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Legal Sidebar

The U.S. Sentencing Commission Seeks to Limit the Use of Acquitted Conduct in Federal Sentencing

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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 19 years in prison.

These are the facts of *McClinton v. United States*. In 2022, the Supreme Court was asked to hear this case and resolve whether enhancing a sentence on the basis of "acquitted conduct"—generally 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. In 2023, the Supreme Court denied review, however, with several Justices explaining that they were waiting for the U.S. Sentencing Commission to act. The Commission studied the use of acquitted conduct for purposes of the U.S. Sentencing Guidelines—the starting point in identifying an appropriate sentence for a federal defendant—and has proposed an amendment to the Guidelines that would limit the consideration of acquitted conduct for purposes of determining the sentencing range under the Guidelines.

This Sidebar discusses acquitted conduct in the context of the Guidelines. 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 proposed amendment to the Guidelines on acquitted conduct. The Sidebar concludes with considerations for Congress, including a discussion of the opportunity for Congress to review and respond to the proposed amendment by November 1, 2024.

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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 them may be subject to a statutorily prescribed mandatory minimum sentence of 10 years and a maximum sentence of life in prison. Under this example, a federal judge historically could have imposed a sentence anywhere between the 10-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, 18 U.S.C. § 3661, which provides 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 18 U.S.C. § 3553(a). For example, a sentence that takes into account acquitted conduct may better reflect a defendant's culpability and thereby advance the 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. The Court later clarified that, in a post-*Booker* advisory regime, federal judges are to follow a three-step process in imposing an appropriate sentence: (1) to calculate the Guidelines range, (2) to consider any reasons to depart from the Guidelines in light of enumerated reasons in the Guidelines, and (3) to consider any reasons to vary from the sentence otherwise indicated by the first two steps in light of the sentencing principles codified in 18 U.S.C. § 3553(a).

Preponderance of the Evidence Standard

The Guidelines specify 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 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 in doing so weighing the traditional grounds for overturning precedent, including whether it is unworkable.

Proposed Amendment to Guidelines on Acquitted Conduct

The Withdrawn 2023 Proposed Amendment

In early 2023, the Sentencing Commission proposed a Guidelines amendment to address acquitted conduct. 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 Commission subsequently withdrew the proposal. Commission Chair Carlton W. Reeves explained that further study was needed given that the proposed amendment had drawn extensive public comment on both sides of the issue and that the matter is "of foundational and fundamental importance to the operation of the entire federal justice system."

The 2024 Proposed Amendment

In 2024, the Commission proposed an amendment to the Guidelines that would limit the use of acquitted conduct for purposes of calculating the Guidelines range. In addressing the need for the amendment, the Commission cited "concerns" about acquitted-conduct sentencing, including statements by Justices Sotomayor and Kavanaugh. In substance, the proposed amendment would establish that relevant conduct

under the Guidelines does not include acquitted conduct, defined as "conduct for which the defendant was criminally charged and acquitted in federal court."

The proposed amendment contains an exception: conduct that "establishes, in whole or in part, the instant offense of conviction"—that is, conduct that "underlies" and overlaps with both an acquitted charge and the instant offense of conviction—would constitute relevant conduct and could be considered under the Guidelines. By its own terms, the proposal indicates that the amendment would only "exclude acquitted conduct from the scope of relevant conduct used in calculating a sentence range"—in other words, the information that a federal judge may consider at steps one and two of the post-*Booker* sentencing framework. The amendment thus does not apply to step three, which involves the consideration of statutory factors listed in 18 U.S.C. § 3553(a). The amendment also expressly provides that it does not "abrogate[] a court's authority under 18 U.S.C. § 3661," further signaling that a federal court remains free by virtue of statute to consider acquitted conduct at step three of the sentencing process.

Congressional Considerations

On April 30, 2024, the Commission submitted the proposed amendment to Congress, triggering a 180-day congressional review period. Congress may allow the review period to pass, in which case the amendment becomes effective on November 1, 2024; 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. Amendments to Sections 3553(a) and 3661, which permit sentencing judges to continue considering acquitted conduct beyond the Guidelines context, may only be accomplished by Congress. In current and past sessions, Members have introduced bills concerning acquitted conduct (see, e.g., H.R. 5430 [118th Congress], S. 2788 [118th Congress], H.R. 1621 [117th Congress], S. 601 [117th Congress], and S. 2566 [116th Congress]).

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