Bloomberg BNA

Criminal Law Reporter™

Sentencing

A Current Perspective on the Sixth Amendment and Acquitted-Conduct Sentencing



By David M. Rody, Michael D. Mann and Mark D. Taticchi

I. Introduction

In 2006, jurors acquitted former Alabama Gov. Don Siegelman (D) on 25 of 32 counts the government brought against him for crimes ranging from bribery to honest-services fraud.[1] The government alleged that Siegelman had corruptly sold a seat on a hospital regulatory board in exchange for $500,000 in donations to an unsuccessful campaign to get voters to approve a state lottery. Despite obtaining a conviction on just seven of the 32 counts, federal prosecutors urged the court to increase Siegelman's sentence based on the conduct for which Siegelman was acquitted.[2] In fashioning a sentence, the district court judge overseeing the case agreed with the government and *tripled* the applicable federal sentencing guideline range: Siegelman's suggested range under the sentencing guidelines went from 51 to 63 months, to a whopping 151 to 188 months in prison.[3]

This practice—often referred to as ''acquitted-conduct sentencing''—is not unique to high-profile cases like Siegelman's. Take Antwuan Ball, for example: In 2007, jurors acquitted Ball of virtually all of the charges against him, including racketeering, drug conspiracy, and murder. The sole exception was a narcotics distribution charge: A $600 hand-to-hand crack cocaine sale.[4] Based on this distribution charge, the federal sentencing guidelines provided a maximum suggested sentence of 71 months' imprisonment.[5] After failing to convince the jury beyond a reasonable doubt that Ball engaged in a conspiracy, prosecutors argued that the court should increase Ball's sentence beyond the 71 months by considering acquitted conduct when sentencing Ball. The district judge concluded, contrary to the jury's verdict, that Ball and his co-defendants had in fact conspired to sell crack cocaine. Based on that additional finding, the judge sentenced Ball to 225 months' imprisonment (about 19 years)—a decade more than he would have faced based on the jury's ver-

[1] Bob Johnson, *Former Alabama Governor, Ex-CEO Convicted*, Wash. Post, June 30, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/30/AR2006063000134_pf.html.

[2] *United States v. Siegelman*, No. 2:05-cr-00119 (M.D. Ala. July 13, 2012) (Docket 1109) (Government Sentencing Memorandum).

[3] Id. (Docket 1165) (Order).

[4] See Jim McElhatton, *A $600 Drug Deal, 40 Years in Prison*, Wash. Times, June 29, 2008, http://www.washingtontimes.com/news/2008/jun/29/a-600-drug-deal-40-years-in-prison/?page=all.

[5] *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Mem.) (Scalia, J., joined by Thomas and Ginsburg, JJ.) (dissenting from denial of certiorari).

 ISSN 0011-1341

dict alone.[6] Under current law, this practice is all too common and legal in every federal judicial circuit in the country.

The basic reasoning in support of the practice runs something like this: When a jury votes to acquit, that acquittal is not (strictly speaking) a finding of innocence;[7] rather, all an acquittal means is that the government failed to prove a defendant's guilt beyond a reasonable doubt. At sentencing, however, the court can increase a defendant's sentence on the basis of any ''relevant conduct'' the court finds the defendant committed. In making such determinations, the court applies a lower standard of proof—''preponderance of the evidence''—than the ''beyond a reasonable doubt'' standard that the jury must use in reaching its verdict. So, in sum, if a *judge* believes the government proved its accusations *by a preponderance of the evidence*—even though it failed to persuade a jury of those same accusations beyond a reasonable doubt—the defendant's sentence can be increased (and dramatically so) based on the judge's findings alone.

The decisions upholding this practice often rely on an over-reading of *United States v. Watts*, a 1997 decision of the U.S. Supreme Court, which rejected two specific challenges to acquitted-conduct sentencing: One based on the Double Jeopardy Clause, and the other rooted in the text of the federal sentencing statute.[8] Despite the narrow scope of the *Watts* decision, the lower courts have tended to read it as a wholesale endorsement of the practice of sentencing on the basis of acquitted conduct.[9] That is clearly wrong, however, as the Supreme Court itself has held, declaring in *United States v. Booker*, that *Watts* did not address ''the contention that the sentencing enhancement [at issue there] had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment.''[10]

Fast forward to 2016 where it has become even more difficult to square acquitted-conduct sentencing with the Supreme Court's recent Sixth Amendment decisions, which have clearly held that ''[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed,'' and that all ''such facts must be established by proof beyond a reasonable doubt.''[11] As explained more fully below, this renewed solicitude for defendants' jury-trial rights has undermined the federal courts' practice of sentencing based on acquitted conduct.

II. *Apprendi v. New Jersey* and the Evolution of the Sixth Amendment

Before the Supreme Court's landmark decision in *Apprendi v. New Jersey*, judges could increase sentences in numerous ways—by increasing the mandatory minimum or the statutory maximum sentence, imposing the death penalty—based on facts not found by the jury. That system gave greater sentencing control to prosecutors, who could bring only a basic set of charges before a jury, and then decide after trial whether to seek enhanced or additional penalties at the sentencing phase, where the prosecutor would face a single, experienced fact-finder (the judge) and lower burden of proof (preponderance of the evidence) than at the guilt phase of the trial. As the Supreme Court later determined, however, that system also gave insufficient weight to the jury's deeply rooted—and constitutionally mandated—role in the trial of criminal cases.

In *Apprendi*, the Supreme Court invalidated a sentencing scheme that allowed a judge to impose an ''extended term'' of imprisonment—*i.e.*, a term that exceeded the statutory maximum of the convicted offense—if the judge found by a preponderance of the evidence that the offense was a hate crime.[12] The Supreme Court held the sentencing scheme violated the Sixth Amendment because it made the availability of the ''extended term'' sentence contingent on facts found by the *judge* rather than the jury.[13]

Since *Apprendi* was decided, the court has repeatedly invoked its holding—that ''[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed,'' and that all ''such facts must be established by proof beyond a reasonable doubt''[14]—to invalidate a wide array of sentencing systems and practices, including both the U.S. Sentencing Guidelines and various state analogues.[15]

In the decision striking down the federal sentencing system, *United States v. Booker*, the court found that the guidelines violated the Sixth Amendment because, absent additional facts found by the judge (or admitted by the defendant), the guidelines *required* that a defendant receive a sentence that fell within a range of imprisonment terms that was calculated based solely on the jury's verdict.[16] To remedy that defect, the court invalidated the portion of the sentencing statute that made the guidelines mandatory, declaring instead that henceforth they should be ''advisory'' in nature,[17] and

[6] Id.

[7] Indeed, because most criminal verdicts are general verdicts (''Guilty / Not Guilty''), there is no way to know what the jury concluded—or why.

[8] See *United States v. Watts*, 519 U.S. 148, 155 (1997) (per curiam).

[9] See, e.g., *United States v. Alsante*, No. 15-5343 (6th Cir. Feb. 5, 2016); *United States v. Cavallo*, 790 F.3d 1202, 1233 (11th Cir. 2015); *United States v. Alvarado*, No. 14-40635 cons/w 14-40641 (5th Cir. Nov. 12, 2015); *United States v. Cook*, 550 F. App'x 265, 273 (6th Cir. 2014); *United States v. Young*, 510 F. App'x 610, 611 (9th Cir. 2013); *United States v. Waltower*, 643 F.3d 572, 574 (7th Cir. 2011); *United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009); *United States v. Tyndall*, 521 F.3d 877, 884 (8th Cir. 2008); *United States v. Todd*, 515 .3d 1128, 1137 (10th Cir. 2008); *United States v. Leahy*, 473 F.3d 401, 403 (1st Cir. 2007); *United States v. Manigalt*, 228 F. App'x 183, 185 (3d Cir. 2007); *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005); *United States v. Dozier*, 162 F.3d 120, 125 (D.C. Cir. 1998).

[10] *United States v. Booker*, 543 U.S. 220, 240 (2005) (majority opinion of Stevens, J.).

[11] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (internal quotation marks omitted).

[12] Id. at 468–69.

[13] Id. at 490.

[14] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (internal quotation marks omitted).

[15] See *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004).

[16] 543 U.S. 220, 232-33 (2005) (majority opinion of Stevens, J.).

[17] Id. at 233 (majority opinion of Stevens, J.); id. at 248-58 (majority opinion of Breyer, J.)

  CRL ISSN 0011-1341

that all sentences (to the extent they are appealed) should be reviewed to determine whether they are substantively reasonable.[18]

Other cases following *Apprendi* have further underscored the rule that the jury-trial guarantee attaches to *any* fact (other than a prior conviction) that changes the range of punishment a defendant would be exposed to at sentencing. In *Ring v. Arizona*, the court applied the jury-trial guarantee to impositions of the death penalty, holding that ''[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.''[19]

Similarly, in *Alleyne v. United States*, the court applied *Apprendi* to judicial findings that raise a defendant's mandatory minimum sentence (rather than the mandatory maximum, as was the case in *Apprendi*).[20] Indeed, in *Southern Union Co. v. United States*, the court even applied the *Apprendi* rule to facts necessary to the imposition of criminal fines.[21]

In light of these decisions, questions increasingly have been raised regarding the continued vitality of acquitted-conduct sentencing. Those concerns are based on a number of factors. First, and at a very fundamental level, sentencing on the basis of acquitted conduct demeans the role of the jury even more severely than do the practices struck down in *Apprendi*, *Booker*, and their related cases. As one jurist has put it: ''[T]o hold that a person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted . . . is jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.' ''[22]

Moreover, jurors themselves have decried the practice, understandably frustrated that their verdicts were later overridden and negated. As one juror wrote after learning that federal prosecutors were seeking to add decades to a defendant's sentence based on conduct as to which the jury had acquitted him, '' 'It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts . . . not given their proper weight[?]' ''[23] Indeed, this practice threatens to reduce the jury trial to ''a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.''[24] Enhancing sentences solely on the basis of acquitted conduct fundamentally endangers ''the jury's historic role as a bulwark between the State and the accused.''[25] Unfortunately, although judicial discomfort with this practice is growing, it has not yet been jettisoned by the Supreme Court or any of the federal courts of appeals.[26]

Second, the practice of acquitted-conduct sentencing cannot be squared with the rule of *Apprendi*. As noted above, the federal sentencing statute—as construed by the Supreme Court in *Booker*—requires that all sentences be ''reasonable.'' But reasonableness is a relative concept. Consider the second vignette with which this article began: Mr. Ball's 19-year sentence may be a reasonable punishment for a raft of serious narcotics offenses and a leadership role in a ruthless, drug-dealing gang. But, if the reference point for that assessment were *only* the single hand-to-hand sale for which Mr. Ball was convicted, it would strain credulity to the breaking point to describe his sentence as ''reasonable.'' So, Mr. Ball's sentence is reasonable—and hence lawful—*exclusively* because the judge found additional facts (the acquitted conduct) that the jury did not find. That, of course, is precisely what *Apprendi* forbids.

That tension between *Apprendi*'s jury mandate and the practice of judicial enhancement of penalties under the sentencing guidelines is and remains a source of serious concern and uncertainty in federal criminal law, particularly given that four Supreme Court justices have raised questions regarding the lawfulness of such enhancements.[27]

III. Conclusion

In sum, acquitted-conduct sentencing has long been a feature of federal criminal prosecutions. Nevertheless, even assuming it ever was consonant with the requirements of the Sixth Amendment, it is no longer tenable in the wake of *Apprendi*, *Booker*, and the many other cases that have once again placed the jury at the center of the trial and punishment of criminal defendants.

David M. Rody is a partner in Sidley Austin LLP's White Collar: Government Litigation & Investigations group in New York. He is a former federal prosecutor with extensive trial and investigative experience in both the public and private sectors, including as a long-time senior unit chief in the U.S. Attorney's Office for the Southern District of New York.

Michael D. Mann is a partner in Sidley's White Collar: Government Litigation & Investigations group in New York. He represents companies and related individuals in white collar criminal litigation, securities enforcement matters, internal corporate investigations and complex civil litigation.

[18] Id. at 260-62 (majority opinion of Breyer, J.).

[19] 536 U.S. 584, 609 (2002).

[20] 133 S. Ct. 2151, 2158-62 (2013).

[21] 132 S. Ct. 2344 (2012).

[22] *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring).

[23] United States v. White, 551 F.3d 381, 396-97 (Merritt, J., dissenting) (quoting letter from Juror #6 in *United States v. Ball* to U.S. District Judge Richard W. Roberts (May 16, 2008)).

[24] *Blakely v. Washington*, 542 U.S. 296, 307 (2004).

[25] *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2351 (2012).

[26] Compare, e.g., *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (en banc) (Kavanaugh, J., concurring) (expressing concern with the constitutional underpinnings of acquitted-conduct sentencing), and id. at 929 (Millett, J., concurring) (same), with *United States v. Herbert*, No. 14-31405 (5th Cir. Dec. 23, 2015) (rejecting challenge predicated on Justice Scalia's argument in his *Jones* dissent from denial of certiorari).

[27] *Jones v. United States*, 135 S. Ct. 8 (2014) (Mem.) (Scalia, J., joined by Thomas and Ginsburg, JJ.) (dissenting from denial of certiorari); *Rita v. United States*, 551 U.S. 338, 371-72 (2007) (Scalia, J., concurring in part and concurring in the judgment); *Cunningham v. California*, 549 U.S. 270, 309 n. 11 (2007) (Alito, J., dissenting) (observing that, under current federal sentencing law, ''there inevitably will be *some* sentences that, absent any judge-found aggravating fact, will be unreasonable'').

Mark D. Taticchi is an associate in Sidley's White Collar: Government Litigation & Investigations group in New York. Before joining Sidley, he served as a law clerk for Justice Anthony M. Kennedy of the U.S. Supreme Court and Judge Sandra Ikuta of the U.S. Court of Appeals for the Ninth Circuit.

The authors currently represent the defendant in United States v. Medina, No. 15-445 (2d Cir.), in which Robert Medina was acquitted on numerous charges, ranging from murder to conspiracy to distribute crack cocaine. Nevertheless, the district judge enhanced Mr. Medina's sentence (for conspiracy to distribute marijuana) based on the judge's finding that Mr. Medina had, in fact, conspired to distribute crack cocaine.

Finally, the authors wish to thank Melanie Berdecia and Amy Wang for their invaluable research assistance in preparing this article.

  CRL ISSN 0011-1341