Sentencing Discretion and the Federal Courts

Author:
Robert M. Sanger

May, 2008

CRIMINAL JUSTICE

By Robert Sanger

Robert Sanger writes this regular column for the Santa Barbara Lawyer entitled **Criminal Justice**. Mr. Sanger has been a criminal defense lawyer here in Santa Barbara for over 34 years. He is a Certified Criminal Law Specialist, a member of the Board of Governors of California Attorneys for Criminal Justice, a Director of Death Penalty Focus and a member of the Sentencing Committee of the ABA. He has published numerous articles in the Federal Lawyer, the ABA Journal, CACJ Forum and recently published a law review article in the Santa Clara Law Review. He is a partner at Sanger & Swysen which limits its practice to litigation, emphasizing criminal defense.

SENTENCING DISCRETION AND THE FEDERAL COURTS

INTRODUCTION

Since the 1970's sentencing discretion has been taken away from the courts. The state legislature has tied the hands of judges in California and the Federal Sentencing Commission in conjunction with the United States Congress has tied the hands of federal district court judges. California may be ready for a re-evaluation of the state system, particularly in light of the prison overcrowding crisis and the lack of budget to

finance the present system. The federal judiciary, however, has been released from the strict application of the United States Sentencing Guidelines and, while still subject to many legislative restrictions, has had some discretion restored. We have discussed the potential development of state law, with the sunsetting of Senate Bill 40,[1] the attempt to establish a Sentencing Commission and the studies by the Little Hover Commission and Dr. Joan Petersilia.[2] In this month's column, we will look at the partial reinstitution of judicial discretion in the federal system..

THE PROBLEM

Politicians promote themselves by arguing that judges are too soft on criminals. It seems that judges are easy targets. They do not fight back. Attacking judges is popular when coupled with proposals that sentences be lengthened because tough on crime rhetoric translates into votes. The result both on a state and federal level has been to have a hodgepodge of legislation that increases penalties for all sorts of crimes. The increases are accomplished by simply increasing the maximum period of confinement, creating mandatory minimum sentences or adding sentencing enhancements for conduct or even status.

This year, the United States set a new record. We now have in our jails and prisons in the country over 2.3 million people — in fact, the United States has about 5 percent of the world's population but houses 25 percent of the world's prisoners.[3] Most are male, poor and of color. Many are incarcerated for non-violent offenses. This political default decision to incarcerate more and more people has resulted in a culture of prison gangs who are now operating both in and out of confinement. It has ended up warehousing not rehabilitating. It has destroyed families and made entire communities cynical about the government.

In 1984, the Congress passed the Sentencing Reform Act and, in turn, the United States Sentencing Commission was formed to create the United States Sentencing Guidelines. The Guidelines were published to be effective November 1, 1987. The Guidelines would be calculated much like a tax return and, after carrying totals from line to line, adding and subtracting, a final level would be obtained. That level would translate into a range of months depending on the defendant's criminal history category. Yet, while accomplishing uniformity to a certain extent, the Guidelines also increased punishment across the board by forcing prosecutors, probation officers and

the courts to stay within a range that in many cases was higher than a more compassionate court would have imposed.

JUDICIAL SENTENCING DISCRETION

The role of judge is thought by the legal profession, and judges themselves, to involve the application of general principles of law to specific complex situations. Yet, these views are seldom expressed in a way that is broadly disseminated to the public other than, perhaps, by the airing of a judicial interview on CSPAN or Public Television. Outside of the legal profession, it is very easy to engender cynicism. Legislators, following the polls, readily sacrifice the concept of judicial independence to enhance their own self-image and promote their own careers.

Hence, judicial discretion is a sitting duck for legislators who simply decry that judges are "soft on crime" and cannot be trusted to impose "tough" sentences. This is a corollary to the time honored principle of governance. Politicians for all of recorded history have consolidated their power by engendering fear in the governed and by telling them that the remedy is to allow them, the governors, to strike out in the name of the people against the enemy, real or imagined. The result is more and harsher punishment, administered more quickly and, by the way, with less protections and more power to the law makers and executives – but less power to the judges to find individual reasons to show mercy or do justice.

The general principles of justice which otherwise would apply to sentencing are still on the books even if made inaccessible by the legislative hodgepodge of "tough" sentencing laws. The general principles still state that judges should sentence based on: 1) protection of the public; 2) retribution, justice or fairness; 3) deterrence of the general population; 4) deterrence of the individual being sentenced; 5) rehabilitation of that individual; and 6) restitution to the victim. These rules are codified in 18 U.S.C. Section 3553 as well as in California Rule of Court 4.410. Yet, increasingly, judges have not been trusted to apply these general principles and, instead have been required to apply inflexible rules to calculate the ultimate sentence.

However, since 2005, the "law" of unintended consequences interceded to restore some discretion to the district court judges in federal sentencing. The United States Supreme Court decided the now famous *Booker* case[4] in which the Court dealt with factors which enhanced sentences under the United States Sentencing Guidelines. The Court held that, under the Sixth Amendment, before such factors could be relied upon by the judge to impose a harsher sentence, the defendant has a right to have the jury decide whether or not the prosecutor had proven those facts true beyond a reasonable doubt. As a result, all the calculations in the guidelines could not be considered mandatory – unless they were going to be presented to the jury. Therefore, the Guidelines had to be considered as advisory only.

In *Rita*[5] the Supreme Court further refined its holding in *Booker* by allowing but not requiring the Courts of Appeals to presume that a sentence within the advisory Guidelines to be reasonable. In *Kimbrough*,[6] the Court allowed the district court judges to address the disparity of the 100:1 ratio in the Guidelines as possibly a disparity itself. Then in *Gall*[7] the Court held that district court judges did not have to provide "extraordinary reasons" to make a substantial departure from the Guidelines. The theme is that the sentencing criteria set forth in 18 U.S.C. Section 3553(a) are to govern sentencing an that the Guidelines are, in fact, merely advisory.

Hence, the ruling in *Booker,* that a defendant had the right to a jury determination beyond a reasonable doubt on sentencing factors, re-instituted reliance by the district court judges on Section 3553. Instead of creating a right to a jury determination as to the factors under the guidelines, the Court and, so far, the Congress, have simply allowed the district court judges to use the Guidelines as advisory. Since they are advisory only, the district court judges have been reinvested with sentencing discretion. The discretion is not totally unfettered because there are still statutes with mandatory prison minimums and other statutory enhancements that might actually be pled and proved. However, the discretion is far greater than existed before *Booker*.

This unintended consequence of the application of the Sixth Amendment right to trial by jury is that the federal judiciary is being trusted to make sentencing decisions on the whole picture – the whole picture of the defendant and the offense – not just the criteria in the United States Sentencing Guidelines. Therefore, a defendant's age or health condition or the fact that an offense is a minor regulatory matter, can be given

consideration. In fact, the broad purposes of punishment set forth in Section 3553 (a)(2) are the traditional purposes: retribution, justice or what is fair (Section (2)(a)); general deterrence (Section (2)(B)); special deterrence (Section (2)(C)); rehabilitation (Section (2)(D)); and restitution to the victim (Section (3)).

It is too early to assess the overall results of allowing judges to do justice and apply the principles of sentencing. The wheels have not fallen off the federal courts as a result of trusting the judges once again to their job. On the other hand, there is no doubt that there will be sentencing disparity by leaving individual sentencing decisions to individual judges. Both Section 3553 and California Rule of Court 4.410 also acknowledge the need to avoid disparate sentences. As federal sentencing proceeds, the disparity of sentences will no doubt be studied. But, the ultimate question will once again emerge as to whether disparities, or perceived disparities, are the cost of doing justice. Conversely, if the remedy to remove disparities is to disallow judicial discretion, is the remedy worth the cure..

CONCLUSION

California would do well to think carefully about sentencing reform rather than simply removing the sunset prevision from SB 40. Since the *Cunningham* case,[8] California judges have nominally been given more discretion in imposing one of the triad of prison sentences in felony cases. In reality, *Cunningham* and the SB 40 fix have not opened sentencing the way that *Booker*, *Kimbrough, Rita* and *Gall* have in the federal system. And, in both federal and California sentencing, mandatory minimums, enhancements and other statutory restrictions still force long sentences in situations in which judges might think otherwise.

The United States is not populated by such remarkably bad people that it must incarcerate so much of its population. Creative, just and fair sentencing – looking at justice, general and special deterrence, rehabilitation and restitution – should still be the objective. Even as this is written, the legislators in Sacramento do not have the courage to make the smallest commitment to correcting the obvious problem if they might be labeled “soft on crime.”. Governor Schwarzenegger, in the face of prison overcrowding and budget crisis, took the obvious step of recommending the early release of certain non-violent prisoners. He dropped the proposal because he could not get a single politician in the legislature to go along with it.[9]

In light of this, whether or not judges can be trusted to impose sentences, it is clear that legislators cannot. Legislators will continue to promote their own interests by fanning the flames of fear and by increasing sentences. They evidently cannot risk any implication that they support reducing sentences, even if the state has been thrown into a crisis as a result of politics as usual. Maybe, the legislators can do us the favor, at least, of handing the problem off to a sentencing commission. The we have a chance of returning to a rational sentencing scheme based on acknowledged principles of justice.

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[1] Amending Penal Code Sections 1170 and 1170.3.

[2] We also have discussed the recommendations locally of the Sheriff's Blue Ribbon Commission on Jail Overcrowding.

[3] International Herald Tribune, April 23, 2008.

[4] *United States v. Booker*, 543 U.S. 220 (2005).

[5] *Rita v. United States*, __ U.S. __, 127 S.Ct. 2456 (2007).

[6] *Kimbrough v. United States*, __ U.S. __, 128 S.Ct. 558 (2007).

[7] *Gall v. United States*, __ U.S. __, 128 S.Ct. 586 (2007).

[8] *Cunningham v. California*, 127 S.Ct. 856 (2007).

[9] Sacramento Bee, reprinted in the Santa Barbara Newspress, May 14, 2008.