Federal Judge in Miami Rules Sentencing Guidelines Unconstitutional

Dan Christensen
Daily Business Review
07-21-2004

Following the U.S. Supreme Court's landmark ruling throwing out Washington state's criminal sentencing guidelines, U.S. District Judge Donald L. Graham in Miami has become the first federal judge in South Florida to declare a key part of the federal sentencing guidelines unconstitutional.

Graham ruled Monday in the case of Dr. Paul Elliott, a Florida physician convicted in March on 22 counts of health care fraud and a single count of obstruction of justice. Prosecutors had charged Elliott with submitting more than $300,000 in bogus bills to Medicare.

His defense lawyers, Richard G. Lubin and Tama Beth Kudman of West Palm Beach, Fla., had asked Graham to reject the government's demand that he hike Elliott's sentence based on allegedly "relevant conduct" not proven at trial.

"Over the government's strong objections Judge Graham has now declared that part of the guidelines to be unconstitutional, meaning the ability to enhance a defendant's sentence for certain unproven conduct," Lubin said. Graham's office confirmed that he'd ruled from the bench on Monday, but declined further comment until the judge issues a written opinion.

With enhancements, Elliott was facing 27 to 33 months under the federal guidelines. But now he faces 12 months or less, Lubin said.

Earlier this month, the 18 active federal judges of the Southern District of Florida, including Graham, gathered in closed session to figure out how best to safeguard the integrity of sentences meted out in South Florida in light of the Supreme Court's June 24 ruling in Blakely v. Washington. Chief Judge William J. Zloch did not respond with comment before deadline.

But they seem to have decided to each go their own way on the issue of whether Blakely applies to sentencing in federal cases. While some Southern District judges have flatly said it does not apply, others are hedging their bets and are handing down two alternative sentences in same cases -- one based on the federal sentencing guidelines and one not based on the guidelines.

Criminal defense attorneys who practice in the federal courts in South Florida say confusion reigns, as different federal district and appellate courts announce different positions on the issue. One Fort Lauderdale attorney has filed an unusual motion asking the Southern District judges to decide en banc whether Blakely affects federal sentencing. Across the country, the sentencing of thousands of federal defendants has been called into question since the split 5-4 ruling last month. The high court struck down the sentencing guidelines used by Washington state. The court said trial judges could not "enhance" -- meaning add prison time -- to a defendant's sentence using aggravating facts not proven to a jury. That violated the Sixth Amendment right to trial by jury, the court held.

The justices explicitly did not pass judgment on the constitutionality of the federal sentencing guidelines -- which are similar to guidelines used by various states. But the implications have not been lost on the lower federal courts.

Indeed, in the four weeks since Blakely was decided, four federal appellate courts -- the 5th U.S. Circuit Court of Appeals in New Orleans, the 6th Circuit in Cincinnati, the 7th Circuit in Chicago and the 2nd Circuit in New York -- have ruled on the matter. And the 9th Circuit in San Francisco has appointed a study committee.

The 5th Circuit adopted the position, advanced by the U.S. Department of Justice, that Blakely does not affect the federal sentencing guidelines. The 6th and 7th circuits held that Blakely does apply, while the 2nd Circuit took the rare step of certifying questions to the Supreme Court about the extent to which it applies.

LOCAL JUDGES SPLIT

Federal district judges in South Florida and around the country also have issued conflicting rulings.

In general, federal judges under the national sentencing guidelines consider enhancing sentences based on factors such as the amount of illegal drugs or economic losses involved in a crime. Enhancements also can be applied if a defendant can be shown, by a preponderance of evidence, to have been a leader in the crime or to have abused a position of trust.

Here's a partial scorecard of federal judicial actions in South Florida. It was compiled with the help of South Florida criminal defense attorneys:

While not going so far as to toss out any part of the federal guidelines, U.S. District Judges James Lawrence King in Miami, Jose A. Gonzalez Jr. in Fort Lauderdale and K. Michael Moore in Miami have stated that they will not enhance sentences absent a jury finding about

any aggravating facts or proof beyond a reasonable doubt.

In contrast, U.S. District Judges James I. Cohn and William P. Dimitrouleas, both in Fort Lauderdale, have held that Blakely does not apply to federal sentencing under the guidelines.

In the case of former Accutel Communications chief executive Arne Soreide, Judge Cohn cited the Supreme Court's explicit statement that its ruling did not apply to federal sentencing rules. Soreide was convicted by a jury this month on 68 counts of fraud, money laundering and tax violations.

But as a "prophylactic" in case the high court extended its application of Blakely, Judge Cohn ordered the jury that convicted Soreide to return today to determine whether facts presented by Assistant U.S. Attorney Neil Karadbil in support of an enhanced sentence were proved beyond a reasonable doubt.

Meanwhile, Southern District Chief Judge Zloch and U.S. District Judges Kenneth L. Ryskamp and Donald M. Middlebrooks in West Palm Beach have taken the creative approach of handing down alternative sentences -- depending on whether the guidelines survive or not. In these cases, the judges issued one sentence that relied on the guidelines and one that did not.

In another approach, U.S. District Judges Federico A. Moreno and Adalberto Jordan in Miami are pondering expedited briefings on the matter received from prosecutors and defense lawyers.

U.S. District Judge Cecilia Altonaga in Miami is punting. Apparently hoping that the issue will be resolved soon, she has put off issuing any sentences until next month in cases where Blakely issues are involved.

Defense attorneys are distressed.

"The uncertainty is not good for anyone - the courts, the government or the defense," said criminal defense attorney Steven E. Chaykin, a partner at Zuckerman Spaeder in Miami. "The amazing thing about this case, unlike any before, is it doesn't really give us the answers," said David O. Markus, speaking for a group of about 160 private attorneys who represent indigent federal defendants when the Federal Public Defender's Office has a conflict. "Judges are doing different things. Defense lawyers are doing different things. Prosecutors are doing different things." Markus is a partner at Hirsch & Markus in Miami.

REQUEST FOR EN BANC RULING

In the hope of pushing the Southern District toward a clearer and more unified stance, Fort Lauderdale-based attorney and sentencing specialist Benson Weintraub on Friday filed papers seeking an extraordinary public hearing by the active judges concerning what to do about Blakely.

"The district judges should collectively assemble en banc to consider, as quickly as counsel may be heard - (1) the constitutionality of the guidelines; and (2) establishment of a uniform standard, at least in this district, for the manner and process of post-Blakely sentencing," Weintraub wrote.

"To promote the administration of justice with fairness and consistency ... the sentencing judge may wish to share the legal issues in this case with a full en banc panel," according to the motion.

The last time such an en banc gathering occurred was in 1988, when the court convened in U.S. v. Bogle to consider the constitutionality of sentencing guidelines enacted by Congress to curb disparity between sentences issued by different judges. The Southern District ruling en banc found the guidelines to be unconstitutional, but that judgment was later overturned.

Weintraub's motion for an en banc hearing was filed in the otherwise unremarkable case of U.S. v. Mehrzad Arbane, an Iranian convicted in May of conspiracy and smuggling more than five kilograms of cocaine.

Arbane, whom Weintraub represents, is to be sentenced Aug. 27. Prosecutors want his sentence enhanced based on other alleged drug shipments. If prosecutors succeed, Arbane faces 235 to 293 months in prison.

But Arbane's attorneys are challenging the sentence enhancement based on Blakely. If U.S. District Judge Ursula Ungaro-Benages in Miami decides that Blakely blocks any sentence enhancement, the guideline range for the base offenses is only 121 to 151 months in prison, Weintraub said.

While Ungaro-Benages is considering the merits of Arbane's constitutional challenge, she has rejected Weintraub's parallel request for an en banc hearing.

"She did not explain herself," Weintraub said in an interview. "My impression, based on speaking with my colleagues, including judges, is that she did it because the court agreed earlier [in its closed session] that each judge would address the Blakely matter individually."

But Weintraub isn't giving up. Soon, he said, he intends to ask the court to enunciate a uniform sentencing policy, either in an administrative order from Chief Judge Zloch or via an en banc hearing.