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Acquitted-Conduct Sentencing: A Quagmire Neither the Supreme Court Nor the U.S. Sentencing Commission Can Continue to Avoid

By Harry Sandick and Nicole Scully
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It would be a surprise to many, but it has been common knowledge to criminal practitioners for years, that a criminal defendant's sentence for a crime which they have been convicted can be increased based on consideration of conduct that the jury acquitted. As some have observed, this outcome can make a partial acquittal in federal court into a pyrrhic victory as the defendant's sentence is impacted by the same behavior that the jury concluded was not proved beyond a reasonable doubt. And not just impacted on the margin — a defendant's sentence can be greatly increased.

This is true in both white-collar cases and in cases involving drug dealing or crimes of violence. Take the case of Dayonta McClinton, who was convicted by a jury of being one of a group that robbed an Indianapolis CVS pharmacy in 2015. *See, McClinton v. United States*, petition for cert. pending, No. 21-1557 (filed June 10, 2022). The jury acquitted McClinton of even more serious conduct — the shooting of one of the other robbers in the back of the head at point-blank range. Nonetheless, the sentencing court found, using a preponderance of the evidence standard, that McClinton did commit the homicide. As a result, the sentencing court more than tripled McClinton's Sentencing Guidelines Range, from 57-71 months, based on the robbery, to a sentence of 228 months, holding him responsible for the homicide.

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State of Acquitted-Conduct Sentencing Jurisprudence

Where does the practice of using acquitted conduct in sentencing come from? Even long before the Sentencing Guidelines were conceived and enacted, the Supreme Court has reiterated that a judge is entitled to consider "the fullest information possible concerning the defendant's life and characteristics" in criminal sentencing. *Williams v. New York*, 337 U.S. 241, 247 (1949). This is so even for "past criminal behavior which did not result in a conviction." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996). Congress codified the general principle that sentencing courts have broad discretion to consider various kinds of information when sentencing a criminal defendant: "[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." 18 U.S.C. §3661.

In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court doubled down on protecting a sentencing court's broad discretion to consider acquitted

conduct. The issue before the Court in *Watts* was whether the consideration of acquitted conduct at sentencing violates the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 154-55. The Court held that, as long as the sentencing court finds that such behavior occurred by a preponderance of the evidence, consideration of acquitted conduct in sentencing does not run afoul of the Double Jeopardy Clause. *Id.* at 157. The Court based its conclusion on the higher standard of proof required for a criminal conviction, holding that even if a jury did not find beyond a reasonable doubt that certain conduct occurred, it is still possible for the judge to find by a preponderance of the evidence that the conduct occurred. *Id.* at 155-56.

While the Sentencing Guidelines are no longer mandatory, and in theory district courts can elect to impose only the sentence supported by the conduct for which the jury returned a guilty verdict, in practice the Sentencing Guidelines still exert a powerful gravitational force at sentencing.

However, the practice of allowing courts to factor acquitted conduct into sentencing has long been called into question by judges. *See, Watts*, 519 U.S. at 170 (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence."); *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.) ("Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and must be found by a jury, not a judge.") (internal quotations and citations omitted); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing 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.").

It is worth noting that when *Watts* was decided, the Court did not have a Fifth Amendment Due Process Clause or Sixth Amendment challenge before it. Indeed, the landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which recognized a Sixth Amendment right to have sentencing elements put to the jury when proving those elements increased the statutory maximum sentence, was still a few years away. Nonetheless, lower courts have "assume[d] that *Watts* controls the outcome of both the Fifth *and* Sixth Amendment challenges to the use of acquitted conduct," *United States v. White*, 551 F.3d 381, 392 n.2 (6th Cir. 2008) (en banc) (Merritt, J., dissenting, joined by five others), and have denied Due Process and Sixth Amendment challenges as precluded by *Watts*.

This is precisely what happened in McClinton's case. The Seventh Circuit denied McClinton's constitutional challenge to the use of acquitted conduct in his sentencing, stating that "[u]ntil such time as the Supreme Court alters its holding [in *Watts*], we must follow its precedent" that "a sentencing court may consider conduct underlying the acquitted charge, so long as that conduct has been found by a preponderance of the evidence." *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022). McClinton's petition for certiorari was filed thereafter and it remains undecided as of this writing.

U.S. Sentencing Commission Reviews Acquitted-Conduct Sentencing

The U.S. Sentencing Commission, however, could change the course of acquitted-conduct jurisprudence in federal court on its own. On Aug. 5, 2022, the U.S. Senate confirmed a group of seven bipartisan members to serve on the Sentencing Commission, providing the independent judicial branch with a voting quorum for the first time in more than three years. The 2023 Proposed Amendments to the Sentencing Guidelines, released Feb. 2, 2023, included Proposed Amendment No. 8, which would prohibit the use of acquitted conduct in applying the Guidelines. *See*, https://bit.ly/3LjcuAN.

Proposed Amendment No. 8 recognized that consideration of acquitted conduct is permitted under the Guidelines through the operation of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with §1B1.4 (Information to be

Used in Imposing Sentence) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)). Section 1B1.3 defines relevant conduct as "all acts and omissions … that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." These can be actions or omissions of the defendant, or of others in a case of jointly undertaken criminal activity that occurred in the course of committing the offense. *See,* §1B1.3(a)(1). Consistent with the principle enumerated in 18 U.S.C. §3661, discussed above, §6A1.3 instructs that "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The Commentary to §6A1.3 references Supreme Court case law upholding the sentencing court's unrestricted discretion in considering any information at sentencing, so long as it is proved by a preponderance of the evidence, a standard that the Sentencing Commission agreed comports with due process.

Proposed Amendment No. 8 would have amended §1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the Guidelines Range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction. This effectively applies the *Apprendi* standard to the consideration of acquitted conduct. The new provision would define "acquitted conduct" as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction. The proposed amendment would also amend the Commentary to §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for the purposes of determining the Guidelines Range.

The Sentencing Commission asked for comments on two issues related to the proposed amendment: 1) whether the proposed amendment allows conduct underlying an acquitted charge that overlaps with conduct found beyond a reasonable doubt to establish the offense of conviction to be considered in sentencing, and whether the Sentencing Commission should provide additional guidance on such "overlapping" conduct; and 2) whether the proposed limitation on the use of acquitted conduct in sentencing is too broad or too narrow.

Proposed Amendment No. 8 attracted a flurry of commentary, with dozens of individuals and organizations submitting comments. Many commenters praised the Sentencing Commission's efforts to ban the use of acquitted conduct in sentencing, but submitted additional modifications. The Federal Courts Committee, Criminal Courts Committee, and White Collar Crime Committee of the New York City Bar Association (City Bar) recommended that the Sentencing Commission modify the language of the proposed amendment to §1B1.3 so that only acquitted conduct that overlaps with conduct "legally necessary" to the factfinder's determination of guilt on the offense(s) of conviction may be considered in sentencing. The City Bar also found the definition of "acquitted conduct" too narrow, and argued that all acquittals, whether based on substantive evidence or acquittals for other reasons, such as lack of jurisdiction, venue, or violations of the statute of limitations, should be precluded for the purposes of determining the applicable Guidelines Range. Families Against Mandatory Minimums (FAMM) proposed a language modification that would ban the use of acquitted conduct in selecting a point within the Guidelines Range or a departure above the range, in addition to banning the use of acquitted conduct for determining the Guidelines Range itself. The National Association of Criminal Defense Lawyers (NACDL) reported similar concerns that Proposed Amendment No. 8 currently does not ban all use of acquitted conduct, and that the definition of "acquitted conduct" is arbitrary.

The Criminal Division of the U.S. Department of Justice (DOJ), on the other hand, does not believe the Sentencing Commission can practicably exclude acquitted conduct from the definition of relevant conduct because it will "unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to

account for the full range of a defendant's conduct." DOJ questioned whether sentencing courts will be able to parse the acts and omissions that can and cannot be considered, especially when there are overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.

After deliberation and review of the many submitted comments, the Sentencing Commission stated at a public meeting on April 5, 2023, that it would not adopt Proposed Amendment No. 8 at this time. The Honorable Carlton W. Reeves, Chair of the Sentencing Commission, explained that "[w]e all agreed that the Commission needs a little more time before coming to a final decision on such an important matter. We intend to resolve questions involving acquitted conduct next year." It appears that in the absence of consensus within the Sentencing Commission, and with commenters criticizing the amendment both for going too far and not far enough, the panel decided to take a wait-and-see approach.

Concluding Thoughts

The use of acquitted conduct in sentencing does not comport with the public's understanding of the sanctity of a jury's verdict. Allowing conduct that the jury does not find proven beyond a reasonable doubt to enhance sentencing undermines the "jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012) (quotation and citation omitted). While the Sentencing Guidelines are no longer mandatory, and in theory district courts can elect to impose only the sentence supported by the conduct for which the jury returned a guilty verdict, in practice the Sentencing Guidelines still exert a powerful gravitational force at sentencing. In addition, a district court that refuses to consider acquitted conduct may see its sentences labelled procedurally unreasonable and therefore vacated on appeal. *See, United States v. Ibanga*, 271 F. App'x 298, 301 (4th Cir. 2008) (per curiam) (holding district court "committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process") (internal citation omitted); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (vacating sentence and ordering district court "to consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence … even those relating to acquitted conduct, consistent with its statutory obligation to consider the Guidelines").

While the Sentencing Commission intends to address acquitted conduct in its next term, it may be that the Supreme Court resolves this issue before then. As Justice Scalia warned, without guidance from the Supreme Court, courts will continue to "take[] [this Court's] continuing silence to suggest that the Constitution *does* permit" acquitted-conduct sentencing. *See, Jones*, 574 U.S. at 949. State courts, which are not bound by the Sentencing Guidelines, may continue to use acquitted conduct in sentencing regardless of any action the Sentencing Commission takes. Since acquitted-conduct sentencing can have such a strong impact on a defendant's sentence, setting a uniform approach would best serve the interests and goals of our criminal justice system.

As mentioned above, Constitutional challenges to the practice of using acquitted conduct in sentencing have been lodged under the Due Process Clause of the Fifth Amendment and Sixth Amendment's right to a jury trial. Five such petitions — including *McClinton v. United States* — are currently pending before the Supreme Court. As of this writing, the Supreme Court has yet to deny or grant certiorari in any of these cases. Even if all are denied, other petitions for certiorari will no doubt follow. On April 14, 2023, a panel of the U.S. Court of Appeals for the Second Circuit acknowledged that while *Watts* remains good law, "several justices and judges have presented a strong case for reconsidering the use of acquitted conduct to determine sentencing." *United States v. Tapia*, No. 21-1674, slip op. at 4 n.2 (2d Cir. Apr. 14, 2023). Defense counsel will continue to make this objection and preserve it for review.

For all these reasons, it seems clear that neither the Sentencing Commission nor the Supreme Court can continue to avoid the hotly contested issue of acquitted-conduct sentencing. Now the question is: who will address it first?