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Uncharged Crimes & Acquitted Conduct 2024
Two Steps Forward, One Step Back

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The admissibility of evidence of uncharged crimes during the prosecution's case in chief and, likewise, the use of acquitted conduct to raise the ante under Federal Sentencing Guideline ("Guidelines") calculations has long been the subject of acrimonious debate among prosecutors and defense attorneys. Prosecutors say that evidence of uncharged crimes constitutes strong circumstantial evidence of guilt. Regarding the use of acquitted conduct, they contend that the Guidelines encourage prosecutors to argue at sentencing that, despite their own inability to prove guilt beyond a reasonable doubt at trial, the acquitted conduct is nonetheless fair game for a sentence enhancement.

Defense lawyers have long decried both rules, maintaining that evidence of uncharged crimes does little more than show criminal propensity and inflame jurors, while the consideration of acquitted contact as "relevant conduct" is nothing more than legal sophistry that creates a "trial penalty". Both are anathema to due process and an offense to the presumption of innocence.

U.S. Sentencing Guideline Section 1.B1.3 allows sentencing courts to consider "all relevant conduct" of the defendant performed in preparation of, during and after the offense to avoid detection. While the Guidelines themselves do not directly address "acquitted conduct", the U.S. Sentencing Commission ("the Commission") took the position that there is no constitutional barrier to consideration of acquitted conduct as long as it: (i) falls within the definition of "relevant conduct" and (ii) is demonstrated by a preponderance of the evidence.[1] Thus, the Guidelines seemingly flout due process by giving prosecutors a "second bite at the apple" and defendants have found themselves in jeopardy of actually serving prison time for conduct upon which they had been acquitted.

Change seems to be on the horizon. Earlier this year, the U.S. Sentencing Commission's Chair, Judge Carlton Reeves, stated that "*not guilty means not guilty*" and the Commission voted that acquitted conduct should never be used, in any fashion, in calculating a Guidelines sentencing range. Unless Congress acts and negates this change, it will go into effect on November 1, 2024.

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[1] United States Sentencing Commission, *Primer - Relevant Conduct, March 2018. See also U.S. v Watts, 519 U.S. 148 (1997) and Loyola Law Review,* Vol 56, p.385

While the Commission took a huge and progressive step forward, the New York State legislature took a draconian step back as it sought to modify New York's *Molineaux* rule. The rule provides for the admissibility of evidence of uncharged crimes to prove motive, intent, opportunity, common scheme or plan, identity or absence of mistake, so long as the probative value of such evidence outweighs the risk of undo prejudice to the defendant.[2]

Whether offered in good faith or as a pretext to prove criminal propensity, the use of uncharged crimes by prosecutors has long been a slippery slope.[3] During the criminal trial of Harvey Weinstein, the prosecution offered (and the court admitted) evidence of prior sexual assaults to rebut defendant's claims of consent and to explain why complaining witnesses were "hesitant to report these assaults".

On appeal, the Court of Appeals held that the evidence was offered for improper purposes and pointed as proof to the "…candid acknowledgment by the District Attorney that the true purpose of this evidence was to bolster complainants' credibility by showing that others behaved similarly toward the defendant, even after he made unwanted sexual demands". [4] Finding this to be impermissible evidence of criminal propensity, a divided Court reversed Weinstein's conviction. *Id.*

Following the *Weinstein* decision, bills were introduced in both the state Senate and the Assembly designed to expand and codify the *Molineaux* rule by paving the way for the admission evidence of prior of criminal sex offenses in any case involving a sexual assault.[5] Noting that the existing threshold was too high, and that forty-seven other states had adopted Fed Rule Evid 413 which permits prosecutors in sex offense cases (upon no less that fifteen days 'notice to the defense) to offer evidence that the defendant had committed prior sexual assaults so long as the prejudicial effect of such evidence is not outweighed by its probative value. In admitting such evidence under the proposed expanded rule, courts will make razor-thin determinations concerning admissibility. Absent FRE Rule 413's notice provision, New York's proposed rule contains few safeguards and seems to allow the offering of prior sexual offenses by unfair surprise.

In the wake of *Weinstein*, the proposed rule reminds us of the old adage that "hard cases make bad law". Unless there is something particularly unique about the defendants *modus operandi*, evidence of prior bad acts, particularly in a sex case, can truly do little more than compromise due process by improperly proving criminal propensity and unfairly prejudicing the accused.

Despite this proposed change, which is truly "two steps back" for due process, one can only hope that prosecutors will think twice before offering *Molineaux* evidence –if for no other reason thanto avoid the assault upon due process and concomitant risk of stinging *Weinstein*-like reversals by a Court of Appeals that will not shy away from doing the right thing, even in tough high-profile cases. In the final analysis, the proposed statute is a political response that hardly changes the law, but nonetheless encourages questionable exercises of prosecutorial discretion. If enacted, one can only hope that prosecutors will employ the rule judiciously to ensure that monsters like Harvey Weinstein do not get their own "second bite at the apple".

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[2] In *People v. Vails, 43 N.Y.2d 43 NY2d 364 (1977)* the Court held that the issues listed in *Molineaux* are illustrative, not exhaustive.
[3] *People v. Molineaux,* 168 N.Y. 264 (1901)
[4] *People v. Weinstein,* 2024 Slip Op 02222
[5] SB 9276, A4992-A

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