

JACOB SULLUM

Backlash from sentencing edict?

Last November, Weldon Angelos, a 24-year-old record company executive with no prior convictions, was sentenced to 55 years in federal prison for selling 1½ pounds of marijuana to a government informant.

The judge who imposed the sentence, Paul Cassell of the U.S. Court for the District of Utah, urged President Bush to commute it, calling it "unjust, cruel and irrational."

The Supreme Court's recent decision restoring broad sentencing discretion to federal judges is expected to make less common such situations, in which a judge agonizes over a draconian punishment he feels legally compelled to impose. But the ruling, which made federal sentencing guidelines advisory rather than mandatory, does not help Angelos.

His sentence was determined not by the guidelines but by statute. It is therefore perfectly constitutional under the Supreme Court decision in *U.S. vs. Booker*, which found the guidelines violated the Sixth Amendment right to a jury trial by lengthening sentences based on facts determined by judges. The ruling does not affect penalties prescribed by Congress for offenses admitted or

proven to a jury, no matter how absurdly disproportionate the sentences are.

In fact, one possible outcome of the decision is that we will see more such mandatory sentences, as tougher-than-thou members of Congress who thought judges were abusing what little discretion they had under the guidelines panic at the prospect of penalties determined by judicial whims.

The Angelos case suggests the dangers of that course. His 55-year sentence was dictated by a federal law that imposes extra punishment on people who commit felonies while carrying or using a gun: five years for the first offense and 25 years for each subsequent offense. Angelos, who completed three government-arranged marijuana sales, each involving about 8 ounces, was convicted of having a pistol in an ankle holster during two of the sales; guns that police found in his home were the basis for a third conviction.

Angelos never used or even brandished his pistol, which he carried for self-protection. Yet as Judge

Cassell noted, his punishment "is far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape."

Had Angelos been sentenced under the guidelines alone, the penalty range would have been roughly eight to 10 years. (Anticipating the Supreme Court ruling in *Booker*, Judge Cassell departed from the sentencing guidelines to give Angelos a one-day sentence for his other offenses.) If he had been convicted of the same offenses under Utah law, the prosecution estimated Angelos would have served five to seven years.

Sentencing guidelines and mandatory minimums were supposed to reduce unjust variations in punishment, making it more likely similar defendants committing similar crimes would receive similar penalties. But as this case shows, they can also cause unjust variations in punishment by making big sentencing differences hinge on which prosecutors (state or federal) bring charges and which charges they choose to bring.

Prosecutors initially told Angelos that if he pleaded guilty to marijuana distribution and one count of carrying a gun, they would recommend a

sentence of 15 years. After he turned down that deal, they filed a new indictment with a total of 20 charges, including five gun offenses that by themselves exposed him to a mandatory minimum sentence of 105 years.

Mandatory minimums thus replace judicial discretion with prosecutorial discretion, which isn't necessarily better and is often worse, since prosecutors tend to aim for the most severe punishment they can get, whereas judges are supposed to take a more balanced approach.

This does not mean there is no cause for concern about unconstrained judicial discretion, but Congress should also be aware of the injustice that results from giving prosecutors too much power, especially since the vast majority of federal cases are resolved by plea agreements.

The wisest approach now is to wait and see how the implications of *Booker* work out in the lower courts. While the sentencing guidelines are no longer mandatory, trial judges are still required to consider them, and appeals courts will be reviewing their sentencing decisions for "reasonableness."

Given the perils of excessively rigid sentencing rules, Congress should hesitate before creating new mandatory minimums. Instead, it should revisit laws under which selling someone pot can trigger a more severe penalty than killing him.

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