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High Court Should Restore Sentencing Due Process

By **Alan Ellis and Mark Allenbaugh** (November 27, 2019, 12:15 PM EST)

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According to U.S. Supreme Court Justice Neil Gorsuch in his recent plurality opinion in United States v. Haymond,[1] "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty."[2] Unfortunately, that isn't always quite true. Since at least the court's 1997 decision in United States v. Watts,[3] sentencing judges, and not juries, have considered uncharged, dismissed and even acquitted conduct for purposes of enhancing a defendant's sentence.

But all that may soon change due to a notorious mobster. This past summer, 84-year-old Vincent Asaro, a long-time captain for the Bonanno crime family,[4] asked the U.S. Supreme Court to review his 96-month sentence for arson. The problem, according to Mr. Asaro, was that the bulk of his sentence was based not on the arson, but on unrelated conduct from a prior Racketeer Influenced and Corrupt Organizations Act trial on which he was acquitted of all counts.

Should the court decide to review his case, it could not only finally put an end to the very troubling and widely criticized un-American use of acquitted conduct at sentencing, but also signal a fundamental change as to the use of even uncharged so-called "relevant conduct" at sentencing.

The Case and Sentencing of Vincent "Vinny" Asaro

On Dec. 11, 1978, the "largest theft of currency ever committed on American soil at the time" occurred at JFK International Airport.[5] Known as the

"Lufthansa Heist," and famously recounted in the 1990 movie "Goodfellas," Asaro and several associates allegedly stole nearly $6 million in cash and jewelry from a vault operated by Lufthansa Airlines. The heist would go unsolved for decades.

Then, on Jan. 16, 2014, Asaro was indicted on racketeering charges, which included the Lufthansa Heist as well as the alleged 1969 murder of informant Paul Katz.[6] On Nov. 12, 2015, however, after a three-week trial, Asaro was acquitted of all charges.[7]

Unfortunately for Asaro, he was apparently a bit of a hot-head. Back on April 1, 2012, a motorist cut him off in traffic, which prompted Asaro to direct some of his underlings to find the motorist's vehicle and torch it.[8] On June 27, 2017, a year-and-a-half after his RICO trial and acquittals, Asaro pled guilty to a single count of arson (unrelated to the prior RICO case).

At his sentencing on Dec. 28, 2017, the government, the court, and Asaro's attorneys all agreed that Asaro was to be sentenced under U.S. Sentencing Guideline Section 2K1.4 — the arson guideline — and that his total offense level was 19 and that he was in Criminal History Category II. This resulted in an advisory sentencing range of 33 to 41 months.[9]

After reviewing the facts of the road-rage incident, the judge then turned to Asaro's 2015 trial for the Lufthansa heist and murder of Paul Katz, over which — coincidentally — she had also presided.

> Although the defense is correct that I am not required to consider this acquitted conduct in sentencing Mr. Asaro, I will exercise my discretion to do so. I am mindful of the weight that I must give to the jury's verdict of acquittal, but I nonetheless am firmly convinced that the Government proved Mr. Asaro's conduct by more than a preponderance of the evidence. And I can imagine few things that are more relevant ... than the defendant's lifelong history of violent crime.[10]

The district court, therefore, decided to impose a significant upward variance to 96 months, which is the highest ever imposed for those similarly situated to Asaro under the guidelines. Asaro's sentence also constituted the only upward departure or variance ever given for similarly situated offenders.[11]

Asaro appealed his sentence arguing that the district court's reliance on acquitted conduct violated due process. The U.S. Court of Appeals for the Second Circuit affirmed,[12] and, on July 22, Asaro petitioned the Supreme Court for certiorari, which remains pending.

The Logical Error Inherent in Watts

Three legal axioms are at play in Watts:

Axiom 1: Where one has elected to be tried by a jury, every element of the offense charged must be proved to a unanimous jury beyond a reasonable doubt using only admissible evidence.

Axiom 2: Until the moment of conviction by plea or trial, one is presumed innocent.

Axiom 3: At sentencing, a judge may lengthen a sentence based on facts — called sentencing factors — found only by a preponderance of the evidence even where such evidence would otherwise be inadmissible at trial.

In permitting the use of acquitted conduct at sentencing, the court in Watts reasoned as follows: An acquittal of x merely means that the government failed to prove x beyond a reasonable doubt. That standard of proof, however, is much higher than what is required to prove x at sentencing. Ergo, an acquittal of x does not necessarily preclude using X to enhance a sentence provided it can be proved by a preponderance of the evidence at the sentencing hearing.

But notice what is left out of this analysis: Axiom 2. Axiom 2 sets forth the concept of legal innocence. Only when one loses one's legal innocence by being found legally guilty — with all its attendant constitutional protections — may one be deprived of life, liberty or property. Factual guilt is insufficient.

The logical error in Watts, therefore, is permitting an acquittal of x — a legal finding, to be converted into a sentencing factor — a mere factual finding. It is a logical sleight-of-hand of the type the philosopher Gilbert Ryles called a "category mistake." The category mistake here is to conflate the category of legal findings with that of factual findings. If one is acquitted of x — a legal finding, then the presumption of innocence is restored, period. Accordingly, one cannot be deprived of life, liberty or property based on the fact of x. That x may be factually proved under a lower evidentiary standard is, legally, irrelevant. Legal innocence, after all, does not admit of degrees.

Current Justices' Concerns About Watts

Shortly before his confirmation, we wrote about what a now-Justice Neil Gorsuch could mean for federal sentencing.[13] In particular, we reviewed his U.S. Court of Appeals for the Tenth Circuit opinion in United States v. Sabillon-Umana,[14] wherein then-U.S. Circuit Judge Gorsuch, a former clerk to retired Justice Anthony M. Kennedy who famously dissented in Watts, questioned the constitutionality of judicial fact-finding at federal sentencing generally.[15]

As it turns out, another former Kennedy clerk, Justice Brett Kavanaugh, also shares Justice Gorsuch's concern, but more specifically with respect to

acquitted conduct.[16] As then-U.S. Circuit Judge Kavanaugh observed in United States v. Bell, [17] "[a]llowing judges to rely on acquitted or uncharged conduct" at sentencing "seems a dubious infringement" of due process.[18]

In his dissent from a denial of certiorari in Jones v. United States,[19] the late Justice Antonin Scalia, joined by Justices Thomas and Ginsburg, stated that "any fact that increases" a sentence "must be found by a jury, not a judge. ... For years, however, we have refrained from saying so. ... This has gone on long enough."[20]

Finally, and rather tellingly, as Justice Ruth Bader Ginsburg recently wrote for the majority in Nelson v. Colorado,[21] "once .... convictions [are] erased, the presumption of their innocence [is] restored. ... [A state] may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions."[22] We have previously argued that Nelson effectively overruled Watts.[23] After all, if an acquittal prevents a state from retaining property (money), surely it must also apply to liberty.

Thus, at least four current members of the Supreme Court are on record that they find the use of at least acquitted conduct at sentencing to be constitutionally problematic.There certainly are enough votes to grant certiorari, and there may be enough to overturn Watts especially in light of Nelson.[24]

Recent Developments

On July 29, in a groundbreaking decision, the Supreme Court of Michigan in People v. Beck held the use of acquitted conduct at sentencing violates the sixth and fourteenth amendments of the U.S. Constitution because "the defendant continues to be presumed innocent."[25] On Oct. 23, 2019, Michigan petitioned the U.S. Supreme Court for certiorari.[26] In its petition, Michigan suggested to the Court that it could consolidate its petition with Asaro's.[27] While the briefing in Asaro is now complete, the briefing in Beck will not be complete until early in 2020, so a decision on certoriari is not likely until early next year.

In addition to Asaro and Beck, on Sept. 26, Sen. Richard Durbin, D-Ill., introduced the Prohibiting Punishment of Acquitted Conduct Act of 2019.[28] The act would revise Title 18 U.S. Code Section 3661 to preclude the use of acquitted conduct except in mitigation thereby statutorily overruling Watts. The act has bipartisan support and now sits with the Senate Judiciary Committee at the time this article was published.

The Upshot

If the court grants certiorari in Asaro and/or Beck and overturns Watts, or the

act is passed, a peculiar and troubling oddity of criminal and constitutional law will finally be rectified. But the upshot may not be all that significant. After all, more than 97% of federal criminal cases were resolved by plea agreement in fiscal year 2018,[29] which has remained at roughly that rate for decades.

The same ratio largely holds for the states. Moreover, of the small percentage of cases that do proceed to trial — less than 3%, an even smaller fraction result in acquittals. Accordingly, only those rare defendants who have been acquitted of some conduct, but convicted of other conduct, will be able to take advantage of Watts' demise. Thus, the real-world impact will be largely insignificant.

Or will it?

If the Constitution precludes the use of acquitted conduct at sentencing because the presumption of innocence has been restored, then why would it not preclude the use of uncharged and dismissed conduct with equal force? The presumption of innocence — legal innocence — also applies to uncharged and dismissed conduct, after all.[30]

To be sure, in Beck, the Michigan Supreme Court stated in dicta, but without argument or citation to any authority, that "no constitutional impediment prevents a sentencing court from punishing the defendant" based on uncharged conduct.[31] But why? What difference does an acquittal make from conduct that never has even been charged? In either case, the presumption of innocence is maintained—it does not become any stronger (or weaker) merely because of an acquittal.

Observations

Logic dictates that Watts was wrongly decided. The same logic also dictates that if the use of acquitted conduct at sentencing violates due process, then so must the use of dismissed and uncharged conduct. After all, it's difficult to see how any conduct — be it acquitted, dismissed or uncharged — otherwise enveloped by the blanket of legal innocence can nonetheless be used as a sentencing factor if the presumption of innocence is to have any significance.

Thirty years after the implementation of the U.S. Sentencing Guidelines, and 15 years after the landmark decision in United States v. Booker rendering the guidelines advisory, the court should finally decide what, if anything, the presumption of innocence actually means at sentencing. While precluding the use of acquitted conduct may not have much of a real-world impact, certainly the logical implications from such a holding will. These implications may serve to limit the use of uncharged and acquitted conduct at sentencing, which can have a profound and fundamental impact on sentencing as every sentence is built on such conduct.

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[1] United States v. Haymond , 139 S. Ct. 2369 (2019) (plurality opinion).

[2] Id. at 2373.

[3] United States v. Watts , 519 U.S. 148 (1997) (per curiam).

[4] Wikipedia, Vincent Asaro at https://en.wikipedia.org/wiki/Vincent_Asaro.

[5] https://en.wikipedia.org/wiki/Lufthansa_heist

[6] http://www.pacermonitor.com/view/YD6ME4A/USA_v_Asaro_et_al__nyedce-14-00026__0001.0.pdf

[7] https://www.nytimes.com/2015/11/13/nyregion/vincent-asaro-accused-in-lufthansa-heist-is-found-not-guilty.html

[8] Wikipedia, Vincent Asaro at https://en.wikipedia.org/wiki/Vincent_Asaro.

[9] Sentencing Transcript at 21a, at https://www.supremecourt.gov/DocketPDF/19/19-107/108820/20190722132311092_Appendix_PetitionForAWritOfCertiorari.pdf

[10] Id. at 23a.

[11] According to the sentencing transcript, Asaro was sentenced under the arson sentencing Guidelines: USSG §2K1.4. His Total Offense Level was 19 and his Criminal History Category was II. Furthermore, he was subject to a statutory maximum penalty of 240 months. According to the authors' own analysis of U.S. Sentencing Commission datafiles, there were 24 individuals sentenced between fiscal years 2006 and 2018 who had a Total Offense Level of 19 and were in Criminal History Category II or greater, and who were subject to at least a 240-month statutory maximum penalty or greater. The authors included those individuals subject to mandatory minimum penalties even though Asaro was not subject to one. Sentencing information was missing for one individual. The average sentence imposed on the remaining 23 was 50.1 months and the median was 60 months. Not only was Asaro's sentence the highest imposed, but it also was the only upward departure or variance imposed.

[12] United States v. Gotti, et al. , 767 Fed. Appx. 173, 174 (2d Cir. 2019) (quoting Watts,519 U.S. at 155).

[13] See Alan Ellis & Mark H. Allenbaugh, "Gorsuch May Bring Needed Changes to Federal Sentencing," Law360, Mar. 3, 2017, available at https://www.law360.com/articles/897467/gorsuch-may-bring-needed-changes-to-federal-sentencing.

[14] United States v. Sabillon-Umana , 772 F.3d 1328 (10th Cir. 2014).

[15] United States v. Sabillon-Umana , 772 F.3d 1328, 1331 (10th Cir. 2014) (citing Jones v. United States , 135 S. Ct. 8, 190 L. Ed. 2d 279 (2014) (Scalia, J., dissenting from denial of certiorari).

[16] See Alan Ellis & Mark H. Allenbaugh, "Sentencing May Change with 2 Kennedy Clerks on High Court," Law360, July 26, 2018, available at https://www.law360.com/articles/1066662.

[17] United States v. Bell , 803 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[18] Id. (emphasis added).

[19] Jones v. United States, 135 S. Ct. 8 (2014).

[20] Id. at 8-9 (citations omitted; bolded emphasis added).

[21] Nelson v. Colorado , 137 S. Ct. 1249.

[22] Id. at 1255-1256 (citations omitted).

[23] See Alan Ellis, Mark H. Allenbaugh & Doug Passon, Does an Acquittal

Matter at Sentencing? Reining in Relevant Conduct Through a Recent Restitution Ruling, 102 Crim. L. Reporter 366 (Jan. 17, 2018).

[24] Justice Ginsburg's majority opinion was joined by the Chief Justice, and Justices Kennedy, Breyer, Sotomayor and Kagan. Justice Alito dissented joined by Justice Thomas. Justice Gorsuch took no part in the consideration or decision of the case. See Nelson, 137 S.Ct. at 1250 (syllabus).

[25] No. 152934, 2019 Mich. LEXIS 1298.

[26] People v. Beck, 19-564 (U.S. 2019).

[27] People v. Beck, Petition for Writ of Certiorari at 35, available at https://www.supremecourt.gov/ DocketPDF/19/19-564/120299/20191025140749229_38685%20pdf%20Williams%20br.pdf.

[28] S. 2566.

[29] See U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics 2018 tbl. 11 (reporting a national plea rate of 97.4%) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table11.pdf.

[30] See, e.g., United States v. Restrepo , 946 F.2d 654, 657 (9th Cir. 1991) (en banc) (holding that uncharged relevant conduct may be considered provided doing so does not "negate the presumption of innocence or the prosecutor's burden of proving guilt with regard to the underlying crime in the conviction stage of the criminal justice process")

[31] People v. Beck , No. 152934, 2019 Mich. LEXIS 1298, *19 (footnote omitted).
