Gorsuch May Bring Needed Changes To Federal Sentencing

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Law360, New York (March 3, 2017, 12:31 PM EST) -- As of this writing, the confirmation hearings for Judge Neil Gorsuch, President Donald Trump's U.S. Supreme Court nominee to fill the late Justice Antonin Scalia's vacancy, are set to begin on March 20, 2017.

This article reviews a key opinion authored by Judge Gorsuch as it pertains to federal sentencing — United States v. Sabillon-Umana, 772 F.3d 1328 (10th Cir. 2014) — and the effect it already has had on recent U.S. Supreme Court sentencing jurisprudence. The authors believe that should Judge Gorsuch be confirmed, he will have not just a progressive influence on the development and reform of sentencing law generally, but his views on federal sentencing law and procedure as articulated in Sabillon-Umana may herald some fundamental and needed changes to federal sentencing law, policy and practice, particularly in the area of acquitted, uncharged and unproven conduct at sentencing.

As hinted at in Sabillon-Umana, Judge Gorsuch appears eager to revisit United States v. Watts, 519 U.S. 148 (1997) (holding uncharged and acquitted conduct may be considered at sentencing for purposes of guidelines application). This in turn may signal the court finally addressing and clarifying the constitutional limits of fact-finding with respect to the application of the U.S. Sentencing Guidelines.

Introduction

Judge Neil Gorsuch has been on the U.S. Court of Appeals for the Tenth Circuit since Aug. 8, 2001. Since that time, he has sat on more than 2,700 panels, of which 1,080 pertained to criminal matters. While he authored 175 majority opinions, some of which garnered significant attention, none of his opinions pertaining to criminal matters — sentencing, in particular — received any significant attention either in the media or in the legal arena by way of citation in judicial opinions or law reviews. Nonetheless, Judge Gorsuch's otherwise unheralded opinion in Sabillon-Umana not only is worth reviewing on its own merits, but also is notable for having received recent attention by the U.S. Supreme Court itself.

United States v. Sabillon-Umana

Elder Geovany Sabillon-Umana "was a bit player in a larger drug operation" who pleaded guilty to money laundering and conspiracy to distribute heroin and cocaine. Per his plea agreement, he reserved the right to appeal the sentence imposed if "the Court determines that the adjusted offense level is greater than 28 and imposes a sentence based upon that offense level determination." Despite the plea agreement, which in any event was nonbinding, the district court found his adjusted offense level to be 32 and his Criminal History Category to be II, which corresponded to an advisory sentencing range of 135-168 months. Due to a government motion for a substantial assistance downward departure, the district court imposed a below-guidelines sentence of 96 months.

Sabillon-Umana appealed his sentence, arguing that the sentencing judge had made two errors. First, the district court determined the offense level before making any findings of fact to support the base offense level. Not only did that not correspond to the correct "order of operations," but it also contained a significant mathematical mistake. The second error was the district court's erroneous belief that it could not impose a sentence below the 40 percent reduction recommended in the government's USSG §5K1.1 motion.

On appeal, Judge Gorsuch, together with one of his old bosses from his clerkship days — Judge David B. Sentelle of the U.S. Circuit Court of Appeals for the District of Columbia, sitting by designation (on loan) from the D.C. Circuit — reversed and remanded due to the errors. (Judge Gorsuch also clerked for Justices Byron White and Anthony M. Kennedy). But as these errors were unpreserved, Judge Gorsuch wrote that they nonetheless constituted plain error: "An obvious misapplication of the sentencing guidelines will usually satisfy ... [these] elements of the plain error test." He reasoned that "[i]f the guidelines form the essential starting point in any federal sentencing analysis (and they do), it follows that an obvious error in applying them 'runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside [the] range' the guidelines suggest." As "the whole point of the guidelines is to affect the defendant's 'substantial rights' by guiding the district court's analysis of how much liberty he must forfeit to the government," "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" Accordingly, the case was remanded for resentencing.

Molina-Martinez v. United States: The Supreme Court Takes Note

It was Judge Gorsuch's analysis of plain error review in Sabillon-Umana that, last April, attracted the attention of Justice Kennedy. In Molina-Martinez v. United States, 578 U.S. __, slip. op., No. 14-8913 (April 20, 2016), Justice Kennedy, writing for a unanimous court, largely relied on Judge Gorsuch's analysis in Sabillon-Umana to hold that "[w]hen a defendant is sentenced under an incorrect Guidelines range — whether or not the defendant's ultimate sentence falls within the correct range — the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."

Apprendi, Booker and Watts Redux?

In 1997, the U.S. Supreme Court held in the controversial case of United States v. Watts, 519 U.S. 148 (1997) (per curiam) that courts may consider uncharged and even acquitted conduct for purposes of enhancing a defendant's sentence. In 2000, the court limited the effect of judicial fact-finding at sentencing when it held in Apprendi v. New Jersey, 530 U.S. 466 (2000) that any facts that increase a statutory maximum penalty are to be considered elements of the offense (regardless of how they are denominated in a statute) and therefore must be proved beyond a reasonable doubt by a jury, or admitted by the defendant. Where Apprendi made clear that factors increasing a statutory maximum penalty must be treated as elements of a crime, it would not be until Alleyne v. United States, 570 U.S. __, 133 S. Ct. 2151 (2013) that the court would hold Apprendi also applies to mandatory minimum penalties. In short, as the law now stands, a judge alone cannot make a finding that would increase the statutory maximum penalty, or mandatory minimum, to which a defendant is exposed without violating the Sixth Amendment's notice requirement.

Apprendi eventually was applied to the U.S. Sentencing Guidelines in United States v. Booker, 543 U.S. 220 (2005). Booker remains unique in the annals of Supreme Court jurisprudence because it was the only case ever to have two majority opinions, inasmuch as Justice Ruth Bader Ginsburg sided with both otherwise diametrically opposed factions. The

first majority opinion — known as the "constitutional holding" — held that since the guidelines were mandatory, judge-found facts used to enhance sentences effectively made each "sentencing factor" an element of an offense and therefore, in light of Apprendi, must be found by a jury or admitted by the defendant. In other words, judge-found facts under the mandatory guidelines violated the Sixth Amendment. And that, many thought, including at least four of the justices in the majority, was the end of the story.

But it was not. The second majority opinion — known as the "remedial holding" — held that since the guidelines violated the Sixth Amendment due to their mandatory nature, the guidelines would hereinafter be considered merely "advisory," which effectively mooted the constitutional problem identified in the constitutional holding. The guidelines now are just one of many factors a judge considers when imposing a sentence, although they still must be correctly calculated inasmuch as they serve as a starting point and anchor a judge's discretion. In light of Booker, federal sentences now are reviewed for procedural error: whether the guidelines are applied correctly; and substantive reasonableness: whether the ultimate sentence imposed constitutes an abuse of discretion even in the absence of procedural error. See Gall v. United States, 552 U.S. 38, 51 (2007).

With the above history in mind, we return to Sabillon-Umana. There, Judge Gorsuch made a very interesting and telling observation, albeit in dicta. In addressing, and ultimately rejecting, the backwards procedure the district court employed at sentencing — determining the guidelines offense level first, then backing into it with findings of fact — Judge Gorsuch stated: "We admit the proper order of operations we've outlined rests in part on a questionable foundation. It assumes that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation." Sabillon-Umana, 772 F.3d at 1331. Judge Gorsuch thus is explicitly calling into question the constitutionality of judicial fact-finding at sentencing.

In support of that observation, Judge Gorsuch cited to the dissent from a denial of certiorari by Justice Scalia, joined by Justices Clarence Thomas and Ruth Bader Ginsburg, in Jones v. United States, 135 S. Ct. 8 (2014). In Jones, three individuals had been charged with distribution and conspiracy to distribute crack cocaine. At trial, the jury acquitted all three on the conspiracy charge. According to the petitioners, based on their offenses of conviction — distribution — their advisory sentencing ranges under the guidelines were between 27 and 71 months respectively. The sentencing judge, however, found that the petitioners in fact had engaged in a conspiracy and sentenced them accordingly as permitted by Watts, which held consideration of even acquitted conduct permissible. As a result, "in light of the conspiracy finding, the court calculated much higher Guidelines ranges, and sentenced Jones, Thurston, and Ball to 180, 194, and 225 months' imprisonment" respectively. Jones, 135 S. Ct. at 8.

According to Justice Scalia:

> [A]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime ... and must be found by a jury, not a judge. We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge. For years, however, we have refrained from saying so. In Rita v. United States, we dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found

> fact, would be reversed for substantive unreasonableness. Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. This has gone on long enough.

Id. at 8-9.

Justice Scalia would have granted certiorari "to put an end to the unbroken string of cases disregarding the Sixth Amendment —or to eliminate Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." Id. at 9. With just one more vote, the case would have been heard.

Indeed, the court has yet to address the reach of the Sixth Amendment within the statutory outer limits in terms of its application to substantive reasonableness review. While the U.S. Sentencing Commission long has "believe[d]" that a judicial fact-finding by a mere preponderance of evidence without the strictures of the Federal Rules of Evidence suffices for due process, and the several courts of appeals have agreed, to date the court never has directly addressed whether a preponderance of the evidence evidentiary standard is constitutionally sufficient.[1] However, Justice Thomas in his dissent to the remedial holding in Booker, stated that he believed the constitutional holding "corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant." Booker, 532 U.S. at 319 (Thomas, J., dissenting).[2] Indeed, this is consistent with Justice Kennedy's dissent in Watts itself, where he opined that "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal." Watts, 519 U.S. at 170 (Kennedy, J., dissenting).

Thus, in the context of Sabillon-Umana, it is quite interesting (and telling) that Judge Gorsuch cites to Justice Scalia's dissent from certiorari in Jones, because, while dicta, Judge Gorsuch apparently recognizes that the constitutionality of judicial fact-finding at sentencing rests upon a very shaky foundation, a foundation that at least three justices were anxious to address in 2014. While Justice Scalia no longer is on the court, it is not unreasonable to believe a Justice Gorsuch could at least persuade his old mentor, Justice Kennedy (who dissented in Watts), to join with him and Justices Thomas and Ginsburg to achieve the requisite four votes to grant certiorari in order to finally decide whether the Sixth Amendment applies to substantive reasonableness review of sentences. After all, as Justice Scalia correctly foretold in his dissent to the remedial holding in Booker, "a discordant symphony of different standards, varying from court to court and judge to judge" has developed which in fact has resulted in, as he feared, "excessive sentencing disparities." Booker, 543 U.S. at 312 (Scalia, J., dissenting).

Conclusion

Should he be confirmed to the U.S. Supreme Court, Judge Gorsuch's opinion in Sabillon-Umana may well herald a paradigm shift in sentencing law, policy and practice. That one of his former bosses — Justice Kennedy — relied on it in authoring the unanimous opinion in Molina-Martinez, demonstrates just how influential and well respected Judge Gorsuch's legal acumen is on sentencing issues. The Sabillon-Umana opinion makes clear that the U.S. Sentencing Guidelines, even though merely advisory, still very much matter for purposes of sentencing, especially the manner of their application. Facts first, then sentence — a sentence that ultimately rests on the discretion of the judge even in the context of government motions for substantial assistance downward departures. Furthermore, as subsequently made clear by Molina-Martinez, unpreserved guidelines calculation errors generally will constitute plain error regardless of the ultimate sentence imposed.

But Judge Gorsuch also signaled in Sabillon-Umana a desire to go further, much further, than these procedural issues alone. Certain factors that disproportionately influence a sentence, e.g., loss, drug amount, or number of images, could be rendered beyond the purview of judicial fact-finding. As Justice Scalia emphasized in Jones, the court's silence in this regard has gone on far too long, which mistakenly has been taken by the courts of appeals as tacit assent that such protections do not apply at sentencing (except at the statutory outer bounds).

Judge Gorsuch indeed is correct, as was the late Justice Scalia, that federal sentencing law still rests on a shaky constitutional foundation urgently in need of addressing by the Supreme Court. The authors hope that should Judge Gorsuch be confirmed, he becomes instrumental in guiding the court to shore up this most fundamental area of federal sentencing law.

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[1] As one of the authors has urged, "Section 6A1.3 [of the U.S. Sentencing Guidelines] should be reevaluated to require higher standards of proof consistent with the Sixth Amendment analysis set forth in the Booker constitutional opinion." Mark H. Allenbaugh, Stop Wagging the Dog: A Plea for the New Commission to Incorporate Due Process and Higher Standards of Proof into the Sentencing Hearing, 23 Fed. Sent. R. 253, 253 (2011).

[2] Somewhat approaching this constitutional resolution, the Ninth Circuit has held that a higher evidentiary standard sometimes applies where a sentencing factor has a disproportional impact on the final sentence. See United States v. Jordan, 256 F.3d 922, 928 (9th Cir. 2001). The Third Circuit formerly held in United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990), that due process required certain sentencing factors with disproportional effects on a sentence to be found by clear and convincing evidence. However, that holding has since been overruled. See United States v. Fisher, 502 F.3d 293 (3rd Cir. 2007).

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