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Legal Sidebar

The Use of Acquitted Conduct to Enhance Federal Sentences

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Consider a defendant who is a part of a group that robs a pharmacy. In a dispute about how to divide up the proceeds, one of the robbers kills another in the group. The defendant is charged both with the robbery and the killing of his confederate. The jury convicts the defendant only of the robbery and acquits the defendant of murder. That is, the jury necessarily finds that the government proved beyond a reasonable doubt that the defendant robbed the pharmacy, but the government failed to prove beyond a reasonable doubt that the defendant committed murder. The judge sentences the defendant for the robbery, which carries a sentence of five to six years in prison, and also finds by a preponderance of the evidence that the defendant is responsible for the confederate's death, enhancing the defendant's sentence to nineteen years in prison.

These are the facts of *McClinton v. United States*. Last term, the Supreme Court was asked to hear this case and resolve whether enhancing a sentence on the basis of "acquitted conduct"—the conduct underlying an alleged criminal offense that the jury has acquitted the defendant of committing—is consistent with the Due Process Clause of the Fifth Amendment and the right to a jury trial under the Sixth Amendment. The Supreme Court denied review, however, with several Justices explaining that they were waiting for the U.S. Sentencing Commission to act. The Commission is currently studying the use of acquitted conduct for purposes of the U.S. Sentencing Guidelines and has indicated that it intends to vote next year on corresponding changes to the Guidelines. Federal judges use these Guidelines as the starting point in identifying an appropriate sentence for a federal defendant.

This Sidebar discusses acquitted conduct in the context of the Sentencing Commission. The Sidebar provides an overview of the Commission's preliminary and current approach to acquitted conduct and identifies some judicial commentary regarding the use of acquitted conduct in sentencing decisions. The Sidebar then turns to the Commission's initial proposed amendment to the Guidelines on acquitted conduct, the public comments on the amendment, and the Commission's decision to further study the issue for a future amendment cycle. The Sidebar concludes with some considerations for Congress.

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Acquitted Conduct under the Current Sentencing Guidelines

Charged Offense and Real Offense Sentencing

Congress enacts federal criminal statutes and can also set the penalties for violations of these statutes. For example, an individual who possesses certain controlled substances with intent to manufacture, distribute, or dispense may be subject to a statutorily prescribed mandatory minimum sentence of ten years and a maximum sentence of life in prison. Under this example, a federal judge could impose a sentence anywhere between the ten-year baseline and life in prison. In 1984, however, Congress established the U.S. Sentencing Commission to develop Guidelines that would guide judges' discretion within these statutory limits and thereby reduce unwarranted sentencing disparities.

The inaugural Commission acknowledged that "one of the most important questions" it faced was whether to base the Sentencing Guidelines on a "charged offense" system (in which the Guidelines would correspond with the elements of the offense of conviction) or a "real offense" system (in which the Guidelines would take into account how the individual committed the offense of conviction). For example, two defendants might independently rob banks in violation of the same criminal statute but may commit the crimes differently: say one defendant brandishes a firearm in the commission of the offense, takes more money, and strikes a teller upon leaving. If both were sentenced in a charged offense system, the two defendants would receive the same known sentence based on the offense of conviction, promoting uniformity and certainty. If they were sentenced in a real offense system, by contrast, the defendant who brandished a firearm, stole more money, and hit the teller might receive a higher sentence. In this sense, a real offense system helps ensure that a sentence reflects the differences in how the crimes were committed and is proportional to the harms inflicted.

The inaugural Sentencing Commission initially attempted to develop Guidelines predicated on a "real offense" approach. The Commission admitted, however, that identifying, weighing, and integrating every harm would be too complex to be workable. The Commission instead ultimately adopted a "modified real offense" system, a compromise between the two models. In particular, the Guidelines set a base offense level that is tied to the offense of conviction (reflecting a charged offense system), which may be modified in light of aggravating and mitigating circumstances called specific offense characteristics and adjustments (reflecting a real offense system).

Relevant Conduct

The Guidelines provide that the base offense level, specific offense characteristics, and adjustments "shall be determined" on the basis of "relevant conduct." The Guidelines define "relevant conduct" as those acts and omissions "that were part of the same course of conduct or common scheme or plan as the offense of conviction." An application note to the Guidelines adds that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." The Supreme Court has read the Commission's description of relevant conduct to include consideration of acquitted conduct, that is, conduct underlying a charged criminal offense of which the defendant was acquitted.

The Commission's inclusion of "relevant conduct," extending to acquitted conduct, is supported by various sources. In 1970, Congress enacted a statute providing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Relatedly, the federal parole guidelines in 1987 included consideration of "the conduct in which the defendant actually engaged." The Commission's approach also is consistent with federal caselaw. Specific to acquitted conduct, in the 1947 case of *Williams v. New York*, the Supreme Court indicated that judges at sentencing should consider the "fullest information possible," "not confined to the

narrow question of guilt." In *Nichols v. United States*, decided in 1994, the Court observed that sentencing judges have "considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." Soon after in *United States v. Watts*, the Court made clear that a sentencing judge's consideration of both acquitted conduct and uncharged conduct does not offend the Double Jeopardy Clause of the Fifth Amendment. A system permitting consideration of "relevant conduct" may also align with the traditional purposes of criminal punishment that Congress has codified in statute. For example, a sentence that takes into account acquitted conduct may better reflect a defendant's culpability, supporting a retributive purpose of punishment.

The Supreme Court has placed some limits on judge-found facts at sentencing. For example, in a pair of cases, the Court in *Apprendi v. New Jersey* and *Alleyne v. United States* held that, other than the fact of a prior conviction, any fact that increases a statutory maximum or mandatory minimum penalty, respectively, constitutes an element of a crime that must be admitted by the defendant or found by a jury beyond a reasonable doubt. The Guidelines were created to be mandatory, but in 2005, the Supreme Court held in *Booker v. United States* that the mandatory Guidelines system violated the Sixth Amendment right to a jury trial because the Guidelines permitted a judge to enhance a sentence based on a judge's finding of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. The Court therefore construed the Guidelines as advisory to avoid the Sixth Amendment issue.

Preponderance of the Evidence Standard

The Commission specifies that a sentencing judge must find relevant conduct by a preponderance of the evidence (i.e., proof that a fact is more likely than not to have occurred), a lower quantum of proof than the standard of "beyond a reasonable doubt" required for a criminal conviction. The commentary to the Sentencing Guidelines explains that "a preponderance of the evidence standard is appropriate to meet due process requirements . . . regarding application of the guidelines to the facts of a case." The standard of proof also finds support in caselaw. In the 1970 case of *In re Winship*, the Supreme Court established that each element of a criminal offense must be proven to a jury beyond a reasonable doubt to secure a conviction. In *McMillan v. Pennsylvania*, the Supreme Court in 1986 suggested that the reasonable doubt standard applies only to the guilt phase and not to the subsequent sentencing phase of the criminal process. Over a decade later in *Watts*, the Court, citing *Nichols* and *McMillan*, emphasized that "application of the preponderance standard at sentencing generally satisfies due process." In addition, "every federal court of appeals with criminal jurisdiction has recognized sentencing courts' authority to rely on conduct that the judge finds by a preponderance of the evidence but that the jury does not find beyond a reasonable doubt," according to the Solicitor General.

Judicial Commentary Regarding the Use of Acquitted Conduct in Sentencing

Several former and current Supreme Court Justices have expressed concern that the use of acquitted conduct at sentencing may be unconstitutional. Then-Justices John Paul Stevens and Anthony Kennedy dissented in *Watts*, arguing that acquitted conduct undermines the jury's verdict of acquittal. Then-Justice Antonin Scalia (joined by then-Justice Ruth Bader Ginsburg and Justice Clarence Thomas) dissented from the denial of certiorari in another case, contending that "any fact necessary to prevent a sentence from being substantively unreasonable . . . is an element that must be either admitted by the defendant or found by the jury." Likewise, Justice Neil Gorsuch wrote while serving on the Tenth Circuit that it is "far from certain" whether the Constitution allows a court to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent," citing then-Justice Scalia's dissent. Similarly, Justice Brett Kavanaugh, while sitting on the D.C. Circuit, commented 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." He also encouraged Congress and the Court to find a "fix" for the acquitted conduct issue, which he said raises concerns "both as a matter of appearance and as a matter of fairness." Before the Sentencing Commission, then-Judge Kavanaugh testified that "acquitted conduct should be barred from the guidelines calculation."

In *McClinton v. United States*, a recent case challenging the use of acquitted conduct that the Supreme Court declined to review, the petitioner pointed to judicial criticisms of acquitted conduct and also argued that the use of acquitted conduct at sentencing incentivizes prosecutors to bring additional charges to both increase their leverage for plea bargaining purposes and increase the chances of an enhanced sentence based on acquitted charges. Justice Sonia Sotomayor issued a separate statement respecting the denial of certiorari in the case, asserting that "the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system." The use of acquitted conduct, Justice Sotomayor argued, minimizes the role of the jury as safeguard of liberty and check on the government's authority to punish while enabling the government to receive a "second bite of the apple" with a lower standard of proof. Justice Kavanaugh, joined by Justices Gorsuch and Amy Coney Barrett, also offered a statement respecting the denial of certiorari, indicating that "[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions." These Justices signaled they would wait for potential action from the Sentencing Commission on acquitted conduct before deciding whether to vote to address the issue.

Justice Samuel Alito concurred in the denial of certiorari in *McClinton*, suggesting that the constitutional right to a jury trial poses no bar to the use of acquitted conduct because, as a historical matter, founding era federal statutes permitted judges to take acquitted conduct into account provided that the sentence imposed fell within a prescribed range. In addition, Justice Alito posited that, down the line, the Court could only preclude the use of acquitted conduct by overruling *Watts* and the traditional grounds for overturning precedent, including whether it is unworkable, cut in favor of retaining *Watts*.

2023 Proposed Amendment to Guidelines on Acquitted Conduct

The Proposed Amendment

In early 2023, the Sentencing Commission proposed a Guidelines amendment to address acquitted conduct that would have gone into effect on November 1, 2023 absent an act of Congress. The Commission subsequently withdrew the proposal, however, determining that additional study was needed and reserving consideration of the matter until next year. The 2023 proposed amendment would have provided that acquitted conduct shall not be considered relevant conduct for purposes of determining a sentencing range under the Guidelines unless, to establish the offense of conviction, the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt. The proposed provision would have defined "acquitted conduct" as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion for acquittal. The proposed amendment also would have revised the Guidelines commentary to provide for limited continued use of acquitted conduct in certain circumstances.

Public Comments and the Committee's Decision to Further Study the Issue

Certain federal defenders, public interest groups, federal judges and criminal defense attorneys, and Members of the Senate Judiciary Committee expressed approval of the amendment. Views in support of the amendment emphasized the proposition that judicial consideration of acquitted conduct violates a defendant's right to due process and a jury trial while fueling the perception that the justice system is unfair. By contrast, the Department of Justice (DOJ) Criminal Division, the National Association of Assistant United States Attorneys, some probation officers, and certain crime victims opposed the

proposed amendment on the grounds that it was unworkable and that judges should be able to continue to exercise their discretion to consider all of a defendant's conduct.

Among supporters of the proposed amendment, some asserted it did not go far enough and should set forth a bright-line rule that acquitted conduct may not be considered in any circumstances. On the other hand, DOJ recommended that any amendment restricting the use of acquitted conduct should be narrow and contain specific carveouts (for example, excluding acquittals for technical reasons such as lack of jurisdiction or venue). Commission Chair Carlton W. Reeves remarked that the proposal had drawn immense public comment on both sides of the issue. He observed that the matter of what judges may consider in sentencing is "of foundational and fundamental importance to the operation of the entire federal justice system." Given the importance of the issue and the myriad of public comment, the Chair said the Commission will take more time and resolve the issue in 2024.

Congressional Considerations

Should Congress consider the issue of acquitted conduct at sentencing, it has at least two primary options. First, if the Sentencing Commission proposes an amendment to the Guidelines on the use of acquitted conduct, the Commission is statutorily required to submit the proposed amendment to Congress. The submission triggers a 180-day congressional review period. Congress may allow the review period to pass, in which case the amendment becomes effective; or Congress can "modify or disapprove" the amendment. In 1995, for example, a bill passed in the Senate and the House, and signed into law by then President Bill Clinton, disapproved two proposed amendments. The 1995 act may serve as precedent for how Congress could reject a proposed acquitted conduct amendment. Second, Congress may pass legislation codifying in federal law whether and to what extent acquitted conduct may be used in federal sentencing determinations. In past sessions, Members have introduced bills to this effect (see, e.g., H.R. 1621 (117th Congress), S. 601 (117th Congress), and S. 2566 (116th Congress)).

Author Information

Dave S. Sidhu
Legislative Attorney

Rosemary W. Gardey
Legislative Attorney

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