No. 05-6596

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROGER CLAYTON WHITE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky

SUPPLEMENTAL BRIEF OF AMICI CURIAE LAW PROFESSORS WHO STUDY FEDERAL SENTENCING ON REHEARING EN BANC IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

Douglas A. Berman
Moritz College of Law at
The Ohio State University
55 W. 12th Ave.
Columbus, OH 43210
(614) 688-8690

Mark D. Harris
Jeffery A. Gross
Anna G. Kaminska
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

ATTORNEYS FOR AMICI CURIAE

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INTEREST OF AMICI CURIAE

Amici are professors at American law schools who study, teach, and write about federal sentencing. They share a deep and abiding interest in ensuring that sentencing proceedings are handled in a fair and proper manner and that sentencing law continues to develop in accordance with these principles. Amici have no stake in the outcome of this litigation except as it pertains to these concerns, and file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. Amici are, however, interested in assisting this Court to interpret the law in a way that is both consistent with the intent of Congress and that recognizes the centrality of the underlying goals of sentencing. A list of Amici is appended to the signature page. A motion for leave to file this brief, to which both Appellant and Appellee have consented, is currently pending before this Court.

Introduction

Sentencing range enhancements based on facts alleged in charges of which a defendant has been acquitted ("acquitted conduct") have long been among the most controversial features of the Federal Sentencing Guidelines, in part because acquitted conduct enhancements effectively nullify the jury's determination in a criminal case. In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court addressed this issue in a limited way when it held that consideration of acquitted conduct at sentencing does not violate the Double Jeopardy Clause. But now that more recent Supreme Court rulings have stressed the constitutional importance of jury determinations in the sentencing enterprise, the constitutionality of acquitted conduct enhancements under the Fifth and Sixth Amendments is questionable. The supplemental brief for appellant Mr. White argues in detail that acquitted conduct enhancements violate the Constitution.

In addition to any constitutional infirmities, acquitted conduct enhancements raise distinct *statutory* concerns. *United States v. Booker*, 543 U.S. 220 (2005), and its progeny stress that, because the Guidelines are now advisory, the directions that Congress set forth in the Sentencing Reform Act (SRA), and particularly the text of 18 U.S.C. § 3553(a), provide the ultimate instructions for sentencing decision-making by district and appellate courts. Acquitted conduct enhancements in some cases—especially when they significantly affect the applicable Guideline

range and the ultimate sentence imposed—may disserve the statutory purposes of sentencing that Congress enumerated in 18 U.S.C. § 3553(a) and sought to vindicate in the SRA.

In this case, where Mr. White's Guideline range was more than doubled on the basis of acquitted conduct, the District Court did not adequately examine whether the sentence complied with the SRA and, in particular, the statutory purposes of sentencing. Instead, the court reflexively treated acquitted conduct in the same way as convicted conduct without properly considering whether the enhancement would promote respect for the law and provide just punishment for the convicted offense. The sentence should, therefore, be vacated and remanded.

I. PROVISIONS OF THE SENTENCING REFORM ACT INDICATE THAT CONGRESS DID NOT INTEND THAT ACQUITTED CONDUCT SHOULD ALWAYS BE TREATED THE SAME AS CONVICTED CONDUCT.

The relevant conduct guideline promulgated by the Sentencing Commission, U.S.S.G. §1B1.3, has generally been interpreted to require the treatment of acquitted conduct in exactly the same fashion as convicted conduct, no matter how much weaker the evidence (so long as it is proven by a preponderance of the evidence) or how factually and temporally distinct the conduct from the offense of conviction. But the express text of the SRA indicates that Congress did not intend that result. Although Congress likely expected that judges would still have authority in a Guidelines system to consider some *uncharged* conduct at

sentencing, the text and goals of the SRA suggest that Congress did not intend or seek that Guideline sentencing ranges would be automatically enhanced for conduct underlying offenses charged but formally rejected by a jury through an acquittal.

A. Both the Plain Text and the Legislative History of 18 U.S.C. § 3553(a) Indicate That Congress Intended Sentencing Judges to Focus Primarily upon Conduct for Which Defendants Have Been Found Guilty.

In *Watts*, the Supreme Court found that 18 U.S.C. § 3661 codified a "longstanding principle that sentencing courts have broad discretion to consider various kinds of information." 519 U.S. at 151. But while the language of § 3661 precludes a "blanket prohibition" on considering certain types of evidence at sentencing, *id.* at 152, other provisions indicate that Congress did not intend courts to rely on acquitted conduct in every case in exactly the same manner as convicted conduct. To the contrary, the precise text selected by Congress in the SRA—both in provisions directed at the Commission (in Title 28) and directed at courts (in Title 18)—indicates that sentences should be based principally on the offense for which a defendant is convicted, with at most limited case-by-case consideration of acquitted conduct.

The word "offense," which appears repeatedly in the SRA, was used by Congress as a specific reference to the offense of conviction. For example, 18 U.S.C. § 3551, which describes the scope of the SRA's provisions, tellingly refers

only to defendants who have "been found guilty of an offense." Because being "found guilty" results in conviction, the phrasing here makes clear that the word "offense" refers to the offense of conviction. Moreover, in provisions directing how the Commission should punish multiple instances of criminal misconduct, Congress authorized incremental punishment only "in a case where a defendant *is convicted of*" multiple criminal offenses. 28 U.S.C. § 994(*l*)(1) (emphasis added); *see* S. Rep. No. 225, 98th Cong., 2d Sess. at 176-77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3359-60 (reiterating that the Commission's Guidelines should reflect the appropriateness of imposing an incremental penalty for each of multiple offenses of which a defendant is "*convicted*") (emphasis added).[1]

Furthermore, § 3553(a) repeatedly instructs judges to consider matters related to "the offense" in a manner that clearly refers to the offense of conviction. *See* 18 U.S.C. § 3553(a)(2)(A) (instructing judge to consider the need for the sentence to "reflect the seriousness of the offense" and to "provide just punishment for the offense"); *id.* § 3553(a)(7) (instructing judge to consider need for restitution for "any victims of the offense"). Similarly, in this key statutory provision,

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[1] In a revealing comment, the Senate Report advised that, "to the extent feasible, the sentences for each of the multiple offenses [should] be determined separately and the degree to which they should overlap be specified. *Under this approach, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence." Id.* at 176-77; 3359-60 (emphasis added). The implication of this statement is that, for a defendant who has multiple offenses, if any individual conviction is overturned, that offense would automatically be excluded from the resulting sentencing re-calculation.

Congress directed sentencing courts to concern themselves with a specific type of disparity—the "unwarranted" disparity that may arise for "defendants with similar records who have been *found guilty* of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). Both the express text and overall structure of 18 U.S.C. § 3553(a) indicate that Congress intended and expected sentencing judges to be focused principally on offenses of conviction. *Cf. United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (Posner, J.) (suggesting that reference to "the offense" in § 3553(a) concerns "the offense of conviction").[2]

Thus, while Congress may have authorized *judges* in individual cases to take acquitted conduct into account in a limited fashion, *see* 18 U.S.C. § 3661, there are strong indications that it did not endorse or expect that *Guideline* calculations would rotely assign acquitted conduct the same significance and weight as convicted conduct.[3]

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[2] In contrast to the SRA's references to defendants having "been found guilty" or being "convicted of" certain offenses, the text of the SRA has no direct references to acquitted conduct. Had Congress intended or sought for acquitted conduct to be a regular and integral component of Guideline calculations, it likely would have made clear this view by using phrases like "has committed" and "responsible for" instead of the chosen phrases of "been found guilty" and "convicted of." *See United States v. James*, 478 U.S. 597, 604 (1986); *Ford v. United States*, 273 U.S. 593, 611-12 (1927).

[3] The Supreme Court has instructed that statutory construction "should go in the direction of constitutional policy even though not commanded by it." *United States v. Johnson*, 323 U.S. 273, 276 (1944). As Judge Friendly explained, "the Constitution is itself a datum in the interpretation of a statute." Henry J. Friendly,

B. A Sentencing Enhancement Based on Acquitted Conduct May Disserve the Statutory Purposes Of Punishment, and a District Court Must Therefore Consider Carefully Such an Enhancement in Light of the Requirements of § 3553(a).

Section 3553(a) specifies a number of factors that the court must consider when imposing a defendant's sentence. In particular, it provides that a court must impose a sentence "sufficient but not greater than necessary" to achieve four broad purposes:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Booker makes these considerations critical now that the Guidelines are advisory; the statutory text is the chief governing standard set forth by Congress against which all sentences must be measured. And the purposes listed in subparagraph (a)(2)(A)—particularly "promot[ing] respect for the law" and

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Benchmarks 210 (1967). Accordingly, to the extent that the meaning of "offense" is ambiguous, the appropriate course is to interpret the SRA in a way that furthers the central role of the jury in sentencing as required by *Apprendi*, *Blakely*, and *Booker*.

"provid[ing] just punishment for the offense"—may be considerably undercut by a sentence based on a Guideline range significantly enhanced for acquitted conduct.

1. Need for the Sentence to "Promote Respect for the Law." A sentence significantly based on acquitted conduct enhancements undermines the firmly-established public expectation that offenders are punished only for crimes of which they are convicted, and not for charges on which they are acquitted. Indeed, the notion that a defendant can be acquitted of serious charges against him—as here—and still be punished as if the jury had returned a conviction on those counts is, to all but lawyers schooled in the federal sentencing process, a shocking proposition. *See, e.g., United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) (acknowledging that "as a matter of public perception and acceptance, [the use of acquitted conduct] can often invite disrespect for the sentencing process"); *United States v. Ibanga,* 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (commenting that use of acquitted conduct "'[drives] a wedge between the community's sense of appropriate punishment and the criminal sanction inflicted'") (quoting Barry L. Johnson, *If At First You Don't Succeed—Abolishing the Use of the Acquitted Conduct in Guideline Sentencing*, 75 N.C. L. REV. 153, 185 (1997)); *United States v. Coleman*, 370 F. Supp. 2d 661, 671-73 & n.14 (S.D. Ohio 2005) (noting that "consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system [because a] layperson would undoubtedly be revolted

by the idea"); *see also United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (calling acquitted conduct rulings a "jurisprudence reminiscent of *Alice in Wonderland*. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'").

When considering whether a sentence "promote[s] respect for the law," it is not sufficient for a district court (or an appellate court) merely to assess and review a final Guideline range after an acquitted conduct enhancement to consider whether the raw total promotes respect for the law. Such a methodology—which the District Court followed here—fails to capture the distinct harms that flow from heavy reliance on *acquitted* conduct enhancements (as opposed to reliance on convicted or even uncharged conduct enhancements). Critically, enhancements that treat acquitted conduct exactly the same as convicted conduct convey the deleterious message that acquittals are legally inconsequential; this message in turn promotes disrespect for the historic and esteemed role of juries in the American legal system. In addition to evaluating the sum-total Guideline range, a court needs specifically to consider whether the heavy reliance on acquitted conduct *to arrive at* that total helps promote, or detracts from, "respect for the law."

2. Need for the Sentence to "Provide Just Punishment for the Offense."

Heavy reliance on acquitted conduct enhancements directly implicates the question whether such a sentence provides "just" punishment for the offense. First, it is

questionable whether "just punishment" is achieved when acquitted conduct is "priced" exactly the same as convicted conduct, as is mandated by the Guidelines, without any discount to reflect the fact that a jury already rejected the charges. As a number of judges have observed, such treatment may violate basic fairness. *See, e.g., United States v. Hunter,* 19 F.3d 895, 898 (4th Cir. 1994) (Hall, J., concurring) (recognizing that, "[a]s regards uncharged 'relevant conduct," this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong"); *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., concurring) (observing that the Commission's decision to count acquitted conduct the same was "entirely unjustified"). Indeed, the text of the SRA suggests a court can and should consider at sentencing the weight, quality, and ultimate persuasiveness to a jury of the evidence presented at trial. Circuit courts since *Booker* have indicated that a sentencing court is free to take these factors into account in arriving at a fair sentence. *See, e.g., United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (Posner, J.) (recognizing that "[a] judge might reasonably conclude that a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of conviction. That would be a judgment for the sentencing judge to make and we would uphold it so long as it was

reasonable in the circumstances"); *United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) (noting that "[d]istrict courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather than (as in the pre-*Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines-specified enhancements accordingly").

At the outer limits, reliance on acquitted conduct enhancements to increase a sentence dramatically raises the question whether such a penalty can be fairly described as a sanction "for the offense," meaning the offense of conviction. The arguable justification for consideration of acquitted conduct at sentencing is that it reflects the "circumstances" of the offense of conviction, and it was this justification that prompted the Supreme Court to reject the Double Jeopardy challenge presented in *Watts* over a decade ago. But where a primary driver of the punishment is alleged conduct of which the defendant was acquitted, it is difficult to describe such a sentence fairly as punishment for the convicted offense. In this case, for example, where a primary determinant of Mr. White's sentence was the discharge of the firearm that his co-defendant held (according to the court's findings), then the reality is that he is being sentenced for *that* charge, despite the jury's refusal to convict Mr. White based on the evidence presented at trial.

As highlighted above, the statutory text enacted by Congress in § 3553(a) indicates that a judge deciding whether to enhance a sentence based on acquitted conduct must consider carefully and with specificity whether the enhanced punishment will serve the purposes of sentencing set forth in the SRA. In some cases it is possible that an enhancement based on acquitted conduct under the Guidelines will be so modest that an increased punishment still could "promote respect for the rule of law" or "provide just punishment for the offense." In other situations, however, where the acquitted conduct enhancement is substantial—as in this case, in which it added not just months, but years to the guideline sentencing range—there is a significant risk that the § 3553(a) purposes will be disserved. In such a situation, it is incumbent on the judge to provide a special accounting that the sentence enhanced greatly by acquitted conduct complies with the statute. Or, to echo the language of a recent panel of this Court, these cases require sentencing courts to develop a record that engenders confidence that it has fully "considered the other § 3553(a) factors" beyond the Guideline range, and has "adequately articulated its reasoning for imposing the particular sentence chosen." *United States v. Bolds*, No. 07-5062, 2007 WL 4440403, at *10 (6th Cir. Dec. 20, 2007).

A requirement calling for additional reasoning to support a sentence based on acquitted conduct adds an important measure of accountability and legitimacy to the post-*Booker* sentencing system. Notably, in its recent ruling in *Rita v.*

United States, 127 S. Ct. 2456 (2007), the Supreme Court emphasized the importance of a sentencing court's statement of reasons, especially as it related to promoting respect for the legal system: "The statute does call for the judge to 'state' his 'reasons.' And that requirement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Id.* at 2468. Demanding a more detailed statement of reasons in cases involving significant consideration of acquitted conduct helps ensure that the federal sentencing system lives up to the "public's trust in the judicial institution." *See Gall v. United States*, 128 S. Ct. 586, 597 (2007) ("[The sentencing judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

II. THE SENTENCE IN THIS CASE, WHICH WAS SIGNIFICANTLY ENHANCED FOR ACQUITTED CONDUCT, IS UNREASONABLE BECAUSE THE DISTRICT COURT FAILED TO CONSIDER PROPERLY THE STATUTORY PURPOSES IN § 3553(A).

The District Court's sentence in this case exemplifies both the danger of treating acquitted conduct the same as convicted conduct, and the importance of an explicit consideration and measured application of all the § 3553(a) factors. Mr. White was acquitted of the majority of the charges in the indictment. The jury sustained two counts alleging that Mr. White, as the getaway driver of a car

involved in a high-speed police chase, aided and abetted his co-defendant to commit bank robbery by force, violence, and intimidation, as well as aided and abetted that co-defendant in the possession of a firearm with an obliterated serial number. The jury acquitted him of four other counts, three of which related to the distinct crime of the co-defendant's alleged use of the gun during and in relation to the bank robbery—offenses that would have carried an automatic ten-year enhancement. While the jury apparently rejected the evidence of Mr. White's involvement in that offense, the court sentenced him as if he had committed it. Had the court set the base offense level to correspond to the crimes of conviction in this case, the resulting sentence would have aggregated to only 108-135 months. Instead, Mr. White was sentenced to an enhanced term of 264 months—an increase of nearly 11 to 13 years.

Despite the highly problematic nature of this enhancement—which gave full credit to an offense of which Mr. White not only was acquitted but which at most reflected his co-defendant's conduct—the District Court provided only a terse statement of its reasons at resentencing. In applying the § 3553(a) factors, it evaluated only whether the 264-month sentence, as a whole, advanced the purposes of sentencing. The court justified that sentence on the ground that "[a]nything less than the 22 years would not promote respect for the law," Resent. Tr. at 46:10-12, and that White had committed "a heinous crime . . . [that] deserves stiff

consequences," *id.* at 44:24; 46:12-13, because he had endangered lives, *id.* at 44:12-13, 20-21. But while the court adopted a broad view of the underlying facts to determine that the *total* sentence complied with § 3553(a), it did not independently consider whether an enhancement attributable to that acquitted conduct itself advanced the goals of § 3553(a); it simply grouped acquitted conduct and convicted conduct together to decide that a vastly higher sentence was in order. Nor did the court explain why it decided to price the acquitted conduct at full value as if it were convicted conduct. As such, there is nothing in the court's decision that explains why a 108-month sentence, or any other lower sentence for that matter, would not similarly have been "sufficient but not greater than necessary" to promote respect for the law and provide just punishment for the offense of conviction. *See* 18 U.S.C. § 3553(a)(2)(A).[4]

Amici suggest as a general proposition that this Circuit's presumption of reasonableness for within-Guideline sentences should not be applicable in any case in which the Guideline range is calculated based in part on acquitted conduct. And, more specifically in light of the facts of this case, because the sentencing

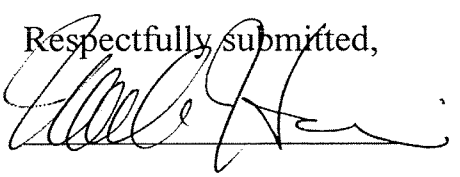
[4] Procedurally, the sentence below was highly suspect for another reason. In 2003, the District Court initially sentenced Mr. White to 264 months, applying Guidelines that required the inclusion of acquitted conduct, and which were at that time mandatory. In 2005, the Supreme Court held that the Guidelines are only advisory, and the Sixth Circuit vacated and remanded Mr. White's sentence. On resentencing, the District Court imposed exactly the same result, despite the fundamental change in the law, without the focused consideration of the other § 3553(a) factors that this Court's post-*Booker* rulings demand.

court failed to evaluate fairly and explain in detail whether and how the specific enhancement based on acquitted conduct itself would advance the central objectives of sentencing, the court's sentencing decision in this case was procedurally unreasonable.

Conclusion

For the foregoing reasons, this Court should vacate Mr. White's sentence and remand to the District Court for resentencing.

Respectfully submitted,



Mark D. Harris
Jeffery A. Gross
Anna G. Kaminska
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Douglas A. Berman
Moritz College of Law at
The Ohio State University
55 W. 12th Ave.
Columbus, OH 43210
(614) 688-8690

Attorneys for Amici Curiae

Dated: January 16, 2008

Appendix—List of Amici

Carissa Hessick
Associate Professor of Law
Arizona State University
Sandra Day O'Connor College of Law
McAllister & Orange Streets
P. O. Box 877906
Tempe, AZ 85287-7906
(480) 965-2007

Dan Markel
Assistant Professor
Florida State University
College of Law
B.K. Roberts Hall, Room 302
425 W. Jefferson Street
Tallahassee, FL 32306-1601
(850) 644-3831

Marc L. Miller
Ralph W. Bilby Professor of Law
University of Arizona
James E. Rogers College of Law
P.O. Box 210176
Tucson, AZ 85721-0176
(520) 626-2414

Michael O'Hear
Professor of Law
Marquette University Law School
Sensenbrenner Hall
1103 W. Wisconsin Ave.
P.O. Box 1881
Milwaukee, WI 53201
(414) 288-3587