perceived currently as the most important issue in the sentencing area—the rise of mandatory sentencing

1. San Francisco Chronicle, Oct. 8, 1983, at 32, col. 4.

2. L. FORER, *CRIMINALS AND VICTIMS* (1980)

3. M. GREER & B. ROSEN, *THE FELONY SENTENCING MANUAL* (1982)

and concurrent limitations imposed on the use of judicial discretion. All the panelists agreed that sentencing is a complicated and difficult process and stressed the need therefore to use discretion in sentencing. The use of alternative sentencing options was also advocated, and each of the panelists added her/his own perspectives on this issue.

MANDATORY SENTENCING VERSUS JUDICIAL DISCRETION

Mandatory Sentencing

Judge Greer described an example of a mandatory sentencing scheme—California's Violent Sex Crimes Act.⁴ In California, prior to 1978, Penal Code section 654⁵ stated in part: "An act or omission which is made punishable in different ways by different provisions of [the Penal] Code may be punished under either of such provisions, but in no case can it be punished under more than one" According to Judge Greer, under Penal Code section 654 multiple sex crimes committed by a defendant could only be punished as one crime. Appellate courts held that although a defendant committed a number of sexual assaults or crimes, there was only one intent—sexual gratification. In 1979, the California Supreme Court in *People v. Perez*⁶ stated it was well settled that Penal Code section 654 applied "not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction."⁷ The court, in determining the applicability of the section to sex offenses, focused on whether a defendant should be deemed to have entertained single or multiple objectives. The court held that the general intent or objective to obtain sexual gratification was too broad to invoke Penal Code Section 654, and that each

4. 1979 Cal. Stat. 944. Chapter 944 increased the determinate sentences and possible enhancement sentences for certain sex crimes and the penalties for solicitation to commit these crimes; it altered probation status related to these crimes and provided new procedures for the registration of persons convicted of certain sex crimes. For a discussion of the legislation, see *Selected 1979 Cal. Legislation*, 11 PACIFIC L.J. 429 (1979).

5. CAL. PENAL CODE § 654 (West 1970).

6. 23 Cal. 3d 545, 591 P.2d 63, 153 Cal. Rptr. 40 (1979).

7. 23 Cal. 3d at 551, 591 P.2d at 67, 153 Cal. Rptr. at 43.

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separate criminal sex act could be punished.⁸ The *Perez* decision, according to Judge Greer, permitted trial judges to punish separate criminal sex acts and was the precursor of the Violent Sex Crimes Act.

The Act added a sentencing statute for sex offenses—Penal Code section 667.6—which provides a five-year enhancement for offenders who have previously been convicted of a violent sex offense and permits the imposition of a full, separate, and consecutive term for each violent sex offense “whether or not the crimes were committed during a single transaction.”⁹ A defen-

8. *Id.* at 552-53, 591 P.2d at 68, 153 Cal. Rptr. at 44.

9. CAL. PENAL CODE 2 § 667.6 provides:

(a) Any person who is found guilty of violating subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or threat of great bodily harm who has been convicted previously of any such offense shall receive a five-year enhancement for each such prior conviction provided that no enhancement shall be imposed under this subdivision for any conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Any person convicted of an offense specified in subdivision (1) who has served two or more prior prison terms as defined in Section 667.5 or any offense specified in subdivision (a), shall receive a 10-year enhancement for each such prior term provided that no additional enhancement shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction.

(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or threat of great bodily harm whether or not the crimes were committed during a single transaction. If such term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time such person would otherwise have been released from imprisonment. Such term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to such term shall not be merged therein but shall commence at the time such person would otherwise have been released from prison.

(d) A full, separate, and consecutive term shall be served

dant's objective in committing the offenses is now irrelevant. Enhancements are mandatory under Penal Code section 667.6; imposition of a full, separate, and consecutive term is not mandatory.¹⁰

Judge Greer stated that the sentencing scheme for violent sex offenders has been effective in California. He felt that the mandatory sentencing aspect of the scheme acts as a deterrent to violent sex offenders—they know they will be sentenced to long prison terms. However, he acknowledged that the effectiveness of the scheme is also due to increased prosecutor awareness of sex crimes, a change in California's evidence code to exclude evidence of a victim's past sexual conduct, and an increased sensitivity to the plight of victims.

Judge Greer also noted the danger of enacting a mandatory sentencing scheme in one area of the law. He stated that the body of law developed to deal with violent sex crimes, such as the admission of evidence of similar acts, can and is being used for other crimes.

Judicial Discretion

Judge Forer warned that since 1970 every state has passed either mandatory or determinate sentencing provisions. She stated that the movement to mandatory sentencing was the result of criminologists' perceived failure of rehabilitation. Impos-

for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or threat of great bodily harm if such crimes involve separate victim or involve the same victim on separate occasions.

Such term shall be served consecutively to any other term of imprisonment, and shall commence from the time such person would otherwise have been released from imprisonment. Such term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to such term shall not be merged therein but shall commence at the time such person would otherwise have been released from prison.

10. *Id.*

ing mandatory sentences and limiting judicial discretion in sentencing is viewed by critics as a solution to individualized justice. Mandatory sentencing schemes reduce a judge's ability to consider an individual defendant's circumstances. It prevents a judge from taking into account various factors and considerations when imposing a sentence, such as the dangerousness of the defendant, the magnitude of the offense, and the victim of the offense.

Mandatory sentencing treats all criminals in the same way; it ignores the differences in crimes and in offenders. According to both Judge Forer and Judge Mattina, a judge needs to be able to consider the totality of the circumstances when sentencing a defendant. A multitude of factors can and should be considered before imposing a sentence—e.g., the age of the defendant; the victim of the crime; the effect of the punishment; the conditions in prisons; the difference in the nature of crimes committed by women; the economic impact on a family of jailing its sole support. A judge should have the discretion to consider these factors and to consider alternatives to prison. Judicial discretion in sentencing permits a judge to consider imposing fines, ordering restitution and reparation, ordering community service or enrollment in a school program. Judge Mattina noted that discretion permits a judge to use creative approaches to sentencing, especially with first-time offenders.

The panelists acknowledged that a scheme such as the Violent Sex Crimes Act can have a positive impact, but Judge Forer noted:

What we are doing [with mandatory sentencing] is taking discretion away from the judges and placing it on the district attorney. The district attorney will decide what charges to proceed on: whether they shall be charges that require a mandatory sentencing or not. We have removed discretion from the judge where it belongs . . . in the open court, and put it behind closed doors in the prosecutor's office.

CONCLUSION

Although sentencing a defendant is the most difficult task a judge faces, mandatory sentencing should not relieve judges from this task. Sentencing schemes such as the Violent Sex Crimes Act can be applauded, but mandatory sentencing cannot be used for every crime. Judges are challenged to be consistent, fair, and creative under a discretionary sentencing system, and all panelists agreed that judges should be permitted to meet this challenge.