Acquitted-Conduct Sentencing: Judicially Bypassing the Fifth and Sixth Amendments [*United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 2400 (2023)]

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In United States v. McClinton, the Seventh Circuit Court of Appeals, affirmed by the Supreme Court, upheld the constitutionality of acquitted-conduct sentencing because a sentencing judge is allowed to take into consideration underlying conduct committed in furtherance of the crime charged, to enhance a defendant's sentence. Relying on precedent that framed the issue under a Due Process analysis, the Supreme Court never really addressed the concerns regarding the Sixth Amendment right to a jury trial. Because acquitted-conduct sentencing undermines the jury's role in a criminal trial, the use of acquitted-conduct to enhance a defendant's sentence should be a violation of the Sixth Amendment. Additionally, with differentiating burdens of proof, the allowance of inadmissible evidence, and the vast amount of discretionary power at the sentencing phase, acquitted-conduct sentencing promotes unconstitutional practices under the Due Process Clause of the Fifth Amendment. Affirming the constitutionality of acquitted-conduct sentencing allows for manipulation of our criminal justice system.

I. INTRODUCTION

In criminal trials, judges may decide to split the proceedings into two separate phases under "bifurcation."[1] During the first phase of a bifurcated criminal trial, the jury decides the defendant's guilt or innocence. In doing so, the jury scrutinizes the facts presented to determine whether the prosecution has adequately proved beyond a reasonable doubt that the

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1. *What Is Bifurcation and Why Would Someone Want Two Trials?*, TIVERON L. PLLC BLOG (May 31, 2018), https://www.tiveronlaw.com/what-is-bifurcation-and-why-would-someone-want-two-trials/.

defendant committed the crimes charged.[2] If the defendant is found guilty, the second phase is used to determine the applicable sentence for the defendant's conviction.[3]

Acquitted-conduct sentencing arises during the second phase of a bifurcated trial. The defendant receives an acquittal from the jury on one or more of his charges, however, the defendant is still found guilty of the remaining charges. Even though the defendant has been acquitted by the jury, the sentencing judge takes into consideration the underlying conduct from the acquitted charge and increases the defendant's sentence.[4] While bifurcating a criminal trial allows the jury to determine issues of guilt without being dissuaded by the implications of possible punishment;[5] the second phase of the trial takes some of the importance away from the jury and places a large amount of discretion into the judge's hands.[6] On the surface, the second phase of the trial operates similar to the first phase; nevertheless "the burden of proof in the penalty phase is preponderance of the evidence."[7] Also, "evidence that would have been prejudicial or irrelevant at the guilt phase is specifically admissible in the penalty phase."[8] The difference between the phases is supported by the notion that the defendant has already been found guilty and does not need the same constitutional protections as offered during the first phase. These justifications do not make sense when the defendant is acquitted of the charges during the first phase and still receives an increased sentence based on the underlying conduct from the acquitted charge. In *United States v. McClinton*,[9] the Seventh Circuit Court of Appeals found that "a sentencing court may consider conduct underlying the acquitted charge, so long as that conduct has been found by a preponderance of evidence."[10]

2. *See* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 4 (4th ed. 2022) ("Trial jurors . . . by contrast are the fact-finders in most criminal trials. After listening to all of the evidence, they decide whether there is sufficient evidence to convict a defendant.").

3. Robert M. Grass, *Bifurcated Jury Deliberation in Criminal Rico Trials*, 57 FORDHAM L. REV. 745, 750 (1989) ("Normally, bifurcation of criminal trials involves the introduction of separate evidence. For example, jury deliberations have been bifurcated in criminal trials to separate the guilt determination from the sentencing determination.").

4. United States v. Medley, 34 F.4th 326, 335 (4th Cir. 2022) ("Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict." (quoting United States v. Grubbs, 585 F.3d 793, 799 (4th Cir. 2009))).

5. *See* TIVERON L. PLLC BLOG, *supra* note 1.

6. *See* H. Morely Swingle, *Jury Trial Sentencing Phase: Grand Finale or Lackluster Fizzle*, MO. BAR, Mar.–Apr. 2021, https://news.mobar.org/jury-trial-sentencing-phase-grand-finale-or-lackluster-fizzle/ ("The jury's recommendation as to punishment is not necessarily binding upon the judge.").

7. *Id.*

8. *Id.*

9. United States v. McClinton, 23 F.4th 732 (7th Cir. 2022).

10. *Id.* at 735.

Even though the unconstitutionality of acquitted-conduct sentencing has been echoed through prior dissents,[11] the Seventh Circuit in *United States v. McClinton* dutifully followed precedent and found acquitted-conduct sentencing to be constitutional. Although the Court held that acquitted-conduct sentencing is constitutional, this comment argues the results achieved through its application are unconstitutional because it violates the Fifth and Sixth Amendment.

II. BACKGROUND

A. Case Description

Dayonta McClinton, along with his five accomplices committed an armed robbery of a CVS pharmacy in an effort to obtain drugs and money.[12] After robbing the pharmacy, the gang drove to an alleyway where they discussed how they should split the proceeds.[13] One of McClinton's accomplices, Malik Perry, refused to share the drugs and exited the vehicle.[14] McClinton followed Perry out of the vehicle and shot him four times in the back, killing Perry in the alleyway.[15]

At trial, a jury found McClinton guilty of robbing the CVS and brandishing a firearm in the process.[16] However, the jury acquitted McClinton for the robbery of Perry and causing death to Perry while using a firearm.[17] Despite the acquittal, the sentencing judge used a preponderance of the evidence standard to find McClinton responsible for Perry's death and increased McClinton's sentence from approximately 5-6 years in prison to 19 years in prison.[18] Thereafter, McClinton filed a petition for writ of certiorari with the United States Supreme Court, which was later declined.[19]

11. *Id.* For example, Justice Scalia's dissent in Jones v. United States "note[es] that [acquitted-conduct sentencing] violates the Sixth Amendment when the conduct used to increase a defendant's penalty is found by a judge rather than a jury beyond a reasonable doubt." *Id.* (citing Jones v. United States, 574 U.S. 948, 949–50 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of cert.)).
12. *Id.* at 734.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. McClinton v. United States, 143 S. Ct. 2400, 2401 (2023).
19. *Id.* at 2400.

B. Legal Background

1. The Sixth Amendment—Right to an Impartial Jury Trial

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State."[20] While the incorporation of the right to a jury trial is crucial in criminal cases, it cannot be said as originating from the United States Constitution; "jury trial[s] in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta."[21] Before jury trials, the royal crown would often imprison or exile any man that was obnoxious for their own will and pleasure.[22] After facing much oppression from the crown, the English colonists voyaged to America and established jury trials as an "inherent and invaluable right."[23] Accordingly, our right to a trial by jury is a "fundamental reservation of power in our constitutional structure."[24] The power to request a jury trial allows criminal defendants to challenge their criminal charges and prevents governmental oppression.[25]

2. The Fifth Amendment—Due Process of Law

The Fifth Amendment of the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[26] In criminal trials, the due process afforded to defendants requires that guilt be established beyond a reasonable doubt.[27] Much like the Sixth Amendment, "[t]he demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times."[28] The beyond a reasonable doubt standard plays many important roles in our criminal justice system: it "reduc[es] the risk of convictions resting on factual error" and assures that no one will be in "doubt whether innocent men are being condemned."[29] Furthermore, the defendant would be at a severe disadvantage if he could be judged guilty with the same standards used in

20. U.S. CONST. amend. VI.
21. Duncan v. Louisiana, 391 U.S. 145, 151 (1968).
22. *Id.*
23. *Id.* at 152.
24. Eang L. Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 253 (2009) (quoting Blakely v. Washington, 542 U.S. 296, 305–06 (2004)).
25. *See Duncan*, 391 U.S. at 156.
26. U.S. CONST. amend. V.
27. *In re* Winship, 397 U.S. 358, 361 (1970).
28. *Id.* (quoting C. MCCORMICK, EVIDENCE § 321 (1954)).
29. *Id.* at 363, 364.

civil cases – the preponderance of the evidence standard and the clear and convincing standard.[30]

In connection to the Sixth Amendment, the beyond a reasonable doubt standard requires a jury to find the accused guilty only if there is no reasonable doubt in their mind that his innocence has been disproved by the prosecution.[31] Yet, our Supreme Court has determined that a judicial shortcut around this standard of proof is constitutional for sentencing purposes.[32] There is much danger in allowing a judge to impose a greater sentence based not only on a standard that we have determined to be inadequate in a criminal trial, but also on conduct that a reasonable jury has had the opportunity to scrutinize, and has ultimately determined the defendant to be innocent of. Not to mention, the prosecution has the opportunity to put forth additional evidence during the sentencing phase to rebut the defendant's proclaimed innocence.

III. COURT DECISION

A. The Seventh Circuit Upheld the Constitutionality of Acquitted-Conduct Sentencing and the United States Supreme Court Affirmed.

Following *United States v. Watts*,[33] the Seventh Circuit Court of Appeals determined that acquitted-conduct sentencing does not violate the Constitution so long as it is supported by a preponderance of the evidence.[34] Because Perry's murder occurred during the distribution of the proceeds, the conduct was an act that occurred in furtherance of the CVS robbery.[35] As a result, the sentencing judge had the opportunity to take Perry's murder into consideration while determining the sentence that McClinton would receive for the CVS robbery.

Although the Circuit Court upheld *Watts*, it acknowledged the opportunity for the Supreme Court to "review an argument that has garnered

30. *Winship*, 397 U.S. at 363; Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt"*, 65 OKLA. L. REV. 225, 238 (2013) (analyzing the history of our burdens of proof and noting that "Justice Harlan insisted that 'reasonable doubt' and 'preponderance of the evidence' conferred different degrees of confidence and factual accuracy to the fact-finder.").

31. *Winship*, 397 U.S. at 363 ("No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (quoting Davis v. United States, 160 U.S. 469, 484, 493 (1895))).

32. *See generally* McClinton v. United States, 143 S. Ct. 2400, 2400 (2023) (The Court's denial of McClinton's petition, in essence, affirmed old precedent that held no Constitutional violation would result from acquitted-conduct sentencing).

33. United States v. Watts, 519 U.S. 148, 155 (1997) (supporting acquitted-conduct sentencing, the United States Supreme Court reasoned that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 261 (1984))).

34. United States v. McClinton, 23 F.4th 732, 735 (7th Cir. 2022).

35. *Id.* at 736.

increasing support among many circuit court judges and Supreme Court Justices."[36] This shows the growing criticism circulating through the courts regarding acquitted-conduct sentencing. At its current posture, it seems as though there is a judicial loophole: if the prosecution fails to satisfy their burden of proof, then the sentencing judge may find an opportunity to seal the case with acquitted-conduct. Upon review of McClinton's writ of certiorari, the United Supreme Court declined to grant the petition.[37]

B. Justice Sotomayor's Concurrence

Justice Sotomayor affirmed the Court's denial of McClinton's writ of certiorari.[38] Supporting acquitted-conduct sentencing, Sotomayor explains that jurors are held to a higher standard, beyond a reasonable doubt, whereas a sentencing judge is merely held to the preponderance of the evidence standard.[39] Therefore, when a jury offers an acquittal it actually means that the prosecution hasn't quite proved their case beyond a reasonable doubt and there is no issue with a judge satisfying this lower standard as a result.[40]

In regard to procedural fairness, Justice Sotomayor fails to take a position because, at the time of the opinion, the Sentencing Commission had the opportunity to review the sentencing guidelines in the coming year.[41] While it sounds like a noble effort to divert the issue away from the Court, a review of the sentencing guidelines does not mean that acquitted-conduct sentencing will be prohibited. The very creation of the U.S. Sentencing Commission was to "develop Guidelines that would guide judges' discretion . . . and thereby reduce unwarranted sentencing disparities."[42] Unbeknownst to Justice Sotomayor, the U.S. Sentencing Commission ended up withdrawing their recommendation for amendment to the sentencing guidelines to address the use of acquitted conduct and determined that "additional study was needed."[43] As a result of the withdrawal, the Supreme Court may have to take up this issue once again, when they could have resolved it in McClinton's case.

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36. *See id.* at 735.
37. *McClinton*, 143 S. Ct. at 2400.
38. *Id.* at 2401 (Sotomayor, J., concurring).
39. *See id.*
40. *Id.* at 2402.
41. *Id.* at 2403.
42. DAVE S. SIDHU & ROSEMARY W. GARDEY, CONG. RSCH. SERV., THE USE OF ACQUITTED CONDUCT TO ENHANCE FEDERAL SENTENCES 2 (Sept. 8, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11037 [https://perma.cc/688P-JGQB].
43. *Id.* at 4.

C. Justice Alito's Concurrence

Justice Alito affirmed the Court's denial by claiming that those who take opposition with acquitted-conduct sentencing have a "flawed understanding of the meaning of the right when the [Sixth] Amendment was adopted."[44] Using *Watts* as support, Justice Alito provided that if the Court were to analyze the right-to-jury-trial and due process, it would have to render a result with a workable rule.[45] Alito offers three reasons why the Court's reviewal of acquitted-conduct sentencing would not produce a workable rule: (1) it would be impossible to know why a jury found a defendant not guilty on a charge; (2) if a jury is unable to reach a verdict, the court would not be able to consider that conduct at all; and (3) if a jury acquits a defendant of a crime with some of the same elements as another charge, then that subsequent charge would be lost.[46]

While Alito emphasizes the constraints of developing a "workable rule,"[47] Justice Stevens' dissent in *Watts* provides that there is no workable rule at all.[48] Is it adequate to say that providing a "workable rule" will solve the issue once and for all? Some argue that sentencing judges should just exclude acquitted conduct under their own discretion.[49] However, this leaves open the possibility for unequal treatment between defendants.[50] Ultimately, the Court will have to determine the constitutionality of acquitted conduct under the Sixth Amendment.[51]

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44. *See McClinton*, 143 S. Ct. at 2403–04 (Alito, J., concurring). In the era of our founding fathers, a trial-by-jury meant something different than what we interpret it to mean today. *Id.* "Federal criminal statutes often gave sentencing judges the authority to impose any sentence that fell within a prescribed range, and in exercising that authority, judges necessarily took into account facts that the jury had not found at trial." *Id.*

45. *See id.* at 2405; Michael Kimberly, *Symposium: The Importance of Respecting Precedent*, SCOTUSBLOG (Dec. 20, 2017, 2:57 PM), https://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/ ("[T]he Court typically assesses the precedent's workability and may overrule a decision when it has proven unworkable in practice."). Alito is basically saying that in order for the Court to reverse *Watts*, it would have to determine the rule—that acquitted-conduct sentencing is constitutional—is unworkable and then provide a workable rule in return. *Id.*

46. *See McClinton*, 143 S. Ct. at 2405–06.

47. *Id.* at 2405.

48. *See* United States v. Watts, 519 U.S. 148, 161 (1997) (Stevens, J., dissenting). The statute relied on by the Court to implement the landmark change allowing acquitted-conduct sentencing provides no guidance for sentencing judges to consider relevant evidence like economic hardship, drug history, or mental illness. *Id.* Thus, sentencing judges are free to weigh whatever they please at a lower burden of proof. *Id.*

49. *See* Nathan Claus, *A Possible Answer to the Question on the Use of Acquitted Conduct*, 59 WILLAMETTE L. REV. 33, 57 (2022).

50. *Id.*

51. *See id.* ("For this test to function, the Court must first find that the use of acquitted conduct is unconstitutional and specifically hold that this ruling is retroactive and applies to both state and federal judiciaries.").

IV. COMMENTARY

While acquitted-conduct sentencing is held to be constitutional, the very essence of its application leads to unconstitutional results. The due process requirement set out in the Fifth Amendment requires the prosecution to prove beyond a reasonable doubt that the accused is guilty, yet when they fail to do so, they get another attempt during the sentencing phase. Not only that, but the evidence standard lowers to the preponderance of the evidence, to which a judge, instead of twelve jurors, gets to decide the defendant's sentence.

Just as concerning, a sentencing judge may consider evidence that was deemed inadmissible during the guilt phase of the trial,[52] meaning that "a defendant could be punished based on improperly obtained evidence[,] offend[ing] traditional notions of fundamental fairness and violat[ing] Fifth Amendment due process rights."[53] The opportunity for manipulation is obvious. For example, if the prosecution cannot introduce hearsay evidence due to its inadmissibility at the guilt phase, then it may be persuaded to wait until the sentencing phase and reintroduce evidence to push for an increase in the defendant's sentence.[54] Not to mention, there is an "absence of the [federal] rules of evidence and procedural safeguards at sentencing, such as the right to confront witnesses, [therefore] the power differential is further shifted in the direction of the prosecution."[55] Consequently, acquitted-conduct sentencing provides the prosecution "the opportunity to take a 'second bite' after they have previously failed at trial to prove that the defendant committed the offense beyond a reasonable doubt."[56]

In the same breath, the considerations for the Sixth Amendment right to a jury trial are thrown out the window. Per the Sentencing Reform Act,[57] the jury's participation was intended to be a check on the judge's sentencing power.[58] On the contrary, under acquitted-conduct sentencing the accused has exercised their right to a jury trial, conducted their defense to the charges, and effectively advocated their innocence in the form of an acquittal. Yet, the defendant still received an increased sentence for conduct that the jury determined inadequate to support a guilty conviction.

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52. *See* Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 249–50 (2009).

53. *Id.* at 250.

54. *See id*.

55. Ngov, *supra* note 24, at 242.

56. *Id.* (quoting Barry L. Johnson, *If at First You Don't Succeed–Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 182–83 (1996)).

57. United States v. Watts, 519 U.S. 148, 161 (Stevens, J., dissenting) ("The Sentencing Reform Act was enacted primarily to address Congress' concern that similar offenders convicted of similar offenses were receiving 'an unjustifiably wide range of sentences.'" (quoting S. REP. NO. 98-225 (1984))).

58. *See id*.

The overwhelming theme is that acquitted-conduct sentencing undermines the role of the jury. Despite its negative effects, courts have determined that the sentencing "guidelines are [merely] advisory" and not binding.[59] Making the jury's participation merely advisory "permits prosecutors and sentencing judges to circumvent the jury, effectively negating the jury's role in determining criminal responsibility and resulting eligibility for criminal punishment."[60] Moreover, courts that face the issue of acquitted-conduct sentencing are bound to apply *Watts v. United States*.[61] At the same time, "[t]he logical error in *Watts*, therefore, is permitting an acquittal of [the charged conduct]—a legal finding, to be converted into a sentencing factor—a mere factual finding."[62] What this means is that the sentencing judge may take into consideration the acquitted conduct because the acquittal is simply a result of the prosecution's failure to meet their burden of proof.[63]

Undermining the jury's role in a criminal trial also has indirect consequences. As the jury is made up of citizens from the community, the opportunity to see a trial and learn about the criminal process is very important.[64] Thus, a sentence that deviates from that of the jury's recommendation may instill in the community a lack of faith in our criminal justice system.[65] In a just system, if the defendant is acquitted of the underlying conduct, then their innocence should be restored. This means that they may not be "deprived of life, liberty or property based on the fact of [the charged conduct.]"[66]

If the Fifth and Sixth Amendments offer fundamental rights that are essential to the roots and traditions of our society, then why would we allow those rights to be undermined? Much like our early English colonizers who resented the crown's manipulation of criminal procedure, we must be wary of the same manipulation within our own system. A sentencing judge has the same ability to double, even triple, prison sentences and may overlook the recommendation from a reasonable jury.

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59. Robert Ehrlich, *Acquitted Conduct Should Not Be Considered at Sentencing*, LAW360 (Nov. 3, 2019, 8:02 PM), https://www.law360.co.uk/articles/1210513.

60. Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 25 (2016).

61. *See Stare Decisis*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last visited Feb. 24, 2024). The Doctrine of Stare Decisis means that if another court has ruled on the same or similar issues, then the court will hold in the same manner. *Id.*

62. Allen Ellis & Mark Allenbaugh, *High Courts Should Restore Sentencing Due Process*, LAW360 (Nov. 27, 2019, 12:15 PM), https://www.law360.com/articles/1223747/high-court-should-restore-sentencing-due-process (emphasis added).

63. *Id.*

64. Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," Uniquely Malevolent," and "Pernicious"?* 54 SANTA CLARA L. REV. 674, 717 (2014).

65. *Id.*

66. Ellis & Allenbaugh, *supra* note 61.

Parties that oppose amending the sentencing guidelines to prohibit acquitted-conduct sentencing claim that there is no way to regulate it without constraining the sentencing judge's ability to take into consideration all relevant factors.[67] On the other hand, parties in support of the amendments primarily rely on the Fifth and Sixth Amendment.[68] As of now, the Supreme Court refused to come up with a rule or test regarding the constitutionality of acquitted-conduct sentencing.

Notwithstanding the Supreme Court's refusal, there exists a proposed "Acquitted Conduct Test" that may accommodate both sides, with the exception that acquitted-conduct sentencing is acknowledged to be unconstitutional.[69] Under the first part of this two-part test, the court looks into the sentencing record to determine if the judge took into consideration any acquitted conduct.[70] Then the court considers whether the defendant was "sentenced above the recommended guideline's range."[71] By limiting the test to only acquitted conduct, the judge is allowed to take into consideration other relevant factors such as the defendant's past convictions.

V. CONCLUSION

From admitting what should be inadmissible evidence, to undermining a jury verdict, acquitted-conduct sentencing has no place in criminal procedure. First, acquitted-conduct sentencing provides a judicial loophole for the prosecution and the judge to bypass the Fifth Amendment. While the guilt phase requires that the prosecution prove each charge beyond a reasonable doubt, the sentencing phase merely requires the judge to satisfy its finding beyond a preponderance of the evidence. Thus, the prosecution may begin to build tactics and save inadmissible evidence for the sentencing phase in order to achieve the same results. Because, at the end of the day, there is no difference in successfully convicting the defendant on all charges if the prosecution can advocate for a sentence that reflects multiple guilty convictions.

Secondly, acquitted-conduct sentencing massively undermines the Sixth Amendment right to a jury trial. During the second phase of a bifurcated trial, the jury has the opportunity again to scrutinize all the

67. SIDHU & GARDEY, *supra* note 42, at 5 ("[The Department of Justice] recommended that any amendment restricting the use of acquitted conduct should be narrow and contain specific carveouts (for example, excluding acquittals for technical reasons such as lack of jurisdiction or venue).").

68. *Id.* at 4.

69. *See* Claus, *supra* note 48, at 57.

70. *See id*. The reviewing court can look into things like the "presentence reports created by the state to help the judge," or looking into whether there was any sort of discussion regarding the acquitted conduct. *Id.* at 57–58.

71. *Id.* at 58.

evidence. After reaching a decision, the jury provides their recommendation to the judge as to the reasonable sentence that defendant should face. To the jury's surprise, the judge may not only throw away their recommendation, but also has the ability to blow past the sentencing guidelines because of conduct that the jury has already acquitted the defendant of. This violates the very foundation of our criminal justice system, where "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."[72] Acquitted-conduct sentencing creates a presumption that jury recommendations are merely advisory. Coupled with the notion that the sentencing guidelines are also advisory, there is very little that actually limits a sentencing judge's discretion. This is shown in cases like *McClinton*, where the judge has the ability to double, if not triple, the defendant's sentence because of underlying conduct that the jury could not adequately find the defendant guilty of committing. While the Court's concerns in prohibiting acquitted-conduct are sound, the actual use of acquitted conduct seems to be far more burdensome than beneficial. Although, it failed to review the constitutionality of acquitted-conduct sentencing in McClinton's case, the Court should finally determine the practice unconstitutional under the Fifth and Sixth Amendments.

72. SIDHU & GARDEY, *supra* note 42, at 3 (quoting Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of cert.)).