Standards of Proof at Sentencing

BY ALAN ELLIS AND MARK H. ALLENBAUGH

As post-*Booker* federal sentencing jurisprudence continues its tumultuous ride, it is developing into a smarter discretionary sentencing system. Although recent discourse has focused on the advisory nature of the U.S. Sentencing Guidelines, 18 U.S.C. § 3553(a) factors, and "reasonableness review," counsel should not neglect to address the standards of proof required at sentencing when calculating the now advisory but still, to most judges, important guidelines.

We have been arguing that *if* the guidelines are followed by a district court at sentencing, then any facts found that increase the guideline sentence must be proved by the government beyond a reasonable doubt. Merely because a district court has a choice whether to follow the guidelines is a separate issue with respect to their procedural application. If a district court fails to use the beyond a reasonable doubt standard, it has miscalculated the guidelines resulting in legal, reversible error and a remand for resentencing under this higher and arguably constitutionally required standard of proof.

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While courts have continued to assume that a preponderance of the evidence is a sufficient evidentiary standard post-*Booker*, *see, e.g., United States v. Fisher*, 502 F.3d 293 (3d Cir. 2007), *United States v. Villareal-Amarillas*, 562 F.3d 892 (8th Cir. 2009) or even clear and convincing evidence, *see United States v. Staten*, 466 F.3d 708 (9th Cir. 2006) (higher standard required where sentencing factor has an extremely disproportionate effect on ultimate sentence), that is not necessarily correct despite the fact that the guidelines are no longer mandatory.

It is important to remember that the whole business about preponderance of the evidence sufficing for purposes of applying the guidelines is entirely a creation of the U.S. Sentencing Commission, and not of common law. Mere commentary to a policy statement at U.S.S.G. § 6A1.3 sets forth that "[t]he Commission believes that use of a *preponderance of the evidence standard is appropriate to meet due process* requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." (Emphasis added.)

As Justice Thomas noted in his partial concurrence (to the constitutional opinion) and dissent (to the remedial opinion) in *Booker*, there is also a due process component to the Court's constitutional opinion, "[t]he Court's holding today corrects [the Commission's] mistaken belief [that a preponderance of the evidence standard is appropriate to meet due process requirements]. *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*, 543 U.S. at 319 n.6 (Thomas, J., concurrence in part, dissent in part) (emphasis added).)

In fact, the commentary at U.S.S.G. § 6A1.3 was not even part of the original 1987 guidelines but only was promulgated much later in 1991. (*See* U.S.S.G. App. C., amend. 387.) The commission itself apparently was indecisive as to whether even to include such a standard let alone whether a preponderance of the evidence com-

ported with the Fifth Amendment. In perhaps the seminal law review article on the foundation of the guidelines, the commission's first chairman, former Fourth Circuit Court of Appeals Chief Judge William W. Wilkins, Jr., and former general counsel (and later vice chair of the commission), John R. Steer, noted in *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, (41 S.C.L. REV. 495 (1990)), that "[n]either the Sentencing Reform Act nor the Guidelines Manual explicitly address these issues [of evidentiary standards]." (*Id.* at 518.) Relying on now-overruled authority, they wrote that "[p]re-guidelines pronouncements by the United States Supreme Court and other courts indicate that a preponderance of the evidence standard comports with fifth amendment due process requirements when sentencing factors, including those within the ambit of Relevant Conduct, are contested." (*Id.* at 518-19 (footnotes omitted).) Again, as Justice Thomas recognized, this reasoning no longer is constitutional.

Indeed, several courts across the country have recognized the inconsistency between still applying evidentiary standards below beyond a reasonable doubt and *Booker*'s constitutional opinion.

> [T]he bottom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases. And notwithstanding the *Booker* constitutional opinion, many 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*. In short, we appear to be back almost where we were pre-*Booker*.

(United States v. Henry, 472 F.3d 910, 920-21 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (emphasis in original).)

As Judge Gertner, a prolific commentator on federal sentencing in both her published opinions and her enormous amount of academic scholarship has perhaps best articulated the conundrum:

> We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then *Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt*.

(United States v. Pimental, 367 F. Supp. 2d 143, 154 (D. Mass. 2005) (emphasis added).)

So, in light of the above, counsel is well advised to always address the issue of proof during sentencing. Even if the sentencing judge decides to vary from the guidelines, case law remains clear that the guidelines *must* first be correctly calculated regardless of their advisory nature. We believe that post-*Booker* a correct guidelines calculation requires the government to prove sentencing factors beyond a reasonable doubt, and that in the alternative, those factors that have an extremely disproportionate effect on the guidelines sentence should be found at least by clear and convincing evidence.

Finally, and perhaps most importantly, the above arguments hold true even in cases involving plea agreements.

> When a defendant pleads guilty, he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). *A waiver of the right to a trial by a jury, however, does not equate to a waiver of the right to have the government prove its case beyond a reasonable doubt*. See *id.* (stating that pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury with no mention of the burden of proof).

(United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005) (emphasis added).) ■