You Can Be Sentenced, Even If You Were Acquitted.

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“Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction,” Yale law professor Daniel J. Freed, a sententencing expert, wrote in 1992. Almost 30 years later, last week, this lawyer was herself astonished to learn this fact.

Can that really happen? “Yes, it can,” writes Oklahoma City University law professor Barry Johnson. “In federal court and many state courts, once a defendant is convicted, under the concept of relevant conduct, the defendant’s sentence can be increased by the consideration of uncharged, dismissed, or even acquitted conduct of the defendant. … Relevant conduct allows a sentencing court to reach as far back in time as can be said to be part of the scheme, plan, or enterprise related to the defendant’s convicted offense.” And at sentencing, the prosecution only needs to prove these allegations by a preponderance of the evidence, not beyond a reasonable doubt. So a person’s sentence can be increased at sentencing by a judge’s determination that the defendant more than likely than not committed additional criminal conduct, even if a jury already found the person not guilty of that very conduct.

“Not only is the government excused from the rigors of proof beyond a reasonable doubt, but the government is also excused from the rules of evidence customarily attendant at trial,” adds Johnson. “Hearsay, double hearsay, and even triple hearsay is permissible as long as there is an ‘indicia of reliability.’” Finally, he writes, “although the additional facts found at sentencing can dramatically increase a defendant’s sentence, the right to confront witnesses, one of the basic rights at trial, is not recognized at sentencing.”

In 2007, a jury convicted Joseph Jones, Desmond Thurston, and Antuwan Bell of distributing a relatively small amount of crack cocaine. The jury acquitted the defendants of a number of more serious charges, including conspiracy to distribute a much larger quantity of crack. At the defendants’ sentencing hearings, the judge found that—despite the jury’s verdict not guilty—the defendants were guilty of a conspiracy to distribute large quantities of crack cocaine. Based in significant part on these findings, each defendant was given a sentence three to six times longer than the federal sentencing guidelines would have recommended.

Robert Mercado, an alleged member of the Mexican mafia operating in Los Angeles, was convicted in federal court by a jury on various counts of drug conspiracy. Based upon those convictions, the sentencing guidelines recommended a maximum of three years in prison. But at

sentencing, the judge found that Mercado was guilty of various violent crimes for which the jury had acquitted him, and gave him 20 years.

This practice has been called "Kafka-esque," "repugnant," "uniquely malevolent," and "pernicious." When I learned about it, I immediately thought it couldn't be true. Didn't it violate or undermine the cases In re Winship, Apprendi, and Booker; the Fifth, Sixth, and 14th Amendments; and the entire jury system? Much of the scholarship on the issue would agree, but so far the practice has persisted.

How? First, the "evidentiary standards at sentencing are lower compared to the guilt-innocence phase, and, per 18 U.S.C. Section 3661, Congress barred any limitation on the conduct sentencing courts may consider in imposing punishment," attorney Robert Ehrlich wrote this week in Law 360. "In United States v. Watts, the U.S. Supreme Court held that the consideration of acquitted conduct by a preponderance-of-the-evidence standard at sentencing did not violate the double jeopardy clause. The idea was "to impose more individualized sentences by considering more factors." But it has had absurd results.

"Both the Supreme Court and Congress will soon have opportunities to clarify that acquitted conduct sentencing is unjust and unconstitutional," writes Jay Schweikert of the Cato Institute. On the judicial side, there is a certiorari petition currently pending before the Supreme Court in Asaro v. United States that explicitly raises the question of whether the Fifth and Sixth Amendments prohibit a federal court from sentencing based on acquitted conduct. The Cato Institute, Due Process Institute, National Association of Federal Defenders, and FAMM have all filed briefs in support of the petition, "and there is good reason to think that many of the Justices will be interested." Justice Clarence Thomas and Justice Ruth Bader Ginsburg joined a "dissent from denial of certiorari in the Jones case from 2014, in which Justice [Antonin] Scalia explicitly called upon the Court to clarify that acquitted conduct sentencing violates the Sixth Amendment" and "Justice [Brett] Kavanaugh, back when he was a judge on the D.C. Circuit, also repeatedly criticized the practice."

In addition, members of Congress are working to eliminate the practice. In September, a bipartisan group of senators, including Democrats Dick Durbin, Patrick Leahy, and Cory Booker, and Republicans Chuck Grassley, Thom Tillis, and Mike Lee, introduced the Prohibiting Punishment of Acquitted Conduct Act of 2019. According to the Senate's press release, the bill would "preclude a court of the United States from considering, except for purposes of mitigating a sentence, acquitted conduct at sentencing." The bill was endorsed by a diverse array of public interest groups, including the ACLU, American Bar Association, American Conservative Union, Due Process Institute, Innocence Project, and Koch Industries. Although this is a problem that will come as news to some, it is the rare one that can (and might) be remedied.