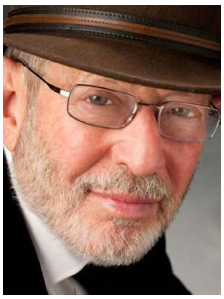
End Of Acquitted Conduct Sentencing Can Spark More Reform

By **Mark Allenbaugh and Alan Ellis** (May 6, 2024)

Mark Allenbaugh



Alan Ellis

On April 17, the U.S. Sentencing Commission largely put an end to one of the most controversial aspects of federal sentencing: the use of acquitted conduct at sentencing.

Acquitted conduct is primarily any conduct for which a defendant was indicted — but was ultimately found to be not guilty of — by a jury or judge in a bench trial. It also includes conduct that an appellate court found to be insufficient to constitute an offense.

To illustrate, let's say your client is charged with two counts of bank fraud, each constituting $1 million in losses to the bank. Your client decides to go to trial. Your client is convicted of the first count but acquitted of the second.

Intuitively, one would think that the judge at sentencing could only consider the $1 million loss underlying the first count — the count for which your client was convicted. One would be wrong.

As the law stands now, the judge must consider the conduct underlying the acquitted count such that, for sentencing purposes, the defendant would be sentenced for causing $2 million in losses. Your client's acquittal was just a Pyrrhic victory.

Now let's say your client is acquitted of both counts. Fantastic, you might think, as you leave the courthouse, relieved no prison awaits your client. But jump forward a few years.

Unfortunately, once again your client finds themself charged with two counts of bank fraud each constituting $1 million in losses.

However, your client now decides to plead guilty to the first count in exchange for dismissal of the second count. At sentencing, not only does the conduct underlying the dismissed count come in to enhance your client's sentence, but so too do the two counts from your client's prior case for which they were acquitted.

How is that fair? How is that even constitutional?

Since 1997, when the U.S. Supreme Court affirmed the practice in U.S. v. Watts,[1] which found that the use of acquitted conduct at sentencing does not violate the double jeopardy clause, federal courts nationwide have used acquitted conduct to increase a defendant's sentence. Since then, a growing chorus of practitioners, including us,[2] as well as academics and even federal judges, have implored the Supreme Court, the Sentencing Commission and Congress to put an end to this practice.

For the Supreme Court's part, despite holding on to a number of petitions for certiorari questioning the use of acquitted conduct at sentencing, last term the Supreme Court ultimately declined to weigh in on the constitutionality of the practice because it wanted to see what the commission was going to do. At that time, the commission had been considering amending the sentencing guidelines to preclude the use of acquitted conduct at

sentencing, but also eventually declined to act because, ironically, it wanted to see what the court would do.

Now that the commission has finally acted, it's important to note that its amendment to the guidelines only precludes the consideration of acquitted conduct for purposes of calculating the advisory sentencing guidelines;[3] the amendment does not preclude judges from considering acquitted conduct for purposes of varying from the advisory guidelines.

For example, returning to our original hypothetical where your client has been convicted of the first count of bank fraud but acquitted of the second count, while a judge may not use the acquitted conduct to calculate your client's guidelines' range, they nonetheless may still consider the acquitted conduct for purposes of imposing a sentence above the calculated range.

Thus, this amendment may not amount to much change in actual practice.

First, the commission estimates that only a mere 0.4% of all those sentenced under the guidelines in fiscal year 2022 could even possibly involve acquitted conduct in light of the fact that over 97.5% pled guilty. So, the amendment could only possibly make a difference in exceedingly rare cases.

Second, as the amendment recognizes, Title 18 of the U.S. Code, Section 3661, provides that "no 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."

Still, Congress currently is considering bipartisan legislation that would modify Section 3661 to add the following after the words "appropriate sentence": "except that a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct under this section preclude."[4]

Presumably, should such legislation pass, then a judge, in those exceedingly rare cases where it would even be at issue, could not consider acquitted conduct for purposes of imposing a sentence above the calculated range — only below.

So, why all the fuss for such a largely academic matter? Because, as we've previously written in a Law360 guest article,[5] much more is at stake.

In unanimously passing the amendment, Sentencing Commission Chair Judge Carlton W. Reeves emphasized that "not guilty means not guilty. By enshrining this basic fact within the federal sentencing guidelines, the Commission is taking an important step to protect the credibility of our courts and criminal justice system."[6]

After all, as the Supreme Court articulated in its 2017 decision in Nelson v. Colorado, "absent conviction of a crime, one is presumed innocent."[7] Indeed, the court held in 1970 in In re: Winship, "the presumption of innocence [is] ... that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law."[8]

And here's the key point: If, absent conviction of a crime, one is presumed innocent, then that presumption should hold not just for acquitted conduct, but also for dismissed conduct and even uncharged conduct as well. Once the acquitted conduct domino falls, so too fall the dismissed and uncharged conduct dominoes. Not only the government, but several

current and former justices of the Supreme Court agree.

Last term, in McClinton v. U.S.,[9] a case that sought the Supreme Court's review of acquitted conduct, the government argued in its brief in opposition to certiorari that

> an individual is equally "presumed innocent" when he is never charged with a crime in the first place. The logical implication ... 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.[10]

Certiorari was ultimately denied in the case. But even Justice Samuel Alito recognized in his concurrence in the denial of certiorari that "there is no relevant difference ... between acquitted conduct and uncharged conduct."[11]

When he was on the U.S. Court of Appeals for the District of Columbia Circuit in 2015, Justice Brett Kavanaugh observed in U.S. v. Bell that "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."[12]

Likewise, when he was on the U.S. Court of Appeals for the Tenth Circuit in 2014, Justice Neil Gorsuch 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" in U.S. v. Sabillon-Umana.[13]

In 2008, when Justice Ketanji Brown Jackson was private defense counsel and before she went on to become a U.S. Sentencing commissioner and public defender, she co-authored a brief seeking certiorari before the Supreme Court on the issue of acquitted conduct. The pertinent issue in that case, Bussell v. U.S.,[14] was whether the petitioner's sentence, which was "based in part on a loss calculation under the guidelines that included amounts related to conduct of which she had been acquitted," violated the Fifth and Sixth Amendments.[15]

Finally, in his dissent to the court's 2014 denial of certiorari in Joseph Jones v. U.S., the late Justice Antonin Scalia, joined by Justice Clarence Thomas and the late Justice Ruth Bader Ginsburg, observed even more broadly that

> 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.[16]

Thus, at least five sitting justices have observed that the use of not only acquitted conduct but also uncharged conduct violates the U.S. Constitution when used to increase "the penalty to which a defendant is exposed." While the commission has now partially resolved the problem of acquitted conduct, and Congress appears to be on the cusp of limiting its consideration even further, only the Supreme Court can set the constitutional boundaries for what facts may be considered at sentencing.

It's worth noting that this coming October marks the 40th anniversary of the Sentencing

Reform Act of 1984, which created the U.S. Sentencing Commission and tasked it with promulgating the U.S. Sentencing Guidelines.

From its inception, the commission imbued the guidelines with two fundamental constitutional errors. We learned of the first in 2005 when the Supreme Court held in U.S. v. Booker that the guidelines could not be treated as binding on federal judges without violating the Constitution.[17] Rather, they may only be treated as advisory.

We now are learning of the second error: Relevant conduct is overbroad.

"Relevant conduct" describes all conduct that a sentencing judge is to consider when calculating the guidelines' advisory sentencing range, which generally constitute "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[18] Relevant conduct traditionally has included not only acquitted conduct, but dismissed and even uncharged conduct.

While the consideration of acquitted conduct to enhance a sentence is exceedingly rare, the constitutional prohibitions against considering such conduct apply with equal force to dismissed and uncharged conduct. The government and several sitting justices agree. The broad scope of relevant conduct, the purported cornerstone of the guidelines,[19] flaunts the Constitution and has been tolerated, as Justice Scalia wrote in his Joseph Jones v. U.S. dissent, "long enough."

Relevant conduct's overbreadth is especially pernicious when considering that dismissed and uncharged conduct are used to increase penalties in nearly every federal sentencing.[20]

These two fundamental flaws in the guidelines are beyond the commission alone to fix. Both Congress and the Supreme Court must be involved to provide the commission with the authority to engage in a wholesale restructuring of the guidelines: a restructuring that culminates in a sentencing scheme that is — finally — constitutionally sound.

A final note: The commission announced on April 30 that it was considering making the acquitted conduct amendment retroactive. If passed, that would mean any federal defendant currently serving a sentence that was increased by consideration of acquitted conduct could potentially be eligible for a sentence reduction.

While retroactive application will affect no more than a few hundred incarcerated people, if the use of dismissed and uncharged conduct is also eventually precluded at sentencing, this development could serve as a precedent for reducing the sentences of possibly every single person currently serving time.

Although some may find such an outcome to be highly unlikely, it is worth recalling that it was a very short and unexpected trip from the court's 1999 decision in Nathaniel Jones v. U.S.,[21] "requiring jury determination of facts that raise a sentencing ceiling,"[22] to U.S. v. Booker just six years later,[23] which fundamentally changed the nature of the guidelines from a binding scheme to "merely advisory."[24]

Should the court now take up the issue of acquitted conduct sentencing and hold that it is unconstitutional — which, to be sure, the commission has not done because it cannot — it could very well also result in the eventual and quick demise of all that would remain of the guidelines' advisory scheme, namely, dismissed and uncharged conduct sentencing.

Mark H. Allenbaugh is a co-founder, president and chief research officer at SentencingStats.com Inc., and a sentencing and mitigation consultant at the Law Offices of Alan Ellis. He previously served as a staff attorney at the U.S. Sentencing Commission. He is a co-editor of "Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice" (2nd ed., Foundation Press, 2002).

Alan Ellis is a criminal defense lawyer at the Law Offices of Alan Ellis. He previously served as president of the National Association of Criminal Defense Lawyers. He is a Fulbright Award recipient, and the co-author of "Federal Prison Guidebook: Sentencing and Post Conviction Remedies."

[1] United States v. Watts, 519 U.S. 148 (1997) (per curiam) (finding the use of acquitted conduct at sentencing does not violate the double jeopardy clause).

[2] See Alan Ellis and Mark H. Allenbaugh, Supreme Court Must End Acquitted Conduct Sentencing, July 19, 2023, https://www.law360.com/articles/1700307/supreme-court-must-end-acquitted-conduct-sentencing.

[3] Currently, Congress is considering this proposed amendment and others. Should Congress not act to the contrary, this and other amendments will take effect Nov. 1.

[4] See H.R. "Prohibiting Punishment of Acquitted Conduct Act of 2023," H.R. 5430, S. 2788.

[5] See Alan Ellis and Mark H. Allenbaugh, Supreme Court Must End Acquitted Conduct Sentencing, July 19, 2023, https://www.law360.com/articles/1700307/supreme-court-must-end-acquitted-conduct-sentencing.

[6] U.S. Sentencing Commission, News Release, COMMISSION VOTES UNANIMOUSLY TO PASS PACKAGE OF REFORMS INCLUDING LIMIT ON USE OF ACQUITTED CONDUCT IN SENTENCING GUIDELINES, Apr. 17, 2024 (internal quotation marks omitted), https://www.ussc.gov/about/news/press-releases/april-17-2024.

[7] Nelson v. Colorado, 581 U.S. 128, 130 (2017).

[8] In re: Winship, 397 U.S. 358, 363 (1970) (internal quotation marks and citation omitted).

[9] McClinton v. United States, No. 2021-1557.

[10] Id. at 13-14.

[11] 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.

[12] United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

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

[14] 07-1262, 2008 U.S. S. Ct. Briefs LEXIS 3999 (Apr. 3, 2008).

[15] Id. at *59.

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

[17] 543 U.S. 220 (2005).

[18] USSG §1B1.3(a)(1)(A).

[19] See generally William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495 (1990), available at https://scholarcommons.sc.edu/sclr/vol41/iss3/3.

[20] "[U]ncharged conduct [is] ... a large category of relevant conduct." Farnaz Farkish, Note: Docking the Tail That Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct after United States v. Booker, 20 Regent U.L. Rev. 101, 120 (2007-2008).

[21] Jones v. U.S., 526 U.S. 227 (1999).

[22] Id. at 251-252, n.11.

[23] Booker, 543 U.S. 220 (2005).

[24] 543 U.S. at 223.