Chaos in Sentencing

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While you were out on summer break, and while members of Congress were worried about their own upcoming elections and how to blame one another for most of the nation's ills, two vital court rulings were issued in August highlighting the extent to which our federal sentencing rules and policies are broken. You won't be hearing any politicians talking about something as obtuse as criminal sentencing between now and November. But come next January, and in the months and years to come, the issue will be A-list materials for judges, lawyers and legislators looking for ways to fix the problem. And there is a problem, a huge one.

Last month, the irrepressible U.S. District Court Judge William G. Young in Boston dropped upon an unsuspecting nation a 125-page ruling -- a mini-treatise, really -- on what is currently wrong with federal sentencing law, why this is so, and what judges and elected officials can and should do about it. Then, a few days later, a divided 8th U.S. Circuit Court of Appeals overturned a capital sentence for a fellow name Jason Getsy after concluding that his punishment from the Ohio courts was "arbitrary" and unfair and thus a violation of the Eighth Amendment's prohibition against "cruel and unusual" punishment.

Taken together, the two rulings represent the sorry state of the art in an area of the law that the United States Supreme Court tried to revamp last year in United States v. Booker when it held unconstitutional the mandatory nature of the Federal Sentencing Guidelines. Both orders focus primarily upon plea bargains and their corrosive impact upon fairness in federal sentences. Both orders take to task the existing sentencing regime, such that it is. Both remind us of the constitutional need for a nexus between crime and punishment, verdict and judgment. Both make compelling cases for how and why Congress and the Supreme Court have utterly failed to fix sentencing problems that have been apparent and growing worse for years.

Judge Young's sentencing order is a compelling and thorough indictment of a range of sentencing policy choices the government has made over the years. He starts with a bang:

"For seventeen years (from the date the Sentencing Guidelines went into effect until Booker)," Young wrote, "federal courts had been sentencing offenders unconstitutionally. Think about that. The human cost is incalculable -- thousands of Americans languish in prison under sentences that today are unconstitutional. The institutional costs are equally enormous -- for seventeen years the American jury was disparaged and disregarded in derogation of its constitutional function; a generation of federal trials judges has lost track of certain core values of an independent judiciary because they have been brought up in a sentencing system that strips the words 'burden of proof', 'evidence', and 'facts' of genuine meaning..."

And it only got sharper from there for the high-profile trial judge probably best known for his feisty sentencing of Richard Reid, the "shoe-bomber" suspect. Young argues that the High Court identified in Booker the correct problem with the Sentencing Guidelines¿contrary to constitutional principles "judges rather than juries" were finding the facts necessary for sentencing and then sentencing defendants to longer prison terms upon facts not proven beyond a reasonable doubt. But then the Court's majority, Young contends, offered the wrong solution to fix the problem -- allowing the guidelines to become merely "advisory," which, Young says, made jury verdicts after Booker no more important than they had been under the old rules.

Before Booker, Congress had taken away from judges and juries through the Sentencing Guidelines (which were mandatory) the power to exercise a broad range of sentences depending upon an individual's crimes, history and a multitude of other factors. Bad idea, said the Booker Court, but it then decided to keep away from juries and judges that same sentencing power even though the same Court in a 2000 decision declared that any fact other than a prior conviction which increases punishment must be submitted to a jury and then

proven beyond a reasonable doubt. You follow? Neither do the lower federal courts. It's a mess. Judge Young and many others know it. And the sad truth is that it's not getting better.

Judge Young came up with his own, creative solution to the problem -- it took him about 100 pages to get to it -- and now we all will wait to see whether the 1st U.S. Circuit Court of Appeals and the U.S. Supreme Court play along. Young argues that "juries can and should perform" a fact-finding role during criminal sentencing both as a constitutional requirement and a matter of practicality. Since right now that "role" cannot trump the role of the judge, or the Sentencing Guidelines, even though they have been declared unconstitutional, jurors in Judge Young's court will still have to settle for an "advisory" role in the vast majority of sentencing decisions. But at least they will play a role. He has squeezed one out for them, at least for now, amid the rubble of the Supreme Court's twisted precedents.

Which brings us to Getsy. The middle-of-the-road 6th U.S. Circuit Court tossed his death penalty last month because it was troubled by the fact that he had received a capital sentence when his three co-conspirators in the murder-for-hire plot received either lighter sentences or verdicts that were inconsistent with the one that Getsy had received. If Judge Young's sermon comes at sentencing inconsistencies from on-high, from theory and grand constitutional intrigue, the language of Circuit Court Judge Gilbert S. Merritt's ruling focuses much more on street level sentencing problems nurtured by the conduct by judges, juries and prosecutors. But both make the same point; the system is still terribly broken.

There were four guys who planned to kill Charles Serafino in 1995. One, named John Santine, hired the other three to do the job. Santine got life in prison. Two of the others got life in prison after they were allowed to plead guilty. Only Getsy got sent to death row. Not good enough, said the federal appeals court judges. Getsy's capital conviction violated the Constitution because it was disproportionate to the sentences received by the others involved. And it also was flawed because it was so inconsistent with the results in Santine's case. Santine, astonishingly, was acquitted by his jury of the murder-for-hire part of the charges. Four criminals. Same crime. And the system treated all four differently. Not good enough, said at least this one appeals court. Not good enough.

Either your elected officials (or the ones you will elect come November) trust you to be jurors or they don't. Either they believe that people who commit the same crime ought to do the same time, all other things equal, or they don't. Either they believe that the current sentencing scheme needs the sort of specific and bold repair that only the legislative branch offer -- or they don't. And if they won't read Judge Young's work because they are too busy campaigning, or the Getsy ruling because they are slinging too much mud and calling one another unpatriotic, then you should read up on the subject. That way, when your very own member of Congress gets to work for real next year you will be ready to ask him or her why this legal mess, too, hasn't yet been cleaned up.

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