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Reasonable Doubts

How Unproven Allegations Can Lengthen Time in Prison

Stories of Five Convicts Show That Charges in Dispute Often Add to Sentences

Supreme Court Takes Up Rules

By Laurie P. Cohen And Gary Fields

Laurence Braun learned the hard way that being acquitted of a crime doesn't always stop you from being punished for it.

Mr. Braun, former co-owner of a New York company that defrauded the U.S. Postal Service, was convicted by a New York federal jury in 2002 of racketeering and conspiracy. Had he been punished just for those crimes, he probably would have gotten around 2½ years in prison.

But the federal judge who sentenced Mr. Braun also decided he should serve time for many of the 23 counts of which he was *acquitted*, calling it "relevant conduct." This last-minute add-on—called an enhancement—doubled Mr. Braun's prison sentence to five years.

"The government gets two bites at the apple," says Thomas C. Goldstein, a Washington, D.C., litigator. "Prosecutors can put stuff before a jury and if they're unsuccessful because the evidence is tossed or the jury acquits, they can ask the judge to find the very same wrongdoing at sentencing."

Now the Supreme Court is weighing whether the federal rules on enhancements violate the Constitution. The high court already determined on June 24 that similar rules in the state of Washington were unconstitutional. The court said any factor, other than a prior conviction, that increases a criminal sentence must be admitted by the defendant in a plea deal or proved to a jury beyond a reasonable doubt. That 5-4 ruling, in the Blakely v. Washington case, has already achieved landmark status although it technically affected the guidelines of just a single state. Federal judges have cited it in dozens of legal opinions.

Fieldwork

The Blakely ruling could ultimately complicate the work of probation officers and require resentencing in thousands of federal cases. Article on page B1.

The System

Facts on the federal sentencing guidelines:

Year took effect	1987
Percentage of defendants who went to trial before the guidelines took effect	12.6%
Percentage after	2.9%
Number of sentences under guidelines in fiscal 2002	64,366
Percentage of sentences enhanced	44.2%*
Percentage of current prisoners serving 10+ years	37.8%

*Includes only cases with identifiable enhancements

Sources: Bureau of Justice Statistics; U.S. Sentencing Commission; Bureau of Prisons

Since Blakely, Mr. Braun, 61 years old, and thousands of other federal defendants have challenged their sentences, arguing that "relevant conduct" and other findings by judges violated their Sixth Amendment right to a jury trial. More than 44% of all cases in 2002, the last fiscal year for which data are available, had enhancements that may now be thrown into question by the Blakely ruling, according to a U.S. Sentencing Commission internal memo. Because of the Blakely tumult and objections raised by many of the 250 defendants sentenced daily, the Supreme Court agreed to hear arguments Oct. 4 on the federal sentencing guidelines. It is expected to rule quickly whether they are constitutional.

The U.S. Sentencing Guidelines, which took effect in November 1987, were intended to make sentencing fairer by assigning similar punishments for the same crime. Previously judges had wide discretion and would give greatly varying sentences based on their personal inclinations.

But many federal judges and defense lawyers say the guidelines have failed to achieve their purpose. The system harshly punishes many people for crimes that juries never considered. And now prosecutors are the ones with wide discretion: They can add decades to a sentence, or keep them off, based on what they tell a judge about a defendant prior to sentencing.

The guidelines have the force of law. They work by assigning point values to federal crimes. Besides "relevant conduct," there are hundreds of sentence-

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How Unproven Charges

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boosting enhancements codified in the 1,800-page Federal Sentencing Guidelines Manual. The number of points rises, for example, if a judge finds that the defendant played a leadership role in the crime, used a special skill or targeted a victim deemed especially vulnerable. In many instances, the point score is boosted based on alleged offenses that never were proved or that defendants weren't even charged with.

All it takes to have an enhancement tacked on is a sentencing judge's finding based on a "preponderance of evidence." That is a much lower standard than the one for a guilty verdict at trial, when a jury must conclude that the defendant committed the crime "beyond a reasonable doubt."

Of course, prosecutors have to secure a conviction or a guilty plea before any enhancements kick in. So it's not as if innocent people routinely are locked up.

But judges say case law and new statutes have made it burdensome in recent years to depart from the guidelines, even if the stipulated sentence seems disproportionate to the crime. Judges usually must hold a lengthy hearing or several hearings to justify a departure, and even then they're likely to be challenged on appeal.

If the Supreme Court holds that the federal sentencing guidelines are unconstitutional, few expect the sentences of all the nation's 180,000 federal prisoners to be up for review. But constitutional-law specialists say courts will likely be forced to reconsider the sentences of thousands of prisoners who have appeals pending.

Here is a look at five federal defendants who stand to have their sentences reviewed if the Supreme Court decides that the federal sentencing system ought to be held to the same standard as that of Washington state:

Yves Darbouze

A Web-site designer, Yves Darbouze founded his own company and won the acclaim of Forbes magazine as a post-Internet-bubble success. In September 2002, police found a suitcase filled with 16 kilograms, or about 35 pounds, of cocaine in a neighbor's apartment. The neighbor said the suitcase was Mr. Darbouze's. The neighbor pleaded guilty to a lesser offense and testified for the prosecution when Mr. Darbouze went on trial in Miami federal court in March 2003. Mr. Darbouze said he was innocent.

The jury convicted Mr. Darbouze of attempting to possess less than five kilograms of cocaine. But it acquitted him on the government's more serious charges that Mr. Darbouze was involved in a conspiracy with the neighbor and that he tried to possess more than five kilograms of cocaine. A lawyer for Mr. Darbouze, Richard C. Klugh Jr., says the charge for which he was convicted would normally carry prison time of no more than seven years.

Then came the probation officer's presentencing report. Federal law requires these officers to draft reports that reflect a defendant's prior criminal [illegible] background and financial condition. The officers then calculate what the defendant's sentence should be under the federal guidelines, taking into account the specific offense of the conviction plus the enhancements.

Probation officers aren't part of the prosecution team: They work for the judge. But in practice, prosecutors supply most of the information for the probation officers' initial drafts. A defendant can then raise objections to the draft, but lawyers often counsel against that because they fear the defendant will lose credit in sentencing for accepting responsibility for their crimes.

In the end, "probation reports usually reflect the government's point of view," says U.S. District Judge Jed S. Rakoff of New York, a critic of the current guidelines system. Time-pressed judges usually accept their probation officers' reports.

Enhancements tend to hit defendants who go to trial, such as Mr. Darbouze, harder than those who agree to a plea bargain. "Many prosecutors will ignore or withhold enhancements from probation officers and judges as a favor to defendants who plead guilty and spare the government the effort of going to trial," says Tony Garoppolo, chief probation officer of the Eastern District of New York.

For the purposes of sentencing, the report on Mr. Darbouze held him accountable for attempting to possess more than 15 kilograms of cocaine. And the probation officer determined that Mr. Darbouze knew or should have known about a gun in his neighbor's home—even though the jury found Mr. Darbouze not guilty of conspiring with the neighbor. Adding up the enhancements, the report said Mr. Darbouze's sentence under the guidelines should be between 15 years, eight months and 19 years, seven months.

Mr. Darbouze's lawyer objected to the report, noting the contradictions with the jury's verdict. "I am living the American dream and the American nightmare at the same time," Mr. Darbouze told U.S. District Judge Shelby Highsmith.

Yves Darbouze

Judge Highsmith said he didn't have much of a choice. His sentence: 15 years and eight months. "That's the way the system is," Judge Highsmith wrote in delivering the sentence. "I encourage anyone who is a citizen of this country to take a long, hard look at what we call sentencing guidelines." The judge called Mr. Darbouze, now 31 years old, "an excellent example of perseverance in his occupation" and "worthy of applause ... prior to this incident."

Informed of the sentence recently, several jurors in the case were distressed. "Some murders don't even get that," said Jean Sardinas, managing director for an optical company. She says five years would have been a stiff sentence for Mr. Darbouze. Juror John

Can Add to Prison Time

Elam, a Miami retiree, says when he voted to convict the defendant, "I thought he'd get 18 months."

Shirley Maye Rollow

In its legitimate usage, pseudoephedrine is a decongestant. It also is a major ingredient in methamphetamine, or "speed," an addictive stimulant drug that can be made in illegal labs and sold on the street.

Shirley Maye Rollow, 55, was indicted by an Oklahoma City grand jury in January 2002 on charges of conspiring to possess and distribute pseudoephedrine for use in making illegal drugs. At trial, Ms. Rollow testified in her own defense. She said she was employed by two companies to pick up pseudoephedrine from legal distributors and deliver it to a warehouse for future distribution to convenience stores. A federal jury didn't buy the explanation. She was found guilty on all nine counts in October 2002.

Shirley Maye Rollow

Although the jury wasn't required to determine the amount of pseudoephedrine Ms. Rollow sold, a 41-page presentence report held her responsible for 3,438 kilograms, or 3.78 tons, which would boost her sentence to at least eight years under the federal guidelines. The report also slapped an enhancement on Ms. Rollow for "obstruction of justice," saying that, "according to the government," her testimony at the trial was false.

Yet another enhancement resulted from a finding that Ms. Rollow "functioned as a leader and organizer" of the crime, although she said she was just an employee of the two companies distributing the chemical. The jury hadn't ruled on that point. Without enhancements or a specific amount of drugs sold, the guidelines would have recommended a sentence of 10 months to 16 months.

Ms. Rollow's lawyer, Bill Zuhdi, filed more than 60 objections to the presentencing report. U.S. District Judge Wayne E. Alley overruled all of them, sentencing Ms. Rollow to 15 years in March 2003.

"Probation officers go to town and kill defendants who go to trial," Mr. Zuhdi asserts. "If you go to trial and lose, you get the book thrown at you—without having a jury consider all the facts of your case. It dissuades you from your constitutional right to go to trial."

Robert McCampbell, the U.S. attorney in Oklahoma City, responds, "The facts given to probation officers for presentence investigation reports are the same whether a defendant goes to trial or not." He notes that defendants can always challenge the report.

Jimmy Bijou

In February 2002, law-enforcement officers were looking for Jimmy Bijou. He had already been convicted three times of possessing crack cocaine and served his time. Now the cops were on his trail again over a January 2001 incident in which he eluded a police officer chasing him and fired a gun in the officer's direction.

Officers found Mr. Bijou at an apartment in Charlotte, N.C., and arrested him. Inside his home, they discovered crack cocaine, a pistol and ammunition. The officers who found the crack said it weighed 74 grams, or about 2.6 ounces. Weeks later, a police-department drug analyst weighed what the government said was the same cocaine, and this time it measured 54.7 grams. Three days before Mr. Bijou's September 2002 trial in federal court in Charlotte was to begin, a police analyst and Mr. Bijou's lawyer, Noell Tin, weighed the crack cocaine. This time, the drugs weighed 67.4 grams.

Mr. Tin argued it was impossible that the drugs the government sought to introduce as evidence in the trial were the same drugs seized from the apartment. U.S. District Judge Richard L. Voorhees agreed, finding it was "improbable that it's the same item," and excluded the government's drug evidence.

Left without that key evidence, the government dismissed the drug counts. Mr. Bijou, who is now 31, pleaded guilty to the remaining counts including possession of a firearm and ammunition by a convicted felon stemming from his February 2002 arrest and possession of a firearm by a convicted felon in connection with the January 2001 incident.

For the charges he admitted to, Mr. Bijou's guideline sentence would have been less than nine years. But prosecutors often don't tell defendants what they'll actually face when they plead guilty, as 97% of federal defendants do. "Every defense lawyer lives in dread of enhancements that he or she hasn't anticipated coming in at sentencing," says Jon Sands, the head of the federal defenders office in Phoenix.

Jimmy Bijou

The presentence report said Mr. Bijou's sentence should be enhanced because of the cocaine allegedly found with him when he was arrested. The probation officer, faced with the conflicting versions of how much that cocaine weighed, wrote in the report: "In the light most favorable to the defendant, the lesser weight is considered for guideline applications."

The probation officer then invoked a guideline provision that creates a special kind of enhancement for firearms possession when the possession is related to other offenses. This provision, known as "cross-referencing," directs the judge to set the sentence at the guidelines level for the other offense—provided that the other offense carries a weightier sentence than gun possession. In Mr. Bijou's case the other offense was cocaine possession.

The guidelines call for a sentence of 17½ years to nearly 22 years for a prior multiple felon who possesses 54.7 grams of crack cocaine. Judge Voorhees found by a preponderance of evidence that Mr. Bijou had committed the identical drug offense

that the government had decided against trying him for. The sentence: 20 years.

"The same judge who excluded tainted drug evidence from the jury turned around at sentencing and used the same evidence to double the applicable sentencing range," says Mr. Bijou's lawyer, Mr. Tin. Judge Voorhees declined to comment.

Carla Lyn Clifton

A former criminology student, Carla Lyn Clifton was filling up her car at an Albuquerque, N.M., gas station on her way to a night job in January 2003 when two Drug Enforcement Administration agents approached her. The police had arrested Jaime Mendoza, a boyfriend of Ms. Clifton's cousin, and found that he used a cellphone to arrange crack-cocaine sales. The cellphone was listed as being owned by Ms. Clifton.

Ms. Clifton confirmed the agents' suspicions: She told them that she had bought the phone as a favor to Mr. Mendoza, who had bad credit. Although the phone was in her name, he was the one using it, she told the agents. But later, when she testified before a federal grand jury, she reversed herself, saying that she was the only one using the phone. Prosecutors charged Ms. Clifton with perjury, arguing in court documents that the change in her story made it harder to link Mr. Mendoza to the cocaine dealing. Ms. Clifton was convicted by a federal jury in October 2003.

Carla Lyn Clifton

Sentencing guidelines for perjury suggested Ms. Clifton, who is now 23, would get about a year in prison. But the probation officer invoked another kind of "cross referencing" enhancement in the guidelines. This one says that if someone commits perjury tied to a criminal act, he or she must be sentenced based on that crime, assuming the crime carries a heavier sentence than perjury.

The officer's judgment meant that for sentencing purposes, Ms. Clifton was now being treated as a cocaine trafficker—even though the prosecutors hadn't linked her to the cocaine dealing by her cousin's boyfriend. It now appeared that Ms. Clifton would spend at least 10 years in prison.

At the first sentencing hearing in February, Judge William Johnson, a George W. Bush nominee, was incredulous. He delayed the proceeding to look for ways of reducing the sentence while staying within the guidelines. Ultimately Judge Johnson decided that although Ms. Clifton would still be sentenced as a cocaine trafficker, she would be considered a "minimal participant." Her sentence: three years and five months.

"My preference on this would have been to simply impose the guideline sentence for the offenses of perjury," Judge Johnson said at the March sentencing. "I note the defendant had no involvement in the underlying drug offense other than providing a single cellular telephone."

Ms. Clifton, now in prison, is appealing the sentence. The federal appeals court is waiting for the Supreme Court decision before deciding her fate.

Laurence Braun

American Presort Inc. was a New York-based company that sorted metered mail for corporate clients and then submitted the mail, about two million letters daily, to the U.S. Postal Service. Its purpose was to help customers get discounted rates for the presorted mail.

Laurence Braun was arrested in April 1999 and charged on 42 counts. The government alleged that American Presort defrauded the Postal Service of more than $20 million, partly by hiding unsorted mail at the bottom of large bins, and defrauded private customers of nearly $1 million by inflating their bills.

Mr. Braun, American Presort's treasurer, owned the company with two brothers, Philip and Steven Fruchter. Philip Fruchter was convicted by a jury and received a sentence of four years and three months. His brother got a 3½-year sentence in a plea bargain.

Mr. Braun went to trial in a New York federal court. He was convicted of racketeering and conspiracy to defraud American Presort's customers. However, Mr. Braun was acquitted on 23 other counts of mail fraud against the post office and false statements to the post office. He maintains his innocence and is appealing the convictions.

Mr. Braun's June 2002 presentencing report held him responsible for total losses to the Postal Service and customers of more than $21 million—even though the jury hadn't found him guilty of defrauding the Postal Service. The guidelines peg the length of a defendant's sentence to the amount of the fraud. Therefore, a $21 million fraud calls for much more time than a $1 million fraud.

The sentencing in March of former Dynegy Corp. executive Jamie Olis shows how the dollar figure can affect a sentence. Mr. Olis was convicted for his role in a fraud case. A Houston federal judge determined the loss from the fraud to be $105 million. That alone added more than 10 years to his sentence. Combined with other enhancements to his sentence, Mr. Olis ended up with more than 24 years in prison although the crime for which he was convicted carried minimal prison time. He is appealing the sentence.

At Mr. Braun's sentencing, U.S. District Judge Michael Mukasey of Manhattan decided that the amount of the Postal Service fraud for which he was acquitted counted as "relevant conduct." Mr. Braun's presentence report recommended a sentence of 6½ years. In an unusual move, Judge Mukasey departed from that recommendation, acknowledging the acquittal and the potential for error in the government's loss calculations. Still, he sentenced Mr. Braun to five years—more than anyone else indicted in connection with the case.

Laurence Braun

Mr. Braun entered prison in November 2002. Last month, the Second Circuit Court of Appeals released him on bond, pending his challenge in the wake of the Blakely ruling. Without enhancements, Mr. Braun's prison term probably would have ended late this year or early next year counting reductions for good behavior, says his lawyer, Joshua Dratel. The appeals court allowed his provisional release because if he had to wait in prison for all the legal maneuvering to be completed, he might end up serving more than his rightful sentence.

If the Supreme Court decides to uphold the federal sentencing guidelines, Mr. Braun will likely be sent back to prison to serve the remainder of his five-year sentence. If it overturns the guidelines, he's likely to walk free.