No. 87-7028

In the

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN M. MISTRETTA,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner respectfully petitions for a writ of certiorari before judgment to review the judgment of the United States District Court for the Western District of Missouri in this case.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri is not officially reported and is reproduced in the appendix to the companion petition filed by the United States, No. 87-1904, ("App.") at pages 1a-15a. The judgment of the district court is reproduced at App. 33a-40a.

JURISDICTION

The judgment of the district court was entered on April 18, 1988. App. 33a-40a. The notice of appeal was filed on April 19, 1988, App. 41a-44a, and the case was docketed in the court of appeals on April 22, 1988. App. 45a-46a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), as amended, are reproduced at App. 47a-85a.

STATEMENT OF THE CASE

1. The Sentencing Commission.

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission was created and assigned the function of developing determinate sentencing guidelines for most federal crimes. The Commission is composed of seven voting members who are appointed by the President with the advice and consent of the Senate for six year terms. 28 U.S.C. § 991(a). The President may reappoint Commissioners, but they may serve no more than two full terms. Id. § 992(a) & (b). The President also has the power to remove the Commissioners for "neglect of duty or malfeasance in office or for other good cause shown." Id. § 991(a).

The Sentencing Reform Act mandates that three of the Commissioners must be Article III judges who are selected from a list of six judges furnished by the Judicial Conference of the United States. Id. § 991(a). The judicial members are not required to resign as federal judges, and thus far all of the judicial members have continued to sit on cases, albeit on a reduced caseload basis, while serving as Commissioners. The Act also designates the Sentencing Commission as "an independent commission in the judicial branch of the United States." Id. §

991(a).

The Commission's principal duty is to issue sentencing guidelines, or, as the Commission has described it, "to establish sentencing policies and practices for the federal criminal justice system . . .." Revised Draft Sentencing Guidelines at 1 (January 1987); 28 U.S.C. § 991(b). Although the Commission is required to submit its guidelines to Congress six months before they go into effect, see Pub. L. No. 98-473, § 235(a)(1)(B)(ii)(I) & (III), affirmative congressional approval is not necessary. To the contrary, Congress can prevent guidelines from going into effect only by passing a law, which requires approval of both Houses and the President, or two-thirds of each House if the President chooses to veto that law.

Another critical feature of the guidelines is that they are not merely advisory, but are essentially mandatory. This is most apparent from 18 U.S.C. § 3553(b), which directs judges to sentence all individuals convicted of crimes that took place after November 1, 1987, under the guidelines. In order to further confine the discretion of sentencing judges, Congress allowed judges to depart from the guidelines only when the case presents aggravating or mitigating factors which the Commission did not adequately take into account in formulating the particular guideline under which the defendant is being sentenced. Id. Furthermore, Congress gave both the defendant and the government a right of appeal based on the claim that the guidelines were incorrectly applied or that a departure from them

was unreasonable. 18 U.S.C. § 3742(a) and (b).

Another important aspect of this new sentencing reform system is that the sentence imposed will be the sentence actually served. Thus, Congress abolished parole so that sentencing judges rather than the Parole Commission will fix the time to be served, and it sharply curtailed the prior reductions for good time by limiting the maximum reduction for good time to 54 days per year. See 18 U.S.C. § 3624(b); Pub. L. No. 98-473, § 218(a)(4) & (5) (repealing old provisions).

Following the completion of an extensive rule-making proceeding, the Commission, by a vote of 6 to 1, issued final guidelines on April 13, 1987, and submitted them to Congress for the statutory six-month period. When Congress took no action to adopt the guidelines or to delay their effective date, they became effective on November 1, 1987, for crimes committed on or after that date.

2. The Proceedings In This Case.

Petitioner was indicted on three counts arising out of a December 3, 1987 sale of cocaine. App. 16a-18a. On February 3, 1988, petitioner pled guilty to conspiracy to distribute cocaine, the first count of the indictment. The government then dismissed the other two counts, and the parties entered into a stipulation regarding the factors to be considered by the Court in imposing sentence. App. 21a-22a.

On March 25, 1988, the United States District Court for the Western District of Missouri heard consolidated motions by

several defendants, including petitioner, challenging the constitutionality of the sentencing guidelines on separation of powers and excessive delegation grounds. On April 1, 1988, the court denied those motions in a decision reproduced at App. 1a-6a.

At the sentencing hearing held on April 15, 1988, petitioner moved to have the guidelines declared invalid under the Due Process Clause on the ground that they prevented the court from considering relevant factors in sentencing. App. 26a-27a. The court denied the motion, concluding that "I am not aware of any factor that is not available to me to consider that would have made some difference favorable to the defendant if I had had it to consider." App. 28a. Accordingly, no due process issue is presented in this petition.

At the conclusion of the hearing, the court sentenced petitioner under the sentencing guidelines to an 18-month term of imprisonment, to be followed by a three-year term of supervised release. App. 30a. The court also imposed a $1000 fine, thereby departing below the fine amount set forth in the guidelines because of petitioner's limited earning capacity, and imposed a special assessment of $50. App. 30a-31a.

REASONS FOR GRANTING THE PETITION

In his petition, the Solicitor General focused on the impact on the Department of Justice and the federal courts of the uncertainty over the constitutionality of the sentencing guidelines. We fully agree that the reasons given by the

Solicitor General warrant granting certiorari before judgment, and we wish only to add two points from the defense perspective. These views are based not solely on this case, but also on a number of other cases in which undersigned counsel have represented defendants in similar challenges to the sentencing guidelines, and from their regular communications with public defenders and other defense counsel in numerous cases regarding these issues. Thus, the unanimous defense counsel view is that it is vital that this Court immediately resolve the questions presented in this petition.[1]

1. Prior to the effective date of the sentencing guidelines, more than 90% of federal defendants pled guilty. A key element in deciding on whether to plead is the likely sentence to be imposed. One of the purposes of the sentencing guidelines is to increase certainty in sentencing, but that goal is wholly thwarted now because of the uncertainty of the status of the guidelines themselves. Thus, defendants cannot intelligently decide whether to plead guilty unless they know whether the guidelines or the pre-guidelines system applies.

In order to advise their clients as best as they can in this state of uncertainty, defense counsel must spend substantial resources investigating and calculating the potential sentences under both the guidelines and the pre-guidelines system. Only with this information in hand can defendants and their counsel

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[1]According to our best estimate, 90 judges have ruled on the constitutionality of the sentencing guidelines with 59 judges declaring them unconstitutional and 31 upholding them.

plan their strategy. Yet this substantial duplication of effort on the sentencing issue has greatly increased the pre-trial workload of defense counsel, and similar increases will result from the inevitable resentencings and possible retrials that will follow the final resolution of this issue. Thus, this is a situation in which it is vital to know, as soon as possible, the answers to these fundamental questions in order for defense counsel to advise their clients, and for defendants to be able to make intelligent choices about how to plead and otherwise conduct their defenses.

2. If the Court agrees with petitioner that there are constitutional defects in the Sentencing Reform Act, the Court must then deal with severability. Some severability issues are closely-tied to the merits, i.e., is there any way in which the offending portions of the statute can be severed in order to save most of the scheme as Congress wrote it? Included in that category are claims that (a) the constitutional defects can be cured by making the guidelines advisory rather than mandatory, (b) the composition of the Commission, which includes three judges and four non-judges, can be restructured to eliminate the inclusion of persons not entitled to participate in the issuance of sentencing guidelines (either the judges or the non-judges), (c) the assignment of the Sentencing Commission to "the Judicial Branch" can be severed, and (d) the provisions for presidential removal and reappointment of Commission members can be severed.

If the Court concludes that none of those attempts to save

the guidelines is successful, we urge the Court to resolve the issues of the severability of the abolition of the prior parole system and the sharp reduction in good time credits. Under pre-November 1987 law, parole was generally available after a prisoner had served one-third of the sentence imposed, see 18 U.S.C. §§ 4205-4206, but for sentences issued under the guidelines, there is no parole. There can be no doubt that it is essential for sentencing judges, prison officials, defense counsel and defendants, not to mention the Parole Commission itself, to know whether parole applies to post-November offenses if the guidelines are declared unconstitutional. Similarly, the Court should also decide whether the newly created category of supervised release, 18 U.S.C. § 3583, which is analogous in several respects to parole, applies if the guidelines are unconstitutional.

The other major element in the 1984 sentencing reform is the substantial reduction in the availability of good time. The old system, which was extraordinarily complex and uncertain for the prisoner, allowed significant reductions in time served for good behavior and work credit. 18 U.S.C. §§ 4161-4162. Under the new system, less good time is available, but its accumulation is far more predictable. 18 U.S.C. § 3624(b). In short, the two systems lead to entirely different terms of imprisonment, but no one knows which system applies. Indeed, for shorter sentences, it is particularly important to know which good time rules control since application of the wrong rules will often result in

either an unjustified delay in release, or an early release not authorized by law. And, just as in the case of parole, everyone in the criminal justice system must know, as soon as possible, whether the new or old good time rules apply, so that the system can function properly.

In petitioner's view, Congress would not have abolished parole or reduced good time credits without adopting the sentencing guidelines because, as the Act and its legislative history make abundantly clear, the sentencing guidelines, abolition of parole, and sharp reduction in good time were all part of a single determinate sentencing package of which the sentencing guidelines were the core. However, at this stage, the only question is whether the Court should decide the severability of the parole and good time changes in this proceeding, and on that question, all of the arguments point toward an immediate resolution. Thus, until that severability question is finally resolved, there will be at least as much, if not more, uncertainty in the federal criminal justice system as there is over the constitutionality of the guidelines themselves. Judges will have to guess how to sentence defendants in order to assure that what they consider to be the proper sentence is actually served, and the Bureau of Prisons will not know when prisoners are eligible for release. In order to prevent mass confusion and a flood of federal habeas corpus petitions raising parole and good time claims, this Court should address the severability question in this proceeding.

CONCLUSION

For the reasons set forth above, and in the petition filed by the United States, it is respectfully submitted that the petitions for a writ of certiorari before judgment in both cases should be granted.

Respectfully submitted,

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