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Commentary

Are Defendants Better Off Under *Blakely*?

Decision Is a Breakthrough

Sixth Amendment at long last is injected into the sentencing process

By Patrick Mullin

For federal criminal practitioners like myself, who have spent decades battling mechanistic federal sentencing guidelines, the U.S. Supreme Court's decision in *Blakely v. Washington* portends their transformation, if not outright demise.

In 1984, in reaction to public perception of rampant crime and lenient sentences, Congress passed the Sentencing Reform Act as part of the Omnibus Crime Control Act. In addition to imposing mandatory minimums for many drug crimes and preventive detention to keep defendants in custody pending trial, the Sentencing Reform Act used a mathematical grid to purportedly make sentencing uniform.

Under that system, defendants' traditional rights are often short-circuited. Sentencing hearings are not true hearings; defendants lack the right to confront and cross-examine government witnesses. Evidence produced against defendants need not meet federal rules. The standard of proof is alarmingly a civil one, preponderance, in the context of perhaps the most important criminal proceeding.

The guidelines shifted power to the government at the expense of the courts and defendants. And they reward defendants who cooperate or who plead guilty early in the process; longer sentences loom for those who dare to take a case to trial, or, even worse, testify on their own behalf.

As a result, defense counsel are often loath to recommend challenging an indictment. They often better serve their clients by racing to the prosecutor's office to secure a 5K cooperation motion for a lesser sentence.

Several statistics illustrate these points. In 2002, the most recent year for which figures are available, 97.1 percent of all convicted federal defendants pleaded guilty rather than go to trial, and more than 90 percent of those defendants received a reduced sentence, according to the *2002 Sourcebook of Federal Sentencing Statistics*.

Seventeen percent of these convicted defendants were credited with providing substantial assistance to authorities and were rewarded with a median 50 percent reduction in sentence. In contrast, the chief judge of the District of Massachusetts reports an average fivefold increase for convicted defendants in comparison with those defendants who entered guilty pleas and cooperated.

Blakely, and predecessors *Apprendi* and *Ring*, have changed the sentencing landscape.

The Sixth Amendment's guarantee of the right to trial, and proof beyond a reasonable doubt, has at long last been injected into the sentencing process. Though state sentencing schemes were at stake, both *Apprendi*, a New Jersey hate-crimes case, and *Ring*, an Arizona death-penalty case, foreshadowed challenges to the federal guidelines that authorize judges to depart upward from a sentencing range maximum by a preponderance standard.

It was *Blakely*, however, that moved the right to a jury trial within close firing range of the federal guidelines as Washington State's determinative sentencing statute, remarkably similar to the federal guidelines, was also found unconstitutional on Sixth Amendment grounds. Though the Scalia majority noted that the federal guidelines were not addressed, most post-*Blakely* federal courts have found its analysis applicable to the federal guidelines.

Without question, the guidelines are on the chopping block. Provided that the Scalia majority remains intact, the logical connection from *Apprendi-Ring-Blakely* is to find at least a portion of the guidelines in violation of the Sixth Amendment.

Some commentators fear that a backlash to *Blakely*, and the chaos it has engendered, will be even more severe congressional measures. I disagree.

Many citizens have grown tired of the expense of warehousing "mandatory minimum" defendants and feel, in a post-9/11 world, there are priorities other

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than the "war on drugs" that ignited the guidelines. A federal judiciary, already under assault as a result of the guidelines, has been radicalized by last year's Feeney Amendment, which restricts downward departures by judges.

It is time to make the guidelines advisory rather than mandatory, and many post-*Blakely* courts are doing so. Judges should be permitted to use the data and analysis produced by the Sentencing Commission staff so they can exercise discretion on a case-by-case basis. Any abuse of discretion can be checked by the circuit courts. Freed up from the restrictions of mandatory sentencing ranges, defendants can better make deliberate decisions about the course of their defense.

Under such a system, a criminal defendant's constitutional guarantees will have far greater effect and our criminal justice system will be the ultimate beneficiary. ■