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Acquitted Conduct Should Not Be Considered At Sentencing

By **Robert Ehrlich** (November 3, 2019, 8:02 PM EST)

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John Adams famously declared, “Representative government and trial by jury are the heart and lungs of liberty." Indeed, given the role the jury trial plays in our modern criminal justice system.

The jury trial was designed as an indispensable structural check on government. A safeguard the framers of the Constitution considered so paramount to a free people that it was enshrined in the Sixth Amendment.

Trial by jury is essential to preserving liberty because it protects individuals from arbitrary use of government power by allowing the people to act independently of the state. Accordingly, upholding the people’s role in the administration of justice is foundational to upholding the purpose of this procedural guarantee.

Against this background, U.S. Sens. Dick Durbin, D-Ill., and Chuck Grassley, R-Iowa, recently introduced the Prohibiting Punishment of Acquitted Conduct Act of 2019. The bill seeks to address the insidious practice known as acquitted conduct sentencing, wherein a judge enhances a sentence based on conduct underlying charges for which a defendant has been acquitted by a jury.

You read that correctly. Under current law, federal judges are permitted to sentence individuals based on charges for which a jury found them not guilty.

This is how the practice developed through federal sentencing law.

Our Constitution guarantees the presumption of innocence until the government proves guilt beyond a reasonable doubt. Once a defendant has been duly convicted by a jury, however, sentencing is generally a matter of judicial determination.

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. 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.

Congress enacted the Sentencing Reform Act to curtail inconsistency and unpredictability in sentencing

that had been exacerbated by the broad discretion afforded judges working within statutory ranges. This act eventually spawned the federal sentencing guidelines, which are designed to facilitate uniformity by providing formulaic procedures to calculate a sentence based on consideration of "relevant conduct" and the jury's verdict.

In other words, the idea is to impose more individualized sentences by considering more factors. In United States v. Booker, the Supreme Court held that, while the guidelines are advisory as opposed to binding, the Sentencing Reform Act requires judges to consider the guidelines during sentencing.

Lower standards of proof at sentencing — in conjunction with 18 U.S.C. Section 3661, legal precedent and application of the guidelines — means that federal judges may consider a wide array of relevant conduct in determining a defendant's sentence, including conduct for which underlying charges have been acquitted by a jury. While the Supreme Court determined acquitted-conduct sentencing did not violate the double jeopardy clause in Watts, the court has never addressed whether the Sixth Amendment right to a trial jury prohibits the practice.

Jones v. United States is a focal case, both for its fact pattern and the late Justice Antonin Scalia's dissent from denial of certiorari. In Jones, the defendants faced two charges: (1) distributing a small amount of drugs and (2) conspiring to distribute a large amount of drugs.

The jury convicted on the distribution charges, but the defendants were acquitted of conspiring to distribute. Despite the jury's acquittal, the sentencing judge found the defendants engaged in the conspiracy by a simple preponderance of the evidence and imposed significantly longer sentences based on this finding of fact.

Had the judge not overridden the jury acquittal for the conspiracy charge, the three defendants would have served 27 to 71 months for distributing in accordance with the guidelines. Instead, they were respectively sentenced to 180, 194 and 225 months — calculations based largely upon conduct the government tried, but failed, to prove beyond a reasonable doubt.

The Supreme Court declined to review Jones, but Justice Scalia — joined by Justices Clarence Thomas and Ruth Bader Ginsburg (quite a rare coalition) — penned a dissent from denial of certiorari that outlined the fundamental flaws with acquitted-conduct sentencing.

Together, the dissent argued, the Fifth and Sixth Amendments require that each element of a crime be confessed to by the defendant or proved to an impartial jury beyond a reasonable doubt. Any fact that authorizes an enhancement to the defendant's penalty is considered an element that must be found by the jury, the traditional trier of fact, and proved beyond a reasonable doubt.

Given the court has held that a substantively unreasonable penalty is illegal, Scalia argued:
It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.

Scalia lamented that, because the court had yet to explicitly set forth this reasoning, the circuit courts had taken silence as license to permit unreasonable sentences based on judicial fact-finding.

The bottom line: Acquitted-conduct sentencing effectively divests individuals of their Sixth Amendment right to trial-by-jury by divesting citizens of their historical and constitutional role in the administration

of criminal justice.

While a defendant remains “not guilty” on paper, the sentencing judge’s veto of the jury’s verdict renders the acquittal meaningless for all practical purposes. Consideration of acquitted conduct at sentencing effectively eliminates the democratic role of the jury in the criminal justice system, inverting the power structure to allow government to limit the people rather than people to limit the government.

Acquitted-conduct sentencing is an affront to individual liberty, and judicial or legislative action would be welcome responses to the unconstitutional practice. The Prohibiting Punishment of Acquitted Conduct Act would amend 18 U.S.C. Section 3661 to explicitly preclude federal courts from considering acquitted conduct at sentencing, except as a mitigating factor. Congress should advance this simple reform to restore the Constitution’s basic guarantees of due process and the right to trial by jury.

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