Sentencing Guidelines Proposal May Encourage More Trials

By **Elena Quattrone and Melissa Jampol** (March 15, 2023)

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On Jan. 12, the U.S. Sentencing Commission, in an act that has been lauded by the defense bar and criminal justice reform advocates alike, published proposed amendments to the U.S. sentencing guidelines for the first time in over four years.[1]

Proposed amendments that are of particular interest to the defense bar and criminal justice advocates are those to U.S. sentencing guidelines Section 1B1.3 regarding the use of relevant conduct at a defendant's sentencing, including acquitted conduct, uncharged conduct and conduct contained in charges that were dismissed.

As is typical for any proposed amendment, the commission has requested public comment on its proposal before any final rule is enacted. The notice-and-comment period on the proposed amendments was open until March 14, with May 1 as the deadline for when the commission will send the proposed amendments to Congress for consideration.

Then, Congress has six months to veto the proposed amendments. Accordingly, the proposed amendments could become effective by Nov. 1.

Given the centrality of "relevant" conduct to the entire construct of the sentencing guidelines, the proposed amendments would significantly affect both a defendant who chooses to exercise their Sixth Amendment right to take their case to trial and is found guilty of some, but not all the counts in an indictment, as well as those defendants who decide to plead guilty in conjunction with a plea agreement.

If the proposed amendments go into effect, they very well may influence a defendant's calculation on whether to go to trial in the first place in cases where the government proposes an onerous plea agreement with expansive conduct.

By prohibiting dismissed and acquitted conduct from being considered at sentencing, the proposed changes may provide a defendant in this situation with an opportunity to narrow the potential criminal conduct considered by the court at sentencing, as opposed to conduct that the government may seek to include in a plea offer to expand culpability through the use of relevant conduct.

Current Use of Relevant Conduct Under the U.S. Sentencing Guidelines

U.S. sentencing guidelines Section 1B1.3 provides guidance on the use of relevant conduct to determine the guideline range, stating that relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."

Section 1B1.3 (a)(1)(B) sets forth that relevant conduct also includes all acts and omissions of others "in the case of a jointly undertaken criminal activity" 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."[2]

Therefore, under the current guidelines, if a defendant decides to proceed to trial instead of pleading guilty to an offense — the latter of which will often result in more favorable conviction terms and a potentially more lenient sentence — a jury may acquit a defendant of criminality, but a court may still use the conduct related to the acquitted offense, including uncharged conduct or conduct contained in charges that were dismissed, as a basis for a sentencing enhancement. The court has the authority to do this through the application of Section 1B1.3, in conjunction with Sections 1B1.4[3] and 6A1.3.[4]

Similarly, the background commentary to Section 1B1.3 advises that a judge may consider virtually any information regarding a defendant's conduct if the information is reliable, including conduct that is not charged or related to an element of the offense of conviction. That information does not have to be admissible at trial under the Federal Rules of Evidence.

The background commentary also cites a line of U.S. Supreme Court and circuit precedent supporting this position. As an example, in a drug case, if a defendant pleads guilty to one count in an indictment, the base offense level can still be calculated based on the total amount of drugs involved in all counts, even the counts that are dismissed as part of a plea deal. [5]

Sentencing judges already have immense discretion when tailoring sentences based on the facts learned at trial and consideration of a defendant's history and characteristics, role in the offense, likelihood for recidivism and other factors set forth in Title 18 U.S. Code Section 3553.

In applying the guidelines to fashion a sentence, judges select a specific sentence through a compilation of mathematical calculations. The process of calculating guidelines offense levels involves determining the appropriate guideline for the statute under which the defendant was convicted, identifying the base offense level, assessing the defendant's conduct in the context of specific offense characteristics and adjusting the range based on a variety of other factors such as particular characteristics of the victims, the role the defendant played in the offense, the defendant's acceptance of responsibility and any other enhancements as applicable based on the facts of the case.

Next, the judge determines the defendant's criminal history through the consideration of any prior criminal convictions. Then, the judge chooses the advisory sentencing range by finding the intersection point of the defendant's calculated offense level and criminal history category on the sentencing table.[6]

And, through consideration of all these factors, the judge selects a sentence to impose on the defendant. Notably, over 80% of sentences imposed fall within the guidelines' sentencing range.[7]

Considered altogether, the guidelines, as currently written and interpreted, indicate that at sentencing, any conduct — including acquitted and uncharged conduct — is fair game for a judge when fashioning a sentence for a criminal defendant.

Accordingly, "relevant conduct," as construed in Section 1B1.3, affects "nearly every aspect of guidelines application," including the determination of the base offense level, role and multiple counts adjustments, and criminal history calculations, even if a defendant was acquitted of certain counts at trial or did not mention the conduct at issue during a plea colloquy.[8]

As the U.S. District Court for the District of Connecticut commented in the 2019 case U.S. v. Stuck, "If a defendant pleads guilty to one crime but the prosecution thinks that he should be sentenced as well for other crimes, then these other crimes may count toward a defendant's offense level under the Guidelines if they qualify as 'relevant conduct.'"[9]

In U.S. v. Watts, the U.S. Supreme Court held in 1997 that considering acquitted conduct at sentencing to enhance a defendant's sentence does not violate the U.S. Constitution.

Indeed, per the holding in Watts, a split verdict — where a defendant might be convicted of certain charges but acquitted of others — does not prevent a judge from considering the conduct underlying the acquitted charges at sentencing if the judge concludes that the acquitted conduct otherwise meets the relevant conduct definition and was proven by a "preponderance of the evidence," as opposed to the much higher standard of proof that must be met for conviction at trial of "beyond a reasonable doubt," typically unanimously agreed to by a 12-person jury.

The effect of the current use of acquitted conduct at sentencing is that defendants are at risk of receiving enhanced sentences from acquitted conduct, and even conduct related to dismissed charges, which many criminal justice advocates have claimed to be an unconstitutional aspect of the criminal justice system.

When Justice Brett Kavanaugh was a judge on the U.S. Court of Appeals for the D.C. Circuit, he criticized the use of acquitted or uncharged conduct to impose higher sentences as being a "dubious infringement of the rights to due process and to a jury trial."[10]

Similarly, U.S. District Judge Alker Meyer in U.S. v. Stuck wrote that the current use of acquitted conduct at sentencing "does not promote respect for the law" if a court accepts a defendant's guilty plea, but then imposes a sentence where conduct not related to the charge pled to — or even charged by the government — is considered.[11]

And changes for relevant conduct figured prominently in the National Association of Criminal Defendant Lawyers' 2018 report co-authored with the Foundation for Criminal Justice, "The Trial Penalty: The Sixth Amendment Right To Trial on the Verge of Extinction and How to Save it," noting that by defining "relevant conduct" so broadly, the guidelines permit prosecutors to introduce into evidence conduct that was not previously charged or vetted by a grand jury or jury, or acquitted conduct.[12]

Proposed Change

The commission's proposal is to amend U.S. sentencing guidelines Section 1B1.3 to add a new subsection (c) to provide that relevant conduct shall no longer include the consideration of acquitted conduct when determining the guideline range for a defendant undergoing sentencing, unless the defendant admitted to the conduct during a guilty plea colloquy, or a trier of fact found beyond a reasonable doubt that the acquitted conduct established the instant offense of conviction.[13]

Further, the new provision would define "acquitted conduct" as that "conduct (i.e., any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon motion of acquittal,"[14] pursuant to Rule 29 of the Federal Rules of Criminal Procedure or analogous motion under applicable state or other law.

Impact of the Proposed Rule on Use of Uncharged Conduct at Sentencing and on a Defendant's Decision To Go to Trial

The commission's decision to adopt this proposed amendment will have a larger impact beyond limiting the use of acquitted conduct at sentencing if it is enacted.

Indeed, the commission acknowledges that the consideration of acquitted conduct at sentencing for defendants who chose to go to trial occurs in only a small percentage of federal cases: In 2021, 98% of criminal offenders (56,324) were convicted through a guilty plea, and of the remaining 963 offenders who were sentenced after trial, only 157 offenders (0.3%) were acquitted of at least one offense.

But the logic behind precluding acquitted conduct for consideration at sentencing will likely extend to many other defendants who are currently faced with enhanced sentences due to prosecutors' motions to have uncharged conduct and conduct related to charges that were dismissed by the court considered at sentencing.

For those defendants who do go to trial, even if they manage to defeat a count in the indictment, the current use of acquitted conduct at sentencing enables prosecutors to get a "second bite at the apple," so to speak, in securing a lengthy sentence for a defendant, which has been rightly criticized by criminal justice advocates as violating the Sixth Amendment.

The proposed amendments may prevent such an injustice by prohibiting a court from considering any conduct — i.e., any acts or omission — underlying a charge of which the defendant has been acquitted by the trier of fact or upon motion of acquittal, as well as of any activity related to uncharged conduct.

Additionally, if adopted, the amendments may encourage a defendant to go to trial instead of entering a plea with the government because the defendant may see trial as an opportunity to narrow the potential criminal conduct considered by the court at sentencing after trial — even if convicted — as opposed to what the government seeks to include in a plea offer prior to trial.

As a result, defendants may deny plea offers that are deemed too draconian. The proposed amendments then may ultimately help to reverse the decline in federal criminal trials that has occurred over the past few decades.

Increasing the number of federal trials would be beneficial for criminal defendants and the public at large.

Given that federal prosecutors control the plea bargain process, the possibility of trial gives a defendant not only the option to exercise their Sixth Amendment right, but also the ability to maintain innocence without succumbing to the pressure of entering into a potentially draconian plea agreement.

Additionally, trial practice is essential to resolving and interpreting unsettled issues of law. And, it is through the trial process that legal precedent is created, expanded and altered.

Hopefully, the new rule will help resuscitate the federal criminal trial, rectifying an arguably unconstitutional aspect of sentencing and bringing more balance to the scales of justice.

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[1] https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf?emci=ce44b8b0-1b91-ed11-9d7b-00224832e811&emdi=f81eb5e6-7893-ed11-9d7b-00224832e811&ceid=21497291.

[2] See also Primer on Relevant Conduct, Office of the General Counsel, U.S. Sentencing Commission, March 2018 (discussing various relevant conduct scenarios of acts and omissions, both prior to and after the charged conduct).

[3] U.S.S.G. §1B1.4 – Information to be Used in Imposing Sentence.

[4] U.S.S.G. §6A1.3 – Resolution of Disputed Factors.

[5] Introduction to Federal Sentencing, Office of the Public Defender, Western District of Texas (15th Edition, August 2020) at 29.

[6] The Trial Penalty Report at 22.

[7] Id.

[8] The Guidelines are now advisory not mandatory, per United States v. Booker, 543 U.S. 220 (2005).

[9] United States v. Stuck, 419 F.Supp. 3d 373, 375 (D. Conn. 2019).

[10] United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015).

[11] United States v. Stuck, 419 F.Supp. 3d 373, 375 (D. Conn. 2019).

[12] The Trial Penalty Report at 23 (quoting Nancy Gertner, Bruce Brower & Paul Shechtman, 'Why the Innocent Plead Guilty': An Exchange, N.Y. TIMES, Jan. 8, 2015).

[13] U.S. Sent'g Comm'n, "Proposed Amendments to the Sentencing Guidelines," (Jan. 12, 2023).

[14] Id.