Sentencing May Change With 2 Kennedy Clerks On High Court

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Published by Law360 (July 26, 2018)

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Shortly before his confirmation just over a year ago, we wrote about what a now-Justice Neil Gorsuch **could mean for federal sentencing**.[1] In particular, we reviewed his Tenth Circuit opinion in United States v. Sabillon-Umana,[2] wherein then-Judge Gorsuch, a former clerk for now-retiring Justice Anthony Kennedy, questioned the constitutionality of judicial fact-finding at federal sentencing, as opposed to fact-finding by a jury. Known as "relevant conduct," judge-found facts — which often include uncharged and even acquitted conduct — drive federal sentencings, often increasing terms of imprisonment by years and even decades. As it turns out, another former Kennedy clerk, Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit — who recently was nominated by President Donald Trump to take the retiring justice's seat on the court — also shares Justice Gorsuch's concern. Accordingly, for the reasons discussed below, should Judge Kavanaugh be confirmed, we believe the "Kennedy clerks" will likely lead the court to finally rein in relevant conduct by holding unconstitutional the use of uncharged and acquitted conduct to enhance federal sentences.

When the U.S. Sentencing Commission first undertook the task of promulgating the sentencing guidelines, "[o]ne of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing)."[3]

It is beyond the scope of this article to review in detail the merits and impediments of these approaches to sentencing; suffice it to say that under a real offense (often referred to as "offense conduct or behavior") sentencing regime, the plethora of relevant variables and how to weigh them quickly becomes unwieldy, whereas under a charge offense sentencing regime, too much sentencing power resides with the prosecutor in terms of how to craft charging documents to limit the sentencing discretion of judges. Thus, according to former U.S. Sentencing Commissioner and then-Judge/now-Justice Stephen Breyer:

[t]he upshot is a need for compromise. A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise. It looks to the offense charged to secure the 'base offense level.' It then modifies that level in light of several 'real' aggravating or mitigating factors, (listed under each separate crime) several 'real' general adjustments ('role in the offense,' for example) and several 'real' characteristics of the offender, related to past record.[4]

Those "real" modifications to the base offense level, known as "specific offense characteristics," make up nearly all adjustments under the guidelines, and can have a considerable impact on the sentence

imposed. Consider loss, for example. The loss amount alone — which is not an element of any federal offense — can increase a first-time offender's sentencing range under the guidelines from a mere zero to six months to 210-262 months.[5] Such specific offense characteristics, moreover, are often based on relevant conduct, i.e., "all acts and omissions committed ... or willfully caused by the defendant" or that were otherwise "within the scope of [any] jointly undertaken criminal activity" that were "in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity."[6]

Unlike elements of an offense, which, unless admitted by the defendant, are determined at a trial by a unanimous jury of 12 under the very demanding beyond-a-reasonable-doubt standard circumscribed by the rules of evidence, relevant conduct, in stark contrast, is determined at sentencing by a single judge by a mere preponderance of the evidence (i.e., more likely than not) without any regard to the rules of evidence — indeed, otherwise inadmissible evidence often is considered by courts at sentencing. Relevant conduct has become the proverbial tail that wags the dog. This culminated in the rather controversial 1997 Supreme Court decision United States v. Watts,[7] which held that courts may consider as relevant conduct uncharged and even acquitted conduct for purposes of enhancing a defendant's sentencing.

As Judge Kavanaugh observed not too long ago:

Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?[8]

In Bell, the defendant was indicted "for a 'mélange' of crimes, including conspiracy and crack distribution. Bell exercised his constitutional right to a trial by jury on those charges, and the jury acquitted Bell of ten of the thirteen charges against him, including all narcotics and racketeering conspiracy charges. The jury [thus] convicted Bell of only three crack cocaine distribution charges that together added up to just 5 grams."[9] Accordingly, based on the jury-found facts, Bell's sentencing range was only 51 to 63 months.[10] At sentencing, however, "the district court found that Bell had engaged in the very cocaine conspiracy of which the jury had acquitted him, and sentenced Bell to 192 months in prison — a sentence that was over 300% above the top of the Guidelines range for the crimes of which he was actually convicted."[11]

Both Judge Kavanaugh and Judge Patricia Millett concurred in the denial of rehearing en banc due to binding precedent. As Judge Kavanaugh observed, however, "[g]iven the Supreme Court's case law, it likely will take some combination of Congress and the Sentencing Commission to systematically change federal sentencing to preclude use of acquitted or uncharged conduct."[12] Judge Millett thus urged "the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation."[13]

Quite tellingly, Judge Kavanaugh reminded district court judges that the "Guidelines are only advisory, as the Supreme Court has emphasized. So district judges may then vary the sentence downward to avoid basing any part of the ultimate sentence on acquitted or uncharged conduct. In other words, individual district judges possess the authority to address the concern articulated by Judge Millett. In my view,

district judges would do well to heed Judge Millett's concern in appropriate cases."[14]

This has been a consistent position of Judge Kavanaugh's, for as he also wrote in a concurrence over 10 years ago:

The bottom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases. ... [M]any key facts used to calculate the sentence are still being determined by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. The oddity of all this is perhaps best highlighted by the fact that courts are still using acquitted conduct to increase sentences beyond what the defendant otherwise could have received - notwithstanding that five Justices in the Booker constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a *jury beyond a reasonable doubt*.[15]

Thus, according to Judge Kavanaugh, in light of "the real-elements-of-the-offense approach ... current federal sentencing practices may be in tension with the Constitution. That is because ... certain facts used to increase a sentence (beyond what the defendant would have received based on the offense of conviction) are found by the judge, not by the jury beyond a reasonable doubt."[16]

In questioning the constitutionality of relevant conduct in Sabillon-Umana, then-Judge Gorsuch cited to the late Justice Antonin Scalia's dissent from the denial of certiorari in Jones v. United States,[17] wherein Justice Scalia, joined by Justices Clarence Thomas and Ruth Bader Ginsburg,[18] stated that "any 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. ... For years, however, we have refrained from saying so. ... [T]he 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."[19] Notably, Judge Millett also quoted this same passage from Jones in her concurrence in Bell,[20] which Judge Kavanaugh described as "thoughtful," "cogent[]," and who "share[d] Judge Millett's overarching concern about the use of acquitted conduct at sentencing."[21]

Conclusion

Should Judge Kavanaugh be confirmed, we believe it quite likely that, based on his prior jurisprudence, the current manner in which relevant conduct or at least acquitted conduct is used to enhance sentences will soon be determined to be unconstitutional. Fifteen years ago, in an address to the American Bar Association, Justice Kennedy stated:

In the federal system the sentencing guidelines are responsible in part for the increase in prison terms. In my view the guidelines were, and are, necessary. Before they were in place, a wide disparity existed among the sentences given by different judges, and even among sentences given by a single judge. As my colleague Justice Breyer has pointed out, however, the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.[22]

It thus is not surprising, and quite telling, that Justice Kennedy dissented in Watts.[23] That key compromise Justice Kennedy urged to be revisited was, of course, relevant conduct. With two of Justice Kennedy's former clerks likely to soon be together on the Supreme Court bench who both have also

criticized the compromise, and in light of the court's recent and near-unanimous decision in Nelson v. Colorado[24] — which we elsewhere have argued effectively overrules Watts[25] — the era of "'require[ing] individuals to linger longer in federal prison than the law demands'"[26] may soon be over.

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[1] See Alan Ellis & Mark H. Allenbaugh, "Gorsuch May Bring Needed Changes to Federal Sentencing," Law360, Mar. 3, 2017, available at https://www.law360.com/articles/897467/gorsuch-may-bring-needed-changes-to-federal-sentencing.

[2] 772 F.3d 1328 (10th Cir. 2014).

[3] U.S. Sentencing Guidelines, Ch.1, Pt.A(1)(4)(a) ("USSG").

[4] Hon. Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 12 (1988).

[5] See USSG §2B1.1(b)(1)("Loss Table").

[6] USSG §1B1.3.

[7] 519 U.S. 148 (1997) (per curiam).

[8] United States v. Bell, 803 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[9] Id. at 929 (Millett, J., concurring in denial of rehearing en banc) (internal quotation marks and citations omitted).

[10] See id.

[11] Id.

[12] Id. at 928.

[13] Id. at 929.

[14] Id. at 928.

[15] United States v. Henry, 472 F.3d 910, 919-920 (D.C. Cir. 2007) (Kavanaugh, J., concurring; emphasis in original).

[16] Id. at 922 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

[17] 135 S. Ct. 8 (2014).

[18] While not joining in the dissent from denial of certiorari in Jones, Justice Sotomayor also is on record as having concern over the use of at least acquitted conduct at sentencing. When she was a Second Circuit judge, she wrote for the panel in United States v. Vaughn:

[W]hile district courts may take into account acquitted conduct in calculating a defendant's Guidelines range, they are not required to do so. Rather, district courts should consider the jury's acquittal when assessing the weight and quality of the evidence presented by the prosecution and determining a reasonable sentence. See [United States v.] Cordoba-Murgas, 233 F.3d [704,] 708 [(2d Cir. 2000)] (acknowledging that enhancements based on relevant conduct may be excessive when imposed "without regard to the weight of the evidence proving the relevant conduct") (citation omitted); United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996) (holding that, for sentencing purposes, "the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered") (emphasis in original).

United States v. Vaughn, 430 F.3d 518, 527 (2d Cir. 2005).

[19] Id. at 8-9.

[20] See id., 808 F.3d at 929.

[21] Id. at 927, 928.

[22] Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) available at https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

[23] See Watts, 519 U.S. at 170 (Kennedy, J., dissenting).

[24] 137 S. Ct. 1249 (2017).

[25] See Alan Ellis, Mark H. Allenbaugh & Doug Passon, Does an Acquittal Matter at Sentencing? Reining in Relevant Conduct Through a Recent Restitution Ruling, 102 Crim. L. Reporter 366 (Jan. 17, 2018) (arguing that the rationale of Nelson v. Colorado, 137 S. Ct. 1249 (2017) effectively overrules Watts).

[26] Rosales-Mirales v. United States, 201 L. Ed. 2d 376, 388 (U.S. June 18, 2018) (quoting Sabillon-Umana, 772 F.3d at 1333-34 (Gorsuch, J.)).