■ FEDERAL SENTENCING

Not guilty? Go to jail

By Harlan J. Protass SPECIAL TO THE NATIONAL LAW JOURNAL

IN HIS NOVEL *The Trial*, Franz Kafka describes a totalitarian state with a repressive judicial system. One technique of this repression is provisional acquittals—the practice of clearing the accused and lifting the charges from their "shoulders for the time being," only to lay the charges on them again "as soon as an order comes from on high."

This is the way Mark Hurn must feel.

In June 2005, police searched Hurn's home in Madison, Wis., and found more than 450 grams of crack, roughly 50 grams of cocaine, ecstasy pills and more than $38,000 in cash. Hurn admitted that he dealt drugs and that the contraband and money belonged to him. He even showed the police where some of the incriminating evidence was located. Hurn was charged and tried by a jury on charges of possession with intent to distribute both cocaine and crack. He was found guilty on the cocaine charge, and not guilty on the crack charge. He was sentenced to 17 1/2 years in prison. *U.S. v. Hurn*, No. 05-CR-0085 (W.D. Wis.).

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If Hurn's sentence had been based solely on his cocaine conviction, he would have received jail time of about 2 1/2 years. It wasn't. Instead, Hurn's lengthy sentence—almost seven times what he faced for his cocaine conviction—was based on the crack offense, of which he was found not guilty. Recently that sentence was affirmed by the 7th U.S. Circuit Court of Appeals. *U.S. v. Hurn*, No. 06-3666 (7th Cir. Aug. 3, 2007).

Believe it or not, Hurn is not alone. Commonly referred to as "acquitted conduct sentencing," sentences based on conduct of which defendants have been found not guilty are authorized, and arguably required, by U.S. law. Federal judges impose them routinely. The U.S. Supreme Court has even approved of the practice, which several federal courts of appeals have found survives the Supreme Court's watershed *U.S. v. Booker* decision.

Acquitted conduct sentencing, however, goes against virtually everything we know and respect about the American criminal justice system.

An erosion of principles

We understand that the government cannot lock people up unless and until guilt has been proven to a jury beyond a reasonable doubt. We also understand that the American criminal justice system would rather free a guilty person than imprison an innocent one. Sentences based on acquitted conduct erode these principles and, with them, our respect for the law. Indeed, nothing could more deeply shake a defendant's confidence in the justice system than a prison sentence based on crimes for which he or she was found not guilty.

Acquitted conduct sentencing also strikes at the very core of the American jury system. In criminal trials, the jury (and only the jury) decides questions of fact, such as whether a particular defendant is guilty of a charged offense. We've been taught from a young age that juries are the bedrock of the judicial system, and that we should take pride in the system's inherent fairness.

But acquitted conduct sentencing effectively nullifies jury verdicts and allows judges to usurp the jury's fact-finding role—no need for juries at all if a sentence can be based on conduct of which a defendant was found not guilty. This upsets the delicate balance that the founding fathers struck when framing the U.S. Constitution. As Alexander Hamilton put it, "arbitrary punishments upon arbitrary convictions" are the "great engines of judicial despotism."

So, why is acquitted conduct sentencing permitted? The courts say that there are different burdens of proof at trial and at sentencing. Judges can consider any fact when sentencing a defendant so long as the final punishment doesn't exceed the maximum for the offense and so long as the fact is proven by a preponderance of the evidence, a standard that falls far short of beyond a reasonable doubt. That distinction makes for an interesting academic discussion, but it doesn't work in the real world, which is filled with real defendants who have real lives and often families that depend on them. Any attempt at explaining this distinction falls on deaf ears and fuels the common complaint that the law is deliberately abstruse. In a word, people don't like systems they don't understand.

Mark Hurn is no boy scout. He's a drug dealer. But the government failed to prove beyond a reasonable doubt that he was dealing crack. Nevertheless, Hurn is serving time as if the government had—17 1/2 years, to be precise. That's a long time. He'll likely spend much of his time wondering how he got there. The American public and lawmakers should spend some of that time asking the same question. NLJ