FREEDOM WATCH

Bait and switch

Government makes an end run around defendants' rights

by Harvey Silverglate

AP/WIDE WORLD

LUCKY MAN: Patriarca would have gotten a lot more than he bargained for if Wolf had sided with the prosecution.

A defendant charged with one or more criminal offenses cuts a deal with the prosecution: he'll waive his right to a trial by jury and plead guilty to certain charges. In return, the prosecution will drop other, more serious charges.

It's called plea-bargaining, and the practice flourishes because both sides benefit. The prosecution gets the guilty verdict it's looking for without having to spend time and money pursuing charges it may not be able to prove. And the defendant can be reasonably sure of what his sentence will be, since he'll be punished according to guidelines for the offense to which he's admitting.

Until now.

In a variation on the old "bait and switch" technique, the government is using the plea-bargaining process to sentence unwary defendants to far longer prison terms than they expected when they agreed to waive their rights.

The practice is rampant in the federal courts, and has infected the state courts as well. It's just the latest weapon in the government's growing arsenal to keep more people behind bars for longer periods of time.

Bait-and-switch has long been a favorite of charlatan salesmen to lure people into their clutches. Newspaper ads would offer astounding bargains on whatever product these con artists were trying to sell. The fine print — if there was any — would indicate "limited quantities available." The customer, upon arriving at the store, would be told the item had sold out and would then be directed to a higher-priced item.

Better Business Bureau policies have helped stop bait-and-switch schemes from being used in commerce. But there is no Better Business Bureau for the courts.

The most recent example of courtroom bait-and-switch is the case brought against Raymond J. "Junior" Patriarca, son of and alleged successor to the late reputed leader of organized crime in New England.

Earlier this week, in Boston, US District Judge Mark Wolf sentenced the younger Patriarca to a prison term of eight years and one month.

Patriarca was lucky.

His case is a classic example of an emerging pattern in which prosecutors, once they've lured a defendant into a plea-bargain, use a vague provision of the sentencing guidelines to argue to the sentencing judge that unproven allegations against the defendant — which the defendant did not plead guilty to and which the government neither charged nor proved in court — should be considered in arriving at a sentence.

Patriarca was persuaded to plead guilty to the racketeering charges against him on the assumption — perfectly reasonable at the time — that he was giving up his right to have a jury decide his case in exchange for exposure to a likely sentence of no more than five or six years.

His attorney, Martin G. Weinberg, of Boston, argued to Judge Wolf that under the applicable sentencing guidelines, the proper sentence would fall in the range of 46 to 57 months — just under five years. Earlier, during bail proceedings, the probation department of the court calculated Patriarca's likely sentence at 63 to 78 months. And the Court of Appeals in 1991 observed that if convicted, Patriarca likely faced a "guideline sentence . . . in the range of only five to six years."

Yet when Patriarca came up for sentencing, the government asked for a sentence in the range of 292 to 365 months — that is, between 24 and 30 years.

By this time, of course, Patriarca had already pleaded guilty and had given up his right to contest the charges before a jury. The government's request was based on a provision of the sentencing guidelines allowing a judge to "enhance" a sentence on the basis of uncharged but supposedly "relevant" conduct. Sentence-enhance-

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John Murphy assisted in the preparation of this article.

Freedom

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ment is a concept that has crept into the law over the past two years, evolving out of the impetus on the part of all three branches of government to crack down on crime.

The government argued that Patriarca should be sentenced on the basis of — among other things — murders committed by Mafiosi who were supposedly in the organization that Patriarca allegedly headed, even though he hadn't been charged in connection with those murders.

The most shocking aspect of the government's argument, other than this betrayal of the defendant's expectations when he decided to plead guilty, is set forth by the US attorney's office in a memorandum it filed in February of this year: "The government need not establish the defendant's approval — or even awareness — of these crimes in order for them to qualify as relevant conduct."

But Judge Wolf, in sentencing Patriarca this past Tuesday, June 16, did not fall for the government's tactics hook, line, and sinker — although he did nibble around the edges of the bait.

He found that the government had not proven "by a preponderance of the evidence" that Patriarca had any involvement in or knowledge of the murders allegedly committed by his supposed associates, and he refused to increase the sentence based on those unproven allegations.

Wolf did, though, find some "relevant conduct." Citing Patriarca's participation in a now-famous Mafia-induction ceremony in Medford several years ago, Wolf ruled Patriarca had violated laws against interstate travel to further a conspiracy under the terms of the RICO (Racketeer Influenced and Corrupt Organizations) Act. Because of that, Wolf imposed additional time on top of the 63-to-78-month guideline sentence.

As far as Junior Patriarca is concerned, what Wolf did was close enough to the right thing that he's no doubt heaving a sigh of relief. Although he'll have to serve an extra year in addition to the five or six he'd bargained on, he's not looking at spending the rest of his life behind bars, as the prosecution sought. Still, Patriarca was punished, however mildly, for conduct with which he was not charged and for which he was not convicted. And doubtless the government will continue to use this weapon, particularly in front of judges who are more pliant than Judge Wolf turned out to be.

Operation Injunction

The law-and-order crowd would no doubt piously intone a profound lack of sympathy for Mr. Patriarca, given his reputation and his lineage.

But when civil liberties are denied to the most unpopular citizen, they're diminished for everyone. For instance, the radical anti-choice organization Operation Rescue, which espouses a cause that's near and dear to the hearts of many law-and-order conservatives, has been badly harmed by another form of government bait-and-switch.

William Cotter, one of the presidents of the Massachusetts chapter of Operation Rescue, was sentenced last November to serve two and a half years in state prison for participating in a demonstration three months earlier at the Preterm Health Services clinic in Brookline. As part of the demonstration, Cotter and others tried to block the clinic, making it difficult for clients to enter.

Cotter, though, was not charged by authorities and convicted by a jury of a specific crime. Instead, he was found guilty — by a lone judge — of violating an injunction against Operation Rescue demonstrations obtained by James Shannon, then the state's attorney general, in 1990.

Cotter was to serve one year in prison, with the balance of his two-and-a-half-year sentence to be suspended.

Massachusetts Superior Court Judge Robert Bohn agreed to that suspension on the condition that Cotter be put on probation for three years, during which he'd be prohibited from participating "in any unlawful activities of Operation Rescue or any other such similar organization."

But when the court clerk read aloud that last sentence and asked Cotter if he agreed to the conditions, Cotter replied, "I do not agree." So Bohn imposed the full two and a half years for violating the injunction.

If Cotter had agreed to Bohn's condition, he'd have subjected himself to a double deprivation of his legal rights. He'd already been deprived of his right to a trial by a jury, since it was Judge Bohn alone who determined that Cotter's conduct violated the injunction. Now Bohn was seeking to make matters worse — by making obedience to the injunction a condition of a suspended sentence.

Any activity in which Cotter might thereafter engage would be subject to interpretation by Bohn — and by Bohn alone — as "unlawful" and hence in violation of the court-imposed conditions. If Bohn ruled against Cotter, he'd be automatically imprisoned to serve the one-and-a-half-year balance of the sentence.

By refusing this onerous and unfair condition, Cotter got to serve the full sentence right away.

Cotter's supporters have compared him to Martin Luther King Jr. And though those who believe in a woman's right to choose might be offended by such a comparison, there is a similarity: they were both jailed more for their political beliefs than for the actual offenses they committed.

Injunctions can be used to stifle protest. They're a wild card the prosecution can play whenever the government or the judiciary wants someone to refrain from conduct that a jury might not agree is illegal.

Were Cotter to participate in any of the more noxious Operation Rescue tactics, such as entering the clinic itself for the purpose of harassing women there, he could be prosecuted and punished under existing trespass or other criminal laws. But Cotter did not violate any of these laws and still got two and a half years.

Injunctions are favorite tools of those on both the left and the right to silence opponents without having to go through the messy and uncertain procedure of leaving to a jury the question of whether a crime has been committed.

Indeed, this method of stifling political protest arrived in Boston nearly two decades ago, when Boston University, under the direction of President John Silber, obtained injunctions against students who conducted annoying, effective, and sometimes disruptive protests against both the Silber administration and the federal government's pursuit of the war in Vietnam.

Once the injunction was obtained, students no longer had the right to have a jury decide whether their protest went over the line from protected speech to unlawful disruption. All BU had to do was find a single law-and-order judge who would do Silber's bidding — and there was always one available.

At that time it was the left that howled, with the right quiescent and happy. Now, in the case of Operation Rescue, the tables have been turned. The only side that gets consistently creamed in these cases is, alas, the Bill of Rights.

Thumb on the scales

The trend toward punishing people well beyond the scope of their conduct can also be discerned by examining a recent development in the so-called war on drugs. Sometimes it seems like the prosecutors, politicians, and judges who are fighting this hopeless war must themselves be dipping into the supply of confiscated drugs.

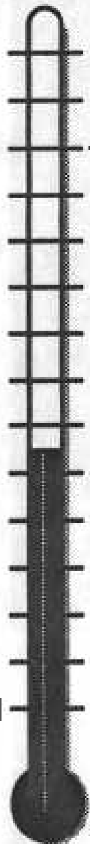
Take, for example, the principle used in sentencing convicted drug dealers — that the sentence normally varies in direct proportion to the amount of drugs involved in the bust. In their zeal to throw anyone and everyone into jail for as long as possible, prosecutors have twisted language, logic, common sense, and fairness beyond recognition.

Last year the US Supreme Court decided the case of *US v. Chapman*, in which Richard Chapman, a Wisconsin man, was convicted of selling a certain quantity of LSD. The amount involved was 1000 "hits," with an approximate street value of $2000.

However, in calculating the sentence, the government argued that the judge should use not just the actual amount of LSD, which was about 50 milligrams, but should include in his calculations the weight of the blotter paper that was permeated by the LSD. The paper, of course, served merely as the inert carrier for the drug, much like the bottle that vodka

LIBERTY MERCURY

DEGREES



Two weeks ago, in an LA case, US District Judge A. Wallace Tashima declared unconstitutional the requirement that the National Endowment for the Arts consider "general standards of decency" when awarding grants to artists. This First Amendment victory, plus Judge Mark Wolf's refusal to cave in to a government censoring of Junior Patriarca, would have caused the Liberty Thermometer to rise a degree or two — were it not for the Supreme Court's astounding decision this past week giving US courts jurisdiction over a defendant who's kidnapped and forcefully brought to this country to stand trial for a crime committed abroad. So the temperature, for now, holds steady.

comes in.

This change in the method for calculating the weight of the LSD raised the seriousness of the crime to one involving 5.7 grams (or 5700 milligrams) of LSD. The thresh-

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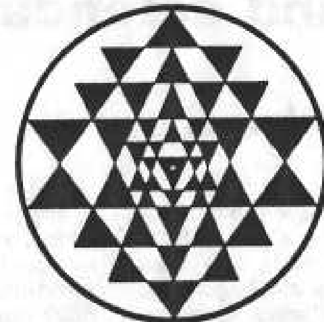

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old for the minimum mandatory sentence is one gram, so suddenly at stake was a possible maximum of 20 years in prison — and in fact, Chapman was sentenced to eight years.

Critics of the *Chapman* opinion charged it was only a matter of time before the practice of including the carrier paper in the weight of the drug would be taken to even more absurd lengths.

The critics didn't have to wait long.

Last month the First Circuit Court of Appeals, which sits in Boston, decided the sentencing appeal in *US v. Jesus Lopez-Gil*, in which the defendant had been convicted of smuggling cocaine into the country.

The cocaine had been molded with fiberglass into suitcases, which the smugglers then simply carried as luggage into the country. The applicable law says that sentences must be based on "the weight of a controlled substance," which is defined as "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." The First Circuit judges decided the cocaine had been "mixed" with the fiberglass and threw the suitcases on the scales — resulting in Lopez-Gil's receiving an extra 41 to 51 months in prison.

One member of the three-judge panel, Judge John Brown, refused to go along. Unfortunately for New England, he was a visiting judge from, of all places, the Fifth Circuit, which includes Texas, Georgia, and Florida.

Judge Brown wrote:

"Carrier mediums [for drugs] that cannot be digested, inhaled or otherwise consumed, but still significantly increase the weight of the controlled substance, have no place in drastically affecting the number of years a person must serve in prison. . . . No longer should the court sit idly by when three, five or possibly many more years of a man's liberty are at stake on the basis of a decision which is so materially and legally unsupported."

It's thinking like that of the First Circuit majority that contributes to the prison population boom: Federal Bureau of Prisons statistics show that the federal-prison population has increased by more than 150 percent since 1980, from approximately 300,000 prisoners to more than 800,000.

■

These sleight-of-hand techniques — used to send people to prison and to keep them there for longer terms, without having a jury of citizens pass on the critical issues involved — are at the same time ludicrous and frightening.

The deprivation of fundamental rights is so raw and obvious, the unfairness so palpable, and the destruction of common sense, logic, and the English language so gross, that one is reduced to the howl of protest issued last year by Second Circuit Judge George C. Pratt. Writing in dissent in a drug case, he decried the loss of civil liberties in the name of fighting for some supposedly good cause:

"When, pray tell, will it end? Where are we going?" ❑

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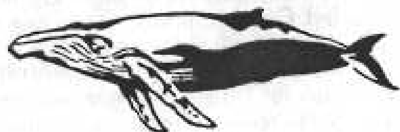

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