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The politics of drug sentencing

By Derrick Z. Jackson, Globe Columnist | February 28, 2007

WASHINGTON THERE WAS a curious footnote to last week's Supreme Court oral arguments over criminal sentencing guidelines.

One case involved Mario Claiborne of St. Louis, who received a 15-month sentence for possessing 5.03 grams of cocaine. That just crossed the line to trigger a federal five-year prison sentence.

The 20-year-old Claiborne's lack of a prior record allowed for the five years to be lowered to 37 to 46 months. But the district judge gave him only a 15-month sentence. Anything more, the judge said, would be "tantamount to throwing you away." The US Court of Appeals for the Eighth Circuit overturned the verdict, saying it was way out of line with federal guidelines.

Claiborne's attorneys appealed to the Supreme Court. It was not surprising to see the American Civil Liberties Union and public defender and defense lawyer groups file briefs on his behalf.

On the other side was the Bush administration. One brief on their behalf stood out. It was from Senator Ted Kennedy of Massachusetts and other allies on the Senate Judiciary Committee, Orrin Hatch of Utah and Diane Feinstein of California.

This is a footnote with big feet. Kennedy and Hatch helped create the Sentencing Reform Act of 1984. They originally pushed for reform because of the "national disgrace" of disparities in sentencing.

But in short order, a new disparity was born. Congress enacted laws in 1986 that slammed possession of only 5 grams of crack cocaine with the same five-year sentence as for 500 grams of powdered cocaine. Thousands of young black people, the majority of whom were nonviolent and in possession of relatively small amounts of crack, were indeed thrown away. According to federal statistics, the average sentence for possessing less than 25 grams of crack is 65 months, 4 1/2 times that of the 14-month average for the same amount of powder.

Two years ago, the Supreme Court ruled that federal guidelines could be only advisory, not mandatory. But the 100-to-1 ratio still stands. That may have been what Claiborne's judge in St. Louis was trying to acknowledge in the 15-month sentence.

One might have thought that such history would lead Kennedy to side with Claiborne. But Kennedy, Hatch, and Feinstein wrote that while they "respect the thoughtfulness with which the court conducted the sentencing of Mr. Claiborne," and while "the court may indeed have been correct that a sentence of 15 months, not 37 or 46 months was warranted in light of the specific facts of the offense and the defendant's background," there is no guarantee "that another court applying the same factors

considered by the court below would reach the same or a similar result."

In a phone interview, Christine Leonard, Kennedy's counsel on the Judiciary Committee, said that the senator is actually "comfortable" with Claiborne's 15-month sentence. Kennedy has long been a critic of the 100-to-1 ratio, citing its "massive racial discrimination." Leonard said the judge simply did not provide enough reasons to justify it, leaving the door open for a conservative judge to say, "I won't give him 15 months, I'll give him 15 years."

The concern, Leonard said, was that you cannot throw out the baby of sentencing reform with the bathwater of this individual case. "We're not necessarily seeking to disturb the verdict," she said. "We want to maintain a system of fairness and accountability for how [the judge] got there."

That sounds reasonable. But there is also the danger of " fool me once, shame on you. " Kennedy has played ball with the Bush administration before on issues involving massive racial impacts, most notably No Child Left Behind. Kennedy worked with Bush to enact it only to see Bush fund it at a fraction of its needs.

There is also the question of how hard the new Democratic majority in Congress will fight the fear of being seen as soft on crime to end the 100-to-1 ratio. House Judiciary Committee member Marty Meehan of Massachusetts expects chairman John Conyers of Michigan to hold hearings in the spring. Conyers is a longtime opponent of the ratio. Republican Senator Jeff Sessions of Alabama has proposed a 20-to-1 ratio, but 20-to-1 is not grounded in facts , either.

"I don't think we'll get it passed in this session," Meehan said. "I would hope that in the next session of Congress there would be the will to change. I wish I could tell you we'll have hearings, the American people would be outraged, and this would pass with bipartisan support. I can't tell you that. But we can start laying the foundation."

What is needed is less a foundation than a wrecking ball.

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