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Locks on the bars of a jail cell are shown.
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INSIGHT: Does Presumption of Innocence Preclude Use of Acquitted Conduct at Sentencing?

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The U.S. Supreme Court will soon decide whether to review a case involving sentencing of Vincent Asaro, a long-time *capo* for the Bonanno crime family. Federal sentencing and prison experts Alan Ellis and Mark Allenbaugh say if the court ultimately finds the presumption of innocence precludes not just the use of acquitted conduct, but of uncharged and acquitted conduct, it will forever and fundamentally change how sentences are imposed—and that would be a good thing.

Justice Neil Gorsuch, in his recent plurality opinion in *United States v. Haymond*, wrote: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty.

That promise stands as one of the Constitution's most vital protections against arbitrary government." Unfortunately, that isn't always quite true.

Since at least the U.S. Supreme Court's 1997 decision in *United States v. Watts*, sentencing judges, and not juries, have considered uncharged, dismissed, and even *acquitted* conduct by a mere preponderance of the evidence, for purposes of enhancing a defendant's sentence.

But that may soon change due to a notorious mobster. In July 2019, 84-year-old Vincent Asaro, a long-time *capo* for the Bonanno crime family, asked the Supreme Court to review his 96-month sentence for arson. The problem, according to Asaro, was that the bulk of his sentence was based not on the arson, but on unrelated conduct from a *prior* RICO trial on which he was acquitted of all counts.

Should the Supreme Court decide to review his case, it might not only 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.

Current Justices' Concerns About Acquitted Conduct

In *United States v. Sabillon-Umana*, then-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: "It is far from certain whether the Constitution allows … a district judge [to]… decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent."

Likewise, then-Judge Brett Kavanaugh, another former Kennedy clerk, also observed in *United States v. Bell* that "[a]llowing judges to rely on *acquitted or uncharged conduct* to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." (Emphasis added).

In his 2014 dissent from a denial of *certiorari* in *Jones v. United States*, the late Justice Antonin Scalia, joined by Justices Clarence Thomas and Ruth Bader Ginsburg, stated that "any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime … and [thus] must be found by a jury, not a judge. ... For years, however, we have refrained from saying so. … [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.*" (Emphasis added).

Finally, as Justice Ginsburg recently wrote for the majority in *Nelson v. Colorado*, "once … convictions [are] erased, the presumption of … innocence [is] restored. … [A state] may not retain funds taken from [defendants] solely because of their now-invalidated convictions, for [a state] may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions." We have

argued elsewhere that *Nelson* effectively over-ruled *Watts*. 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 U.S. 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*.

Recent Developments

On July 29, 2019, in a groundbreaking decision, the Supreme Court of Michigan in *People v. Beck* held that the use of acquitted conduct at sentencing violates the Sixth and Fourteenth Amendments of the U.S. Constitution.

The court said that "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent."

"To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself," the Michigan Supreme Court said, quoting State v. Marley, 364 SE2d 133 (1988).

On Oct. 23, 2019, Michigan petitioned the U.S. Supreme Court for *certiorari* and has asked the court to consolidate its petition with *Asaro*'s. Both petitions are scheduled to be considered during the court's Feb. 21 conference.

Also, on Sept. 26, 2019, Sen. Richard Durbin (D-Ill.) introduced the Prohibiting Punishment of Acquitted Conduct Act of 2019 (S. 2566). The act would preclude the use of acquitted conduct except in mitigation, thereby statutorily overruling *Watts.* The act has bipartisan support and now sits with the Judiciary Committee.

The Upshot

If the Supreme Court grants *certiorari* in *Asaro* and/or *Beck* and then overturns *Watts*—which we expect to happen—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.

Moreover, of the small percentage of cases that do proceed to trial, only a small 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, it appears that 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.

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 protected by the presumption of legal innocence can nonetheless be used to enhance a sentence. To do so renders the presumption of innocence a nullity.

Thirty years after the implementation of the U.S. Sentencing Guidelines, and 15 years after the landmark decision in *United States v. Booker* rendered the guidelines advisory, the court should finally decide what, if anything, the presumption of innocence actually means at sentencing.

Should the presumption of innocence preclude not just the use of acquitted conduct, but also of uncharged and dismissed conduct as well, it will forever and fundamentally change how sentences are imposed. "This has gone on long enough."

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