Statement for Congressional Record

William R. Underwood
Constitutional Argument: Where is the Rule of Law under the Bill of Rights?

From the moment of my trial and throughout my thirty-three years of incarceration, I continuously made the following constitutional arguments. These arguments were based on the objections I made under the 6th Amendment right to have a jury decide all elements of the offense, but I never received the opportunity to exercise the constitutional objections that I preserved that is now Alleyne vs. United States, 570 U.S. 99 (2013). Nonetheless, I continued to maintain hope, despite the hopelessness of my life without parole sentence and transformed my life while in prison. I devoted my time and energy to studying the law in the law library, being a present and focused father to my children and grandchildren and mentored the young men I encountered throughout my years in federal prison. My devotion to transformation resonated with my children and my eldest daughter, Ebony Underwood, became an advocate for criminal justice reform. In 2017, she founded, WE GOT US NOW, a national nonprofit advocacy organization built by, led by and about children and young adults impacted by parental incarceration. On January 15, 2021, I received a compassionate release from federal prison and less than six months into my freedom I now have the opportunity to present to the United States Congress the story of my constitutional challenge and the profound impact that my daughter's organization has championed throughout these United States.

In 1989-90, during trial, I made a Sixth Amendment challenge to the application of the Federal Sentencing Guidelines to my case. I stated that it was for the jury to determine whether my conduct continued past the effective date of the Sentencing Guidelines. "The issue was squarely raised in the district court at a hearing in February 1990." "[T]he judge explicitly addressed the question and determined …." The Court of Appeals upholding Cederabaum's ruling stated: "That finding is not clearly erroneous, and we therefore accept it. See 18 U.S.C. S 3742(e)." U.S. v. Underwood, 932 F.2d 1049, 1053-1055 (2nd Cir. 1991).

We now know, under the requirements of the Sixth Amendment, the Second Circuit's ruling in U.S. v. Underwood, 932 F.2d at 1053, that: "McMillan v. Pennsylvania, 477 U.S. 79 (1986), is dispositive of Underwood's claim." Underwood I. And, that the Second Circuit's ruling in Underwood v. U.S., 15 F.3d 16, 19 (2nd Cir. 1993), that: "As we held in Underwood I, the Supreme Court's decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), is dispositive here." Underwood II. Those decisions which determined the mandatory minimum of life with no parole for Underwood, were wrongly decided. McMillan v. Pennsylvania, 477 U.S. 79 (1986), was overruled in Alleyne v. United States, 570 U.S. 99 (2013). As "inconsistent…with the original meaning of the Sixth Amendment." 570 U.S. at 103.

The definition of **dispositive:** "Being a deciding factor; (of a fact or factor) bringing about a final determination." **Black's Law Dictionary, Bryan A. Garner, Tenth Edition, p. 572 (2014).**

We now know, under the requirements of the Sixth Amendment, Underwood should have been given the opportunity to have a jury determine beyond a reasonable doubt, whether his offense conduct continued past November 1, 1987, the effective date of the mandatory sentencing Guidelines, in order to sentence him to a mandatory minimum life sentence.

We now know, "Justice Sotomayor, with whom Justice Ginsburg and Justice Kagan join, concurring, [stated]. 'I join the opinion of the Court, which persuasively explains why Harris v. United States, 536 U.S. 545 (2002), and McMillan v. Pennsylvania, 477 U.S. 79 (1986), were wrongly decided. Under the reasoning of our decision in Apprendi, …, and the original meaning of the Sixth Amendment, facts that increase the statutory minimum sentence (no less than facts that increase the statutory maximum sentence) are elements of the offense that must be found by a jury and proved beyond a reasonable doubt.' " Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J.) (Concurring at 1).

Ergo, under the requirement of the Sixth Amendment, when Judge Cedarbaum, stated that she was sentencing Underwood under the old law version of S 848(a), the 10-year minimum up to life sentence maximum. But, she then sentenced Underwood to a mandatory minimum life sentence under the Guidelines. She committed a fundamental sentencing error.

The Supreme Court over the ages, has continually held: "A constitutional right 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right'." Yakus v. United States, 321 U.S. 414, 444 (1944).

The error in Underwood's case can be seen as an error in sentencing—i.e., as the District Court imposing a sentence that it had no actual authority to impose. It can also be seen as an error in the conviction—i.e., as the conviction of a defendant for a crime different then the crime charged in the indictment and for which an element that the defendant was demonstrably prepared to contest was decided by the judge by a preponderance-of-the-evidence standard rather than by a jury beyond a reasonable doubt.

The irony of Underwood's case is that he made a constitutional challenge to every law that was used to incarcerate him and throw away the key, and his objections fell on deaf ears. When the Supreme Court overruled those challenges as unconstitutional, his preserved challenges fell on blind eyes.

The Supreme Court has now stated,

"Together with the right to vote, those who wrote our Constitution considered the right to trial by jury, ' the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' …. Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions….

Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has 'extend[ed] down centuries'. Apprendi vs. New Jersey, 530 U.S. 466, 477 (2000)….

Before Apprendi, however, this Court had held that facts elevating the minimum punishment not need be proven to a jury beyond a reasonable doubt. McMillian vs. Pennsylvania, 477 U.S. 79 (1986); see also Harris vs. United States, 536 U.S. 545 (2002) (adhering to McMillian).

Eventually, the Court confronted this anomaly in Alleyne. …. This Court reversed. Finding no basis in the original understanding of the 5th and 6th Amendments for McMillian and Harris, the Court expressly overruled those decisions and held that 'the principle applied in Apprendi applies with equal force to facts increasing the mandatory minimum' as it does to facts increasing the statutory maximum penalty. Alleyne, 570 U.S., at 112."

Which begs the question, "Where is the rule of law in the United States Constitution as guaranteed by the Bill of Rights that is supposed to protect its citizenry? When the guarantee under the rule of law does not exist and all of its citizens do not receive equal protection under the law?"