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Supreme Court Must End Acquitted Conduct Sentencing

By **Alan Ellis and Mark Allenbaugh** (July 19, 2023, 4:20 PM EDT)

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To most reasonable observers, sentencing a defendant for conduct they were acquitted of seems not only illogical and absurd, but also fundamentally unfair.

And yet, since 1997, none other than the U.S. Supreme Court has endorsed the practice.

In U.S. v. Watts,[1] the court observed that an acquittal simply means that a jury found the evidence insufficient to remove all reasonable doubt as to the conduct alleged. It does not necessarily mean that the defendant did not engage in such conduct — just that there was insufficient evidence to meet the high evidentiary standard required for conviction.

Thus, according to the court, there is no constitutional prohibition for a judge, using a lower standard of proof — a mere preponderance of the evidence — to find that the defendant engaged in such conduct for purposes of sentencing.

Since Watts, so-called acquitted conduct sentencing has been upheld time and again in federal courts across the country, including in many, but not all, states.

To be sure, for as long as acquitted conduct sentencing has been around, there have been significant criticisms of the practice, including by at least three current justices of the Supreme Court.[2]

After all, if one is acquitted, then one is presumed innocent of the conduct alleged. So, punishing a defendant for conduct they are presumed innocent of appears to violate the Fifth Amendment's due process guarantee and the Sixth Amendment's right to a jury trial.

Unfortunately, on the last day of the court's current term, it once again **declined to review** the constitutionality and logic of Watts, but not without some of the justices making notable observations.

This article discusses the recent history of efforts to curtail, if not eliminate, the use of acquitted conduct at sentencing, and the much larger implications of doing so.

Ultimately, the court must — as only it can — put an end to this fundamentally unfair and unconstitutional practice, even if that requires a wholesale restructuring of federal sentencing.

Recently, it appeared that the U.S. Sentencing Commission was finally poised to eliminate the use of acquitted conduct at sentencing to a large degree.

The commission **proposed an amendment** to the sentencing guidelines that would have precluded acquitted conduct from the ambit of relevant conduct, with the effect that it could not be used to calculate the guidelines range.[3]

However, the commission did allow that acquitted conduct could be considered to determine the sentence within the guidelines' range or whether departure from the guidelines was warranted.[4]

Ultimately, the commission declined to adopt this proposed amendment. According to U.S. District Judge Carlton Reeves, the chair of the commission, "[w]e all agree that the Commission needs a little more time, we think, before coming to a final decision on such an important matter."[5]

Perhaps, too, the fact that several petitions were pending before the Supreme Court regarding the use of acquitted conduct, which were raised during testimony on the proposed amendment,[6] convinced the commission it should wait for the court to act first.

Regardless of the reason, the commission not only declined to act on the proposed amendment, but has not even listed acquitted conduct as a priority issue for its next amendment cycle.[7]

Unfortunately, after holding over a dozen petitions for certiorari on the issue — some for over a year — the court, on the last day of its current term, decided to toss the sizzling sentencing potato of acquitted conduct back to the commission by denying certiorari in McClinton v. U.S. and related cases.

In her statement regarding the court's denial of certiorari, Justice Sonia Sotomayor observed that "[t]he Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year."[8]

Likewise, in his statement regarding denial of certiorari, joined by Justices Neil Gorsuch and Amy Coney Barrett, Justice Brett Kavanaugh stated that

> the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.[9]

But as noted, the commission had **already declined** to act and has not listed acquitted conduct as a priority for its next amendment cycle.

In any event, as Justice Samuel Alito noted in his concurrence in the denial of certiorari,

> [e]ven if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts, and therefore the constitutional issue will remain.[10]

Congress, too, has taken up legislation to preclude the use of acquitted conduct at sentencing, most recently with the Prohibiting Punishment of Acquitted Conduct Act, S. 601, introduced in 2021.

However, Congress allowed this bill to die, presumably in the hope that either the commission or the court would finally provide the fix.[11] And so, this glaring absurdity remains unresolved, all

the while continuing to burn defendants with patently unreasonable sentences.

To be sure, exceedingly few cases involve acquitted conduct sentencing. Indeed, according to a study by the Congressional Budget Office regarding the impact of S. 601,

> In fiscal year 2021 ... 57,287 offenders were sentenced for a federal felony or Class A misdemeanor offense. Of that group, ... 963 offenders ... were convicted and sentenced after a trial on one or more of the counts for which they were charged. ... [O]f the 963 offenders convicted after a trial, 157 had at least one charge acquitted. These 157 offenders represent only 0.3% of all offenders sentenced in fiscal year 2021.[12]

So, what could possibly explain the reluctance by all three branches of government to address this issue, especially when its impact appears to apply to so few? Undoubtedly, it is because the reach of holding acquitted conduct sentencing unconstitutional extends far beyond those 157 offenders.

Indeed, it has the potential to reach every single federal and state defendant inasmuch as the sentencing for virtually all offenders rests on — and often is driven by — uncharged conduct.

In short, if the fatal flaw with using acquitted conduct at sentencing is that it conflicts with the presumption of innocence, then logically and legally, that flaw extends also to the consideration of dismissed and even uncharged conduct at sentencing. The presumption of innocence, after all, is only overcome by a conviction.

For example, in the typical federal fraud sentencing, the amount of loss involved plays the predominant role in determining the sentence. But as loss is not an element of the offense, it is not charged. The loss amount alone can increase a defendant's offense level up to 30 levels.

In drug trafficking cases, the same holds true of the amount of drugs involved, except when required to trigger a mandatory minimum penalty.

In a child pornography case, a number of facts are uncharged — the defendant's role in the offense, the number of victims, the amount of images — but these facts can be, and often are, used to enhance a defendant's sentence, sometimes significantly.

To be sure, at least one court has held that the constitutional infirmities attached to acquitted conduct sentencing do not extend to uncharged conduct.

In People v. Beck,[13] the Michigan Supreme Court, distinguishing Watts, held in 2019 that acquitted conduct sentencing is unconstitutional.

In so doing, that court sought to distinguish acquitted conduct from uncharged conduct, but it's reasoning is not very convincing: "Acquitted conduct is, of course, different from uncharged conduct — acquitted conduct has been formally charged and specifically adjudicated by a jury."[14]

But, so what? Indeed, in the government's brief in opposition to certiorari in the principal acquitted conduct petition of U.S. v. McClinton, the government found the Beck court's reasoning to be tenuous.[15]

As the government correctly stated,

> an individual is equally "presumed innocent" when he is never charged with a crime in the first place. ... The logical implication of the Beck majority's reasoning would therefore

> preclude a sentencing court from relying on any conduct not directly underlying the elements of the offense on which the defendant is being sentenced.[16]

Even Justice Alito recognized in his concurrence in the denial of certiorari in McClinton that "there is no relevant difference ... between acquitted conduct and uncharged conduct."[17]

As Justice Kavanaugh observed in 2015 in U.S. v. Bell when he was on the U.S. Court of Appeals for the District of Columbia Circuit,

> [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.[18]

Likewise, when he was on the U.S. Court of Appeals for the Tenth Circuit in 2014, Justice Gorsuch in U.S. v. Sabillon-Umana questioned the assumption

> that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent.[19]

As the late Justice Antonin Scalia stated in 2014 in Jones v. U.S., joined by Justice Clarence Thomas and the late Justice Ruth Bader Ginsburg,

> 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." ... For years, however, we have refrained from saying so. ... [T]he Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding ... This has gone on long enough. ... We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment.[20]

Helpfully, Justice Sotomayor did note in her McClinton statement that "[i]f the Commission does not act expeditiously or chooses not to act, ... this Court may need to take up the constitutional issues presented."[21]

The court must, as only it can put an end to this fundamentally unfair and unconstitutional practice.

As Judge Reeves noted at a commission hearing, quoting law professor Douglas Berman, "'What conduct judges can consider when using the guidelines' is ... 'of foundational and of fundamental importance to the operation of the entire federal justice system.'"[22]

Indeed, it is of foundational and fundamental importance to the entire nation's criminal justice system.

It's long past time for the three branches of government to stop tossing this sizzling sentencing potato between them. The court must finally heed Justice Scalia's call to resolve the constitutional question once and for all, regardless of consequence.

That will then provide a foundation for the commission, with the oversight of Congress, to develop sentencing guidelines that finally comport with the U.S. Constitution. If that requires a complete overhaul of the convoluted and advisory guidelines, so be it.

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[1] 519 U.S. 148 (1997) (per curiam).

[2] Jones v. United States, 574 U.S. 948, 949-950 (2014) (criticizing the use of acquitted conduct at sentencing) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); United States v. Bell, 808 F. 3d 926, 928 (D.C. Cir. 2015) (same) (Kavanaugh, J., concurring in denial of reh'g en banc); United States v. Sabillon-Umana, 772 F. 3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (same).

[3] See U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines at 213, Feb. 2, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.

[4] See id. at 223-224.

[5] U.S. Sentencing Comm'n, Public Hearing Trans. at 23, Apr. 5, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_transcript.pdf.

[6] U.S. Sentencing Comm'n, Public Hearing Trans. at 115, Feb. 24, 2023, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0224_Transcript.pdf.

[7] U.S. Sentencing Comm'n, Fed. Register Notice of Proposed 2023-2024 Priorities, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2023-2024-priorities.

[8] McClinton v. United States, No. 21-1557, 600 U.S. _ at 5 (June 30, 2023) (Sotomayor, J., statement respecting denial of certiorari), https://www.supremecourt.gov/opinions/22pdf/21-1557_3kg4.pdf

[9] Id. at 1 (Kavanaugh, J., statement respecting denial of certiorari).

[10] Id. at 1 (Alito, J., concurring in denial of certiorari).

[11] See Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R. 1621 and S. 601.

[12] Letter from CBO Budget Analyst Jon Sperl to U.S. Sentencing Commission at 2-3, Aug. 4, 2022, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-

sentencing-impact-assessments/August_2022_Impact_Analysis_for_CBO.pdf.

[13] 504 Mich. 605, 939 N.W.2d 213 (2019).

[14] Id. at 620, 939 N.W.2d at 221-222.

[15] United States v. McClinton, No. 2021-1557, Br. of Gov't in Opp. to Cert. at 13 (Oct. 28, 2022) (citation omitted), https://www.supremecourt.gov/DocketPDF/21/21-1557/244236/20221028122337099_21-1557%20McClinton%20opp.pdf.

[16] Id. at 13-14.

[17] McClinton v. United States, No. 21-1557, 600 U.S. _ at 2 fn.* (June 30, 2023) (Alito, J., concurring in denial of certiorari), https://www.supremecourt.gov/opinions/22pdf/21-1557_3kg4.pdf. To be sure, the thrust of Justice Alito's argument here is that since there is no relevant difference, if the consideration of uncharged conduct is constitutional, then so is consideration of acquitted conduct.

[18] United States v. Bell, 803 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (emphasis added).

[19] United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014).

[20] Jones v. United States, 574 U.S. 948, 949-950 (2014) (Scalia, J., dissenting from denial of certiorari).

[21] McClinton at 5 (Sotomayor, J., statement respecting denial of certiorari).

[22] U.S. Sentencing Comm'n, Public Hearing Trans. at 23, Apr. 5, 2023, (Chair Reeves quoting Prof. Douglas Berman), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_transcript.pdf.