UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	*	
	*	
v.	*	
	*	Criminal Action No. 13-30028-MGM
JOSEPH BUFFIS,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER REGARDING GOVERNMENT'S MOTION FOR HEARING AND TO SENTENCE DEFENDANT BASED UPON TOTALITY OF HIS MISCONDUCT
(Dkt. Nos. 248 and 251)

April 20, 2016

MASTROIANNI, U.S.D.J.

The government has filed a motion requesting the court sentence the defendant based on the totality of his misconduct. Specifically, the government is requesting the court sentence the defendant based on charged conduct for which he was acquitted by the jury, several incidents of uncharged behavior, and conduct initially charged but dismissed before trial. The superseding indictment against the defendant charged twelve counts; defendant was convicted of the first count, the twelfth was dismissed, and defendant was acquitted of counts two through eleven. The general nature of the Government's case against the defendant involves his extortion and theft of funds, while in his role as Chief of Police for the Town of Lee. The defendant was also charged with money laundering relative to his extortion and other allegedly stolen monies. The defendant oversaw a toy fund that existed within the police department. He was convicted of extorting money by

promising not to criminally prosecute an individual, provided the individual make a substantial donation to the toy fund. The government alleged the defendant used the toy fund money to pay personal and family expenses. He was acquitted of money laundering related to both the specific extorted donation and other money. Other conduct the government asserts is relevant was uncharged and included two claimed embezzlements, one involving the Lee Police Association and one related to the fundraising efforts of a Lee church. Finally, the government wants the court to consider at sentencing the allegedly fraudulent payments made by the Town of Lee for cell phones used by members of defendant's family. The government advocates for legally appropriate sentencing considerations to affect the defendant's sentence on the one convicted charge. The government's motive, however, is to sentence the defendant based generally on its belief, after a largely unsuccessful prosecution, that the defendant is a "longtime thief and a brazen liar." (Dkt. No. 248, Gov's Mot. Sentence at 1.)

A. Acquitted Conduct

The government's position is that all circuits have allowed district courts to consider acquitted conduct as part of the sentencing process. The First Circuit has recognized that, pre- and post-*Booker*, acquitted conduct can be the basis of a sentencing enhancement if proven by the lower preponderance of the evidence standard.[1] *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006).

Such broad recognition of a sentencing court's authority to consider acquitted conduct comes from the holding in *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam). The decision of the Supreme Court in *Watts* leaves it to the discretion of the district judge to make a considered

[1] The Ninth Circuit allows for a clear and convincing standard of proof analysis relative to acquitted conduct that has an extremely disproportionate effect on a sentence. *United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006). The government does not address the defendant's guideline range. The defendant makes a concededly rough general calculation of 27-33 months before considering relevant conduct and 87-108 after such consideration.

and conscientious decision about an exercise of authority that profoundly implicates a historically fundamental principle of our criminal justice system. A core principle of criminal justice, from both a technical and common-sense perspective, is that punishment will be imposed based on the finding of guilt by a jury. The wisdom of interpreting *Watts*, under Sixth Amendment scrutiny, as even creating an available option for considering acquitted conduct at sentencing has been often questioned. *Id.* at 170 (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence."); *id.* at 170-71 (Kennedy, J., dissenting) (noting the Court's ruling "does raise concerns about undercutting the verdict of acquittal."); *see also United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) ("*Watts,* in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases.").

Before *Booker,* the Court held in *Apprendi v. New Jersey*, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Continuing under a Sixth Amendment analysis, in *Blakely v. Washington*, the Court held the strict adherence to sentencing parameters, as set by the jury verdict, is not limited only to sentences exceeding the statutory maximum. 542 U.S. 296, 303-04 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (emphasis in original)). The Court further found, with reference to the intent of the 'Framers,' "the judge's authority to sentence derives wholly from the jury's verdict" *Id.* at 306. *Booker* built on the *Apprendi-Blakely* foundation by extending to guideline calculations the Sixth Amendment jury verdict limitation at sentencing. More currently, in *Alleyne v.*

United States, the court continued an adherence to the Sixth Amendment implication in the context of a judicial finding at sentencing which exposes a defendant to a punishment exceeding the mandatory minimum for the offense. 133 S.Ct. 2151 (2013). Such a finding of fact must "be submitted to the jury and found beyond a reasonable doubt" *Id.* at 2163.

The issue regarding acquitted conduct being used at sentencing and the impact that has on defendants' Sixth Amendment rights is not going away as noted by Justice Scalia in a 2014 dissent from the denial of a petition for writ of certiorari.

> [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. . . .
>
> We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.

Jones v. United States, 135 S.Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, J.J., dissenting from the denial of certiorari) (citations omitted; emphasis in original); *see also Cunningham v. California*, 549 U.S. 270, 290 (2007); *Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment).

Again, in *Siegelman v. United States*, the Supreme Court denied a petition for writ of certiorari in a case raising this issue, despite an amicus brief filed by 116 former State Attorneys General. 136 S.Ct. 798 (2016). The amici urged that Sixth Amendment guarantees are "denigrated" by the use of acquitted conduct at sentencing. Brief of Former Attorneys General as Amici Curiae in Support of Petitioner, *Siegelman v. United States*, 136 S.Ct. 798 (No. 15-353), 2015 WL 6445856, at *1. District and circuit court judges have also provided thoughtful commentary over the years, voicing concern over this issue. *See, e.g.*, *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008); *United States v.*

Baylor, 97 F.3d 542, 549-53 (D.C. Cir. 1996) (Wald, J., concurring specially); *United States v. Grier*, 475 F.3d 556, 604-621 (3d Cir. 2007) (McKee, J., joined by Sloviter, J., dissenting); *United States v. Pimental*, 367 F. Supp. 2d 143, 149-53 (D. Mass. 2005); *United States v. Ibanga*, 454 F. Supp. 2d 532, 535-43 (E.D. Va. 2006), *vacated*, 271 F. App'x 298 (2008).

The commentary in *Pimental* addresses the evolving consideration given to acquitted conduct in the wake of *Watts* and *Booker* and in the context of changes from mandatory to advisory guideline sentencing. *Pimental*, 367 F. Supp. 2d at 150-53. Now, eleven years after *Pimental*, there has been further development of analytical considerations on this topic which only sharpen the points raised in that case. That is, "[t]o consider acquitted conduct trivializes 'legal guilt' or 'legal innocence'—which is what the jury decides." *Id.* at 152. In *Watts*, the Court explained that consideration of acquitted conduct is not punishment for that conduct, noting the acquittal did not technically prove innocence, but, rather, is the causal increase of sentence based on the manner of commission of the crime convicted. *Watts*, 519 U.S. at 154-55. Established law under *Watts* allows a judge to decline to consider acquitted conduct at sentencing. This court has difficulty reconciling *Watts* with the burden of proof and presumption of innocence standards, which align an acquittal more naturally with factual innocence than with a guileful avoidance of justice deserving of a penalty. This court, therefore, declines to consider acquitted conduct in this case based on the implication of Sixth Amendment guarantees.

Additionally, under the facts here, I am not satisfied the acquitted conduct has useful relevance to the consideration of the manner in which the defendant committed the crime for which he was convicted. This relevance of the crimes to the manner of commission is the connection

emphasized by the court in *Watt*s. 519 U.S. at 154-55. In this case the jury, by special verdict form, indicated the manner it found the defendant to have committed a single act of extortion.[2]

Based on the jury's verdict form, the court knows the manner of commission found by the jury for the only convicted charge. None of the acquitted charges speak to the manner of commission of the extortion. Rather, the acquitted conduct would describe a motive and pattern of scheming and dishonesty to accomplish theft generally. This is unlike relying on acquitted conduct at sentencing to find that a firearm was possessed at the time of a drug crime and connected to its commission. *See Watts*, 519 U.S. at 154-55; *Gobi*, 471 F.3d at 313-14. Nor is this a situation like that of a drug case where acquitted conduct could be relevant to the manner of commission by showing the total weight of drugs involved. *United States v. Putra*, 78 F.3d 1386, 1388-89 (9th Cir. 1996), *reversed by* 117 S. Ct. 633 (1997).

In this case the acquitted conduct was all alleged to have occurred after or before the convicted extortion conduct. Both by date and nature of alleged criminal acts, the acquitted conduct does nothing to inform the manner of commission of the single count of extortion. In a very general sense the acquitted conduct provides information of character and overall scheming behavior which could theoretically be urged for consideration pursuant to 18 U.S.C. § 3661 and U.S.S.G. § 1B1.4. However, under the circumstances of this conduct being rejected by a jury and its having insufficient connection to the manner of the extortions commission, it will not be considered here.

B. Uncharged Conduct

Under 18 U.S.C. § 3661, sentencing judges have wide latitude to consider "background, character and conduct" of a person to be sentenced. That consideration, however, must be relevant

[2] The jury was given the option of checking a box for all theories of conviction. Given the option of choosing all theories applicable, the jury chose extortion under official right and not extortion through use of fear.

to what would be an "appropriate sentence" for the crime of conviction. *Id.* Similarly, U.S.S.G. § 1B1.4 allows consideration of such conduct-type evidence in the guidelines calculation for a convicted offense. The standard accepted by courts has been that proof of the underlying conduct must be by a preponderance standard. *Watts*, 519 U.S. at 157; *Gobbi*, 471 F.3d at 314; U.S.S.G. 6A1.3, comment.

While the uncharged conduct cited by the government does not raise the precise same issues as considering acquitted conduct, there remain fundamental fairness concerns. An increase in a defendant's sentence hanging in the balance by a preponderance of the evidence standard seems to strike against the *Apprendi*, *Blakely*, *Booker*, and *Alleyne* developments as noted previously herein. However, from a historical perspective, before guidelines applied at all, judges had discretion to consider and weigh sentencing factors as they found applicable under the circumstances; such broad discretion ultimately was viewed by some as raising its own problems.

In this case, the government raises three categories of conduct to consider in guideline calculation and sentencing:

(1) iPhone fraud;

(2) Church embezzlement; and

(3) Lee Police Association embezzlement.

As to the iPhone fraud, it is alleged the defendant deceitfully designed a way for the Town to pay for cell phones used by his family. Relative to the church embezzlement, it is alleged the defendant stole fundraising proceeds from church functions for his own use. For each of these forms of conduct, the defendant, in theory, could have been charged criminally. The iPhone fraud and church embezzlement have only a tenuous connection to the one count for which the defendant was convicted. That connection, as the government pointed out, is that it believes he is a "longtime thief and brazen liar." (Gov's Mot. Sentence at 1.) Neither of these two forms of conduct

involved the toy fund at issue in the crime of conviction, and involvement in his police capacity was not uniquely similar to the convicted behavior. The use of these incidents at sentencing would be less about considering an "appropriate" sentence for the convicted crime under 18 U.S.C. § 3661 and more about the government seeking retribution for its trial losses. Accordingly, the iPhone fraud and church embezzlement incidents will not be considered at sentencing or in the guideline calculation.

The defendant's conduct involving the Lee Police Association is connected in a more substantial way to the crime of conviction. This uncharged conduct was allowed to be introduced by the government at trial after satisfying Rule 404(b) considerations. This conduct related to the Lee Police Association involved, at least to some extent, the toy fund and the defendant's diversion of Police Association collected funds for his personal use. This uncharged conduct, which has been demonstrated to this court beyond a reasonable doubt, is appropriate under 18 U.S.C. § 3661 for consideration at sentencing. Similarly, the Lee Police Association conduct may be factored into calculation of the advisory guideline range. The court is sensitive to the *Apprendi*, *Blakely*, *Booker*, *Alleyne* issues and realizes that consideration of the Lee Police Association conduct involves judicial fact finding with the potential for increased penalty that extends beyond the jury's verdict.

However, the guidelines are advisory only and 18 U.S.C. § 3661 rightly allows the sentencing judge to consider information about a person which is appropriate relative to imposing a sentence for the crime of conviction. At sentencing, the court, to the best of its ability, will attempt to balance fairness to both sides while adhering to constitutional protections.

It is So Ordered.

_/s/ Mark G. Mastroianni_____

MARK G. MASTROIANNI

United States District Judge