

## Attorneys React To High Court's Speedy Trial Ruling

*Law360, New York (May 19, 2016, 6:20 PM ET)* -- The U.S. Supreme Court ruled Thursday that the Sixth Amendment right to a speedy trial does not extend to the sentencing phase of a criminal proceeding. Here, attorneys tell Law360 why the *Betterman v. Montana* decision is significant.

### **Joel Bertocchi, Hinshaw & Culbertson LLP**

"This unanimous decision is no surprise; what surprised me was that there were actually six states and two circuits that did apply the speedy trial right to sentencings. This ruling thus confines defendants claiming undue sentencing delay to challenges under federal or state rules or the Due Process Clause. And since the court notes that a defendant jailed pending sentencing will get credit for time served, those challenges will only matter where the delay in sentencing approaches the likely amount of time they will get. A defendant in that position should be able to obtain some sort of bail."

### **Steve Corso, Haynes and Boone LLP**

"The opinion touches on a few poignant truths. Today, the nation's criminal justice system is overly tilted against defendants who would exercise their right to put the government to the test before judge and jury. It's fitting that defendants seek to extend the legal rights and protections they enjoy during trial to the sentencing phase, where so much critical advocacy occurs now. The court appears to be sympathetic and leaves the door open to further argument on this question, as well as similar issues."

### **Ty Howard, Bradley Arant Boult Cummings LLP**

"The decision forecloses one avenue of attack — the Speedy Trial Act — for a criminal defendant challenging a delay in sentencing. Nonetheless, the court seemed open to such a challenge on the alternative grounds of a due process. Ultimately, I think the decision's practical effect will be minimal. As the unanimous opinion suggests, there was little textual support for such a challenge under the Speedy Trial Act. But convicted defendants awaiting sentencing still have options for challenging delay, whether under due process, as the court suggests, or potentially Fed. R. Crim. P. 32 or comparable state law. This decision lays the groundwork for that future case and perhaps the most interesting issue: If a delay does violate due process, what is the appropriate remedy?"

### **Christopher LaVigne, Shearman & Sterling LLP**

"The court drew a clear distinction between the pre-conviction and post-conviction stages of criminal proceedings, and found that the Sixth Amendment's right to a speedy trial does not apply once a defendant has been found guilty. The court recognized, however, the criminal defendants retain due process rights even after their convictions, and left the door open for challenging post-conviction delays under the due process clauses of the Fifth or 14th Amendment. It will be interesting to see whether defense counsel pursue such claims going forward — successful challenges could be ones in which mitigating evidence for Fatico hearings is lost or compromised due to sentencing delays."

**Nicole Knox, Nicole Knox Law**

"While the result in this case is fundamentally unfair and contrary to basic American liberties and freedoms, the Supreme Court's opinion is correct and predictable, given the defense argument regarding speedy trial rather than due process. Montana violated Betterman's constitutional right to due process when it unreasonably delayed the pronouncement of his sentence. The cure is to credit Betterman's sentence with time served pending sentencing. But since Betterman's defense lawyers did not make a due process argument, the court could not rule on it. Montana could fix all of this with a state law — like Texas and federal laws — that codifies the right to post-conviction due process and that credits a defendant with time served while awaiting sentencing."

**Daniel Marx, Foley Hoag LLP**

"The most significant aspect of *Betterman v. Montana* may be what the Supreme Court made clear it had not decided. In the majority opinion and both concurrences, the justices emphasized the decision concerned only the Speedy Trial Clause. Thus, whether inordinate delay in the sentencing phase of a criminal prosecution can violate the Due Process Clause remains an open question. And the Supreme Court even suggested a defendant may fare better bringing a due process challenge, because due process is a more 'pliable standard,' with greater remedial flexibility, and an available analytical framework from *Barker v. Wingo*."

**Carolyn McNiven, Greenberg Traurig LLP**

"Delays between an individual's criminal conviction and their sentence can be lengthy. The Supreme Court ruled today in *Betterman v. Montana* that the Speedy Trial Clause does not protect defendants from unreasonable delays between conviction and the imposition of a sentence. Justice [Ruth Bader] Ginsburg's opinion for the court relied on the historical framework around which the Speedy Trial Clause was drawn to provide support for the proposition that the aim of the clause was to protect the presumptively innocent, namely those who had not yet been convicted, and that it was not intended to benefit or protect those convicted of a crime. The court reasoned that 'vacating validly obtained convictions' — the sole remedy available under the Speedy Trial Clause — would be an 'unjustified windfall' for a defendant. The court did not address the impact of delay on the rights of a defendant whose conviction was not validly obtained. In such a circumstance, delay in sentencing translates to delay in the ability to appeal an unlawfully obtained conviction. Although it closed the door on speedy trial right actions, the court made clear that defendants who experience unreasonable post-conviction delays do have another remedy: a constitutional challenge under the Due Process Clause."

**David Miller, Morgan Lewis & Bockius LLP**

"In a unanimous decision, the court held that the Sixth Amendment's speedy trial right attaches at arrest/indictment and detaches upon conviction. In a clear voice, the court recognized that it would be unjust to unwind a validly obtained conviction to remedy a sentencing delay. The court, however, suggested that both the federal rules and the Due Process Clause may still be available for a defendant to argue for a lower sentence where a sentence has been unreasonably delayed. But the door to vacating a conviction for such a delay has been closed — and loudly at that."

**Ariel Neuman, Bird Marella Boxer Wolpert Nessim Dooks Lincenberg & Rhow PC**

"The *Betterman* decision most obviously impacts defendants detained pending trial and sentencing. But it also impacts every case resolved via plea agreement, where the sentencing hearing is a defendant's only chance to tell the judge her side of the story. In white collar cases, the prejudice is especially acute because prosecutions are normally years removed from the conduct at issue. Being forced to wait even longer before presenting mitigating evidence means memories will further fade and evidence will disappear. Hopefully a solution lays in Justice [Sonia] Sotomayor's signal that the Due Process Clause may provide 'procedural protections' to significant sentencing delay."

**Eli J. Richardson, Bass Berry & Sims PLC**

"Betterman represents a welcome resolution of a split among lower courts as to whether the Speedy Trial Clause applies to the timing of sentencings. In answering the question with a resounding 'no,' the court relied on straightforward and uncontroversial (albeit disputable) arguments. Thus, Betterman delivers no big surprise in its result or its reasoning. Perhaps its legacy will be its concurrences, which suggest that future complaints about delays in sentencing be brought as due process claims. This makes sense, as the Due Process Clause has the flexibility, which is simply lacking in the Speedy Trial Clause, to apply to sentencings."

**Ralf R. Rodriguez, Peckar & Abramson PC**

"On Thursday, in *Betterman v. Montana*, the Supreme Court unanimously found that the Sixth Amendment right to a speedy trial afforded to defendants accused of a crime does not apply to a sentencing hearing. Specifically, the court determined that the constitutional guarantee of a speedy trial ends once there is an adjudication of guilt. The court distinguished between the different phases of a criminal proceeding, which include: (1) pre-investigative and arrest phase; (2) prosecution and trial phase; and (3) post-conviction and sentencing phase. The court's opinion was grounded on the presumption of innocence that applies to defendants accused of a crime during the arrest and trial phases, recognizing that the Sixth Amendment right to a speedy trial attaches upon arrest and applies through the trial phase to avoid unlawful and oppressive detentions of individuals presumed innocent. The court reasoned that after a conviction takes place, there is no longer a presumption of innocence and therefore, the Sixth Amendment's Speedy Trial Clause no longer applies to a post-conviction proceeding such as a sentencing hearing. The court was not willing to vacate a conviction that was otherwise valid because of a delay in the sentencing phase. However, the court left the door open for a Fifth Amendment challenge to an unreasonable delay in sentencing premised on a violation of the Due Process Clause where a delay in sentencing results in an unfair proceeding against the defendant. This question, however, must wait until the proper case is before the court."

**Charles Ross, Charles Ross & Associates**

"In *Betterman v. Montana* the Supreme Court ruled that Sixth Amendment speedy trial protections end upon a properly entered plea of guilty or a conviction after trial. The net effect of this decision really depends upon whether the client is in jail pending sentence or is out on bail. While there are instances, particularly in state practice, where lengthy time periods exist between a finding of guilt and sentence, time is generally good to clients facing sentence. Especially if the client is out of custody pending sentence, time allows for rehabilitation and for proper preparations to be made for sentence. In the case of an incarcerated client, *Betterman* could spell problems if sentencing delays exceed the time the client may face on the day of actual sentence."

--Editing by Edrienne Su.

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