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Watts: The Decline of the Jury

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It is no secret that we have serious problems with our trial system in the United States. To say simply that public respect for the system is low is putting it somewhat euphemistically. It is probably more accurate to say that the public views our trial system with disrespect and cynicism.

Part of the problem is that, as our system has evolved, we have left largely undecided what are to be the priorities at trial. In defending rules which are not primarily concerned with uncovering the truth, we like to say that "truth is only one of the goals of our trial system." But we are wonderfully vague about what the other goals are, or where truth ranks compared to the trial system's other priorities. The result is a system that leaves uncertain what trials are supposed to do, and a system that will do almost anything to avoid trial, including accepting plea bargains that other western criminal justice systems would not touch.[1] One extreme example is the system's willingness to accept what are known as *Alford* pleas, after the Supreme Court case upholding them,[2] in which a defendant is permitted to plead guilty and receive a lengthy sentence while nevertheless insisting that he is innocent of the crime in question.

Many of the problems with our trial system were driven home to me in the Supreme Court's joint decision of the cases of *United States v. Watts* and *United States v. Putra*, handed down on January 6 of this year. Vernon Watts was a dealer in cocaine base (referred to more commonly as "crack") whose house was lawfully searched by the police. In the course of the search the police found more than 500 grams of crack in a kitchen cabinet and also found two loaded guns and ammunition hidden in a bedroom closet. Watts was charged in federal court with possessing cocaine base with the intent to distribute and with using a firearm in connection with a drug offense. The jury convicted Watts of the drug charge, but acquitted him of the gun charge.

But Watts' problems with the gun charge were not over, despite the acquittal. The trial judge at sentencing concluded that Watts had possessed the guns in connection with the drug offense and thus decided to increase the range under which Watts was to be sentenced. Under the strictures of the sentencing guideline system that exists in federal courts, the judge's finding that Watts had possessed a firearm in connection with the drug offense had the effect of raising Watts' sentence rather substantially: he received an additional four years of imprisonment.

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In the companion case, Cheryl Putra suffered the same fate as Watts. Although she was convicted of one count of selling cocaine and acquitted of a second count of selling cocaine the next day (both sales having been videotaped), the sentencing judge concluded that Putra had committed both crimes, thereby increasing the sentencing range. In her case, the effect was not as severe as it was for Watts: the minimum sentence in the range was lifted from 15 months to 27 months (which she received).

On appeal, the Ninth Circuit ruled that the sentences imposed on Watts and Putra were illegal because, according to the court, an acquittal by the jury forecloses any increase in sentence based on the same conduct. To permit otherwise, the court felt, would effectively punish the defendant for conduct that the jury had explicitly rejected as a basis of punishment.

The Supreme Court reversed the Ninth Circuit's ruling. In upholding what the trial judges had done, the Court took a very technical approach to the issue before it. The Court reasoned that the increased sentence was permissible because the jury had to find the defendant guilty of the gun charge beyond a reasonable doubt, while the standard of proof at sentencing is not as high. A judge, the Supreme Court continued, need only find facts that support an increase in the defendant's sentencing range by a preponderance of the evidence. Thus, the Court concluded, there is no inconsistency in the fact that a judge increases a defendant's sentence on the basis of the same conduct for which the jury has acquitted the defendant.

The issue decided in *Watts* and *Putra* has tremendous importance in our federal system because federal judges under the sentencing guidelines are *required* to take "relevant conduct" into account in sentencing whether or not such conduct involves an acquittal, uncharged conduct, or charges that were dropped (such as might occur in a plea bargain). In other words, federal judges are instructed to sentence for what they determine are the "real offenses" committed by the defendant and not simply the "conviction offenses." Many judges in state courts would be reluctant to do openly what the federal judges did in *Watts* and *Putra*, but federal judges under the guidelines have no option. And now the Supreme Court has held that there is no constitutional bar to sentencing a defendant expressly on the basis of criminal conduct for which the defendant was acquitted.

What is most startling about the Supreme Court opinion is that the Court viewed the sentencing issue before it as easy. The Court decided the case in a 7 - 2 *per curiam* opinion without even requiring full briefing or hearing oral argument. The Court apparently took the case in order to correct what it viewed as a clear aberration among federal appellate

courts in the Ninth Circuit's holding that "acquitted" conduct could not provide the basis for enhancing a sentence. And yet this issue is hardly beyond dispute—though the Ninth Circuit was alone in its holding, a number of thoughtful dissenting opinions from other circuits have argued that reading the guidelines to permit increased punishment on the basis of acquitted conduct is wrong and unjust.[3]

The sterility and formalism of the Court's reasoning reveals a great deal about the problems that exist in our trial system. Because we cannot resolve the purpose of a trial or, perhaps more accurately, because trials are supposed to achieve many purposes, it becomes very difficult to know what an acquittal is supposed to mean. In this case, the Court assumed in its opinion that the jury had dutifully measured the evidence against the standard of proof and found that the government's proof on the gun charge was a bit short of proof beyond a reasonable doubt. But at other times the Court has acknowledged and even seemed to value a jury's ability to look past the law and to reach a verdict that is "just" despite facts and instructions that would have required a more severe result. As the Supreme Court put it in *Duncan v. Louisiana*, the case which originally held that jury trials are required in every felony prosecution, when judges disagree with the results reached by juries, "it is usually because [juries] are serving some of the very purposes for which they were created and for which they are now employed."[4]

Considering the jury's role from such a broader perspective raises a host of questions about the true nature of the verdicts in *Watts* and *Putra*. Isn't it possible that the juries in those cases acquitted Watts of the gun charge and acquitted Putra of a second drug sale because they decided that our drug penalties are very high and they did not want to add more prison time to what they knew would be substantial prison sentences even for a single conviction? (It is perhaps worth noting that even without the gun possession charge, Watts, who was definitely no angel, would have received a sentence of 18 years in prison; with it, he received nearly 22 years.)

Or perhaps, in the case of Watts, the jury intended to send a different message in its verdict, namely that it did not approve of the way our federal drug laws single out cocaine in the form of crack for extremely harsh sentences compared to the treatment of similar amounts of powder cocaine. The tremendous disparities in the federal system between the sentences received by black drug dealers and white drug dealers due to the disparate consideration of crack and cocaine have been much discussed in the press—especially since the Sentencing Commission took the unusual step of asking Congress to lower the statutory penalties on crack cocaine because of those disparities. Congress, however, overwhelmingly refused to change the law.

Given the real possibility that the jury acquittals in these cases represented more than a simple determination of the weight of the evidence, does it not amount to a rejection of the jury function to allow (or even require) a sentencing calculation which takes no heed of these acquittals? Even assuming that the juries in both cases reached their verdicts as the Supreme Court assumed they did—by a straightforward application of the law to the evidence—does it not show some disrespect for our jury system to permit (let alone require) a trial judge to punish a defendant for conduct that the jury decided was not sufficient to support the stigma of a conviction in the first place?

That the decision in *Watts* and *Putra* seemed easy and straightforward to the Supreme Court when it seems to be so disrespectful of jury verdicts is very troubling. For it was the Supreme Court that first committed our criminal justice system to jury trials far more strongly than any other western country through its use in the *Duncan* opinion of soaring rhetoric about the jury as an "inestimable safeguard against the . . . overzealous prosecutor and against the compliant . . . judge."[5] The Supreme Court has established that jury trials are constitutionally required in any criminal case in which a sentence of more than six months in jail is theoretically possible, even if the judge and the prosecutor were to agree before trial that not one day of incarceration would be imposed in the event of a conviction.[6] (The resulting burden on the system creates courts in urban areas that more closely resemble third world bazaars than courts of justice.) Yet when the system does put a case to a jury and the jury acquits on one of the charges, this same Court now allows an increased sentence based on the acquitted conduct without considering the possibility that the disagreement occurred because the jury was serving "some of the very purposes for which [juries] were created and for which they are now employed."[7]

Back in 1975, Marvin Frankel, then a federal judge, complained in a provocative essay that our trial system did not value truth as highly as it should.[8] I think that what he said then is even more true today. Lots of lawyers and judges have grown cynical about our trial system. The metaphor that calls a jury trial a "crapshoot" and the outcome to be little more than a "roll of the dice" is commonly used when lawyers and judges speak about the system. With this background, that the Supreme Court would profess deep respect for juries on the one hand and then issue an opinion that sees little of significance in a jury acquittal is simply another reflection of the system's cynicism about juries and trial verdicts. But, of course, it is this same Supreme Court that created so much of our modern trial system and its adherence to the elaborate jury trial system through decisions that now actually stand in the way of

reforms that might make the system more efficient and more reliable.

Today our federal system accepts that there is such a sizable gap between "conviction offenses"—those for which a defendant is convicted—and "real offenses"—those which were actually committed by the defendant—that judges must sentence based on the latter. Lots of other trial systems would be concerned about the gap and would work hard to close it. *Watts* and *Putra* seem to move us in the opposite direction. A trial system that undervalues truth slips easily into thinking about verdicts in this way.

NOTES

[1] *See* William Pizzi, *Accepting guilty pleas from "innocent" defendants*, 146 NEW L.J. 997 (1996).

[2] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

[3] *See, e.g., United States v. Silverman*, 976 F.2d 1502, 1519, 1527 (6th Cir. 1992) (Merritt, C. J., dissenting); *id.*, at 1533 (Martin, J., dissenting); *United States v. Concepcion*, 983 F.2d 369, 395, 396 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing en banc) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); *United States v. Galloway*, 976 F.2d 414, 436 (8th Cir. 1992) (Bright, J., dissenting, joined by Arnold, C. J., Lay, J., and McMillian, J.). *See also United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him.").

[4] *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).

[5] *See id.* at 156.

[6] *See Baldwin v. New York*, 399 U.S. 117 (1970).

[7] *Duncan*, 391 U.S. at 156.

[8] *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1038 (1975).