Bloomberg Law®

Criminal Law Reporter™

SENTENCING

Three experts on federal sentencing discuss the recent U.S. Supreme Court decision examining the use of acquitted conduct at sentencing. The authors argue that based on the high court's ruling, only facts arising out of a final conviction, and not elements of acquitted, dismissed, or uncharged crimes, may be considered at sentencing.

Does an Acquittal Now Matter at Sentencing? Reining In Relevant Conduct Through a Recent Restitution Ruling



By Alan Ellis, Mark H. Allenbaugh, and Doug Passon

Now in its 30th year of existence, despite the noble intentions of bringing uniformity, certainty and proportionality to federal sentencing, the U.S. Sentencing Guidelines (Guidelines) have been the subject of significant and sustained criticism. Among the features of the Guidelines that have received the most critical attention is the use of acquitted conduct at sentencing. A recent ruling by the U.S. Supreme Court, however, may indicate that such a controversial practice may finally be coming to an end.

Introduction

At sentencing, federal judges consider ''relevant conduct'' for purposes of calculating the Guidelines, which may include uncharged conduct, otherwise inadmissible-at-trial evidence, and even acquitted conduct. Twenty years ago, in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the U.S. Supreme Court controversially ruled ''that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.'' (Despite being a per curiam decision, there were two concurrences, one each by Justices Antonin Scalia and Stephen Breyer. More surprisingly, there were two dissents, one each by Justices John Paul Stevens and Anthony Kennedy. This is surprising inasmuch as per curiam decisions generally are considered to be non-controversial and of such a garden variety where unanimity is a given. *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 Tulane L. Rev. 1197 (2012)). The Court reasoned that as an acquittal does not indicate actual innocence, the government is not precluded from proving up the conduct at sentencing since all that is required is a preponderance of the evidence.

The U.S. Supreme Court's recent decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) regarding a restitution matter may provide a legal foundation for reining in the inclusion of acquitted conduct within relevant conduct. (Authored by Justice Ruth Bader Ginsburg,

 ISSN 0011-1341

the majority opinion was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elana Kagan. Justice Samuel Alito filed a concurrence and Justice Clarence Thomas filed the sole dissent. Justice Neil Gorsuch, being too new to the Court, ''took no part in the consideration or decision of the case.'')

Reversal by Appellate Court

At issue in *Nelson* was whether a reversal of a conviction by an appellate court on direct or collateral review entitles a defendant to reimbursement of any restitution the defendant—in this case, defendants—may have paid pursuant to the sentence imposed for the now-vacated conviction.

Under Colorado's Exoneration Act, ''an innocent person who was wrongly convicted'' could recover any restitution, costs, fees, or fines paid as a result of the conviction, provided the ''conviction has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence.'' *Nelson* at 1254. Furthermore, the defendant-claimant had to prove his actual innocence by clear and convincing evidence. *See id.* at 1255.

The Supreme Court held that Colorado's Exoneration Act violated due process. ''[O]nce those convictions were erased [for any reason], *the presumption of their innocence was restored*.'' *Id.* (emphasis added; citing *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (After a ''conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.'')). Accordingly, as the defendants in *Nelson* were now innocent *simpliciter*, the state held no right to retain the restitution, costs, fees or fines paid by them.

Tension: Effect of Acquittal

The tension between *Nelson* and *Watts*, therefore, is the effect of an acquittal. *Watts* held that an acquittal is irrelevant for purposes of sentencing because it is not a finding of innocence. In stark contrast, *Nelson* held that an acquittal absolutely is relevant *because of* the reversion to a presumption of innocence—so relevant in fact as to preclude any penalty being sustained subsequent to the acquittal.

As the Court in *Nelson* observed, ''[t]he vulnerability of the State's argument that it can keep the amounts exacted so long as it prevailed in the court of first instance [and thus met some burden of proof] is more apparent still if we assume a case in which the sole penalty is a fine. On Colorado's reasoning, an appeal would leave the defendant emptyhanded; regardless of the outcome of an appeal, the State would have no refund obligation.'' *Nelson*, 137 S. Ct. at 1256.

When Some Counts Remain

Arguably, *Nelson* (7-1) may have effectively overruled the Court's per curiam decision in *Watts*. After all, it is difficult, if not impossible, to square the reasoning of *Nelson* with that of *Watts*. As the *Nelson* Court observed, ''once . . . the presumption of their innocence was restored,'' a state ''may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions,'' including costs, fees, and restitution. *Id.* at 1255-56.

The same surely holds true where liberty, as opposed to property, is at stake.

To be sure, the Court's holding in *Nelson* did not rest on the fact that the defendants there were convicted of ''no crime,'' i.e., that they had been acquitted of *all* their counts of conviction. At least one federal court of appeals has applied *Nelson* in a multi-count case where the defendant had been both acquitted of some charges but remained guilty of others.

In *United States v. Brooks*, 13-3213 (2d Cir. Sept. 20, 2017), the defendant was charged with various counts of fraud, securities law violations and tax fraud. He successfully severed the fraud and securities related counts from the tax counts, and proceeded to trial on the fraud and securities counts. He then was convicted on all counts and subsequently decided to plead guilty to the tax fraud counts.

The defendant then appealed the fraud and securities-related counts. While his appeal was pending, he died in prison. The defendant's estate then sought a refund of the restitution amounts ordered as a result of all the defendant's convictions. Applying the doctrine of abatement *ab initio*, the Second Circuit held that ''when a convicted defendant dies while his direct appeal as of right is pending, his death abates not only the appeal but also all proceedings had in the prosecution from its inception.'' *Id.* at *16 (internal quotation marks and citation omitted).

The Second Circuit then observed that ''the reasoning of *Nelson* also compels abating monetary penalties where a defendant dies during his direct appeal, as there is no longer a valid conviction to support the government's retention of the [penalty].'' *Id.* at*22-23 (internal quotation marks and citation omitted). In other words, the death of a defendant during an appeal restores the presumption of innocence. *See also United States v. Libous*, 858 F.3d 64 (2d Cir. 2017) (also relying on *Nelson* to refund a fine paid by a defendant who died during pendency of appeal).

Accordingly, the estate was entitled to a refund of the restitution amounts paid as a result of those convictions. However, as the defendant had pleaded guilty to the tax counts and had not appealed, the estate was not entitled to a refund for those restitution amounts because those convictions had become final. In short, the presumption of innocence precludes penalizing conduct underlying acquitted counts, but conduct underlying counts of conviction (that have been finalized) may, of course, be penalized. And never the two shall mix. Furthermore, and to be sure, it matters not the form of acquittal—be it by jury, by an appellate court on direct appeal, by a court on collateral review, or by death during pendency of an appeal. An acquittal is an acquittal is an acquittal.

Four Scenarios

The reasoning of *Nelson* is more far-reaching than just acquitted conduct. To illustrate, we provide some scenarios of increasing scope below. All scenarios are based on the following fact pattern: Defendant X has defrauded Company A of $1 million and, in separate conduct, also defrauded Company B of $1 million.

  CRL ISSN 0011-1341

Current Practice: *Watts* Permits Acquitted Conduct to Be Considered

Assume that X is charged with two counts of fraud. Count 1 pertains to Company A and Count 2 pertains to Company B. X goes to trial and is convicted of Count 1 but acquitted of Count 2. Under current practice, as a result of *Watts*, as long as X is convicted (by plea or trial, and the conviction becomes final) of defrauding either Company A or B, then the total $2 million loss may be considered for purposes of enhancing X's sentence. So, despite being convicted only of Count 1, the conduct underlying Count 2 may still be considered for purposes of enhancing X's sentence. Of course, if the conviction for Count 1 is reversed, then X may not be penalized at all for any such conduct.

Acquitted Conduct: *Nelson* Precludes Punishment

Assume again that X is charged with two counts of fraud. Count 1 pertains to Company A and Count 2 pertains to Company B. X goes to trial and is convicted of Count 1 and Count 2. Now, under *Nelson*, if X is acquitted *by any means* of Count 2, then he may not be penalized for the conduct underling Count 2, i.e., the $1 million loss suffered by Company B may not be used to enhance X's sentence. Why? Because, per *Nelson*, X is now ''presumed innocent'' of the conduct underling Count 2 regardless of the means of acquittal.

Dismissed Conduct

The reasoning of *Nelson*, however, clearly reaches farther than just precluding acquitted conduct. Assume that X is charged with two counts of fraud. Count 1 pertains to Company A and Count 2 pertains to Company B. X now decides to plead guilty to Count 1 in exchange for the government dismissing Count 2. Under current practice, the $1 million underlying now-dismissed Count 2 can still be considered for enhancing X's sentence. But, under *Nelson*, X must still be presumed innocent of that conduct, i.e., the $1 million fraud against Company B. After all, the presumption only is overcome by a conviction that becomes final. Accordingly, X may not be punished for that $1 million fraud. Why? Because, per *Nelson*, if X is presumed innocent of acquitted conduct, then certainly that presumption remains for dismissed conduct.

Uncharged Conduct

This is perhaps the most startling result of the reasoning of *Nelson*. Assume that X is charged only with one count of fraud, the fraud pertaining to Company A. The government, for whatever reason, decides to not charge X with the $1 million fraud pertaining to Company B. X now decides to plead guilty to the single count indictment. As the presumption of innocence can only be overcome by a final conviction, X cannot be held criminally liable for the uncharged fraud pertaining to Company B. Otherwise, the government could easily circumvent *Nelson* by simply *not* charging a defendant with conduct it subsequently will use to penalize the defendant at sentencing. Put differently, if a defendant is presumed innocent upon acquittal, then it necessarily follows that he is innocent of charges for which he was never convicted regardless of whether the ''non-convictions'' are a result of a dismissal or a failure to charge outright.

The Upshot of *Nelson*

Nelson entails not only that X may not be penalized for acquitted conduct, but also that X may not be punished for dismissed or even uncharged conduct. To be sure, this does not mean that X may only be sentenced based exclusively on facts he either admitted to pursuant to a plea of guilty, or were found by a jury beyond a reasonable doubt at trial. X may, of course, be sentenced on facts arising out of any count of conviction, for example, the amount of loss underlying Count 1 and the number of victims arising from the conduct underlying that count.

But if X may not be penalized for even uncharged conduct, then that entails that any facts that could constitute elements of a separate offense from the offense conviction, may not be considered for purposes of sentencing. This is so if, as has been emphasized in *Nelson*, the presumption of innocence is to be given weight. Or put differently, a state may not engage in an end-run around the Constitution by characterizing at sentencing (acquitted, dismissed, or uncharged) facts that are actually elements of a separate offense as mere sentencing factors. To do so eviscerates the presumption of innocence.

And this ultimately is where the Court in *Watts* got it wrong: innocence is not a matter of degree; it is an all or nothing proposition. Or, as the Court in *Nelson* observed: ''once . . . the presumption of . . . innocence [i]s restored,'' a state ''may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for [sanctions to apply].'' And just as it does not matter the mode of acquittal, so too does it not matter the mode of sanction. The reasoning of *Nelson* is just as applicable to deprivation of liberty as it is to a financial sanction. If the state may not take a dollar, it certainly may not take a day.

Conclusion

If an acquittal precludes a defendant from being financially penalized for certain conduct, then how can an acquittal still allow a defendant to lose his liberty for such conduct? While the *Watts* decision was correct that an acquittal is not an affirmative finding of *actual* innocence, the problem is that the Court in *Watts* overlooked the fact that an acquittal does restore the *presumption* of innocence—something the Court has now clarified and amplified in *Nelson*.

The reasoning of *Nelson* thus compels the conclusion that *Watts* has been effectively overruled. (As two of the authors have written elsewhere, there is every reason to believe that should the Court ever reconsider *Watts* directly, it will not hesitate to overrule it. With Justice Gorsuch now on the bench, the votes are there. *See* Alan Ellis and Mark H. Allenbaugh, ''Expert Analysis: Gorsuch May Bring Needed Changes to Federal Sentencing,'' Law360 (March 3, 2017). Acquitted conduct cannot be used to penalize (or increase a penalty) because an acquittal, by any means, restores the presumption of innocence. And no one may be penalized for being presumed innocent. This has far-reaching application as the reasoning of *Nelson* applies not only to acquitted conduct, but to dismissed and even uncharged conduct. This, in turn, greatly circumscribes, but does not eliminate, the use of relevant conduct at sentencing in terms of what constitutional may be considered by sentencing courts.

The principle of *Nelson* thus is this: Only facts arising out of a final conviction—which may not also be construed as elements of acquitted, dismissed or uncharged crimes—may be considered at sentencing. And this is not inconsistent with 18 U.S.C. § 3661, which provides that ''[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'' That statute, like all statutes, must be read within the context of the Constitution. Thus, facts that may violate due process—as announced in *Nelson*—may not be included in that otherwise broad universe of facts that may be considered for purposes of imposing an appropriate sentence.

As the Court has recognized for well over a century, ''[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'' *Coffin v. United States*, 156 U.S. 432, 453 (1895). Relevant conduct, as a result of *Watts*, has performed an end run around that most elementary presumption, which has resulted in enhanced sentences that violate due process. *Nelson* hopefully has announced that that era is over.

About the Authors

Alan Ellis, a past president of the National Association of Criminal Defense Lawyers and Fulbright Award winner, is a criminal defense lawyer with offices in San Francisco and New York. Ellis has 50 years of experience as a practicing lawyer, law professor and federal law clerk. He is a nationally recognized authority in the fields of federal plea bargaining, sentencing, prison matters, appeals, habeas corpus 2255 motions and international prisoner transfer for foreign inmates. Ellis has successfully represented federal criminal defendants and inmates throughout the United States. He is a sought-after lecturer in criminal law education programs and is widely published in the areas of federal sentencing, Bureau of Prisons matters, appeals and other post-conviction remedies, with more than 120 articles and books and 70 lectures, presentation and speaking engagements to his credit. He can be reached at AELaw1@alanellis.com.

Mark H. Allenbaugh is co-founder of Sentencing Stats, LLC (www.sentencingstats.com), a consulting firm focused on analysis of federal sentencing data for attorneys and their clients. He is a consultant to the Law Offices of Alan Ellis. Prior to entering private practice, he served as a staff attorney for the U.S. Sentencing Commission. He is a co-editor of ''Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice'' (2nd ed., Foundation Press, 2002). He can be reached at mark@sentencingstats.com.

Doug Passon, Of Counsel to the Law Offices of Alan Ellis, is a practicing criminal defense attorney and President of and Creative Director of D Major Films, LLC. After over twenty years in the trenches, including 12 years with the Trial Unit of the Office of the Federal Public Defender in Phoenix, Arizona, Passon knows that in litigation, our stories are everything, and how we tell them can mean the difference between victory and defeat. As an award-winning documentary filmmaker recognized by the *Wall Street Journal* as a pioneer in the use of video in sentencing mitigation, Passon understand that film/video can be the most compelling way to convey the true emotion of the story. He produces documentary films for use in and out of court, and brings an unmatched skill set to this process. He regularly authors and contributes to articles in criminal defense publications and has led nearly 70 training and workshop sessions. He can be reached at doug@dougpassonlaw.com.

  CRL ISSN 0011-1341