

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 21-cr-190-WJM-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. THOMAS O'HARA

Defendant.

**RESPONSE TO THE GOVERNMENT'S SUPPLEMENTAL BRIEF REGARDING
CONSIDERATION OF ACQUITTED CONDUCT IN CALCULATING THE
SENTENCING GUIDELINES, ECF 277**

Mr. O'Hara, through his counsel, Adam Frank of the Frank Law Office, respectfully submits the following Response to the government's supplemental brief, ECF 277:

Summary of Response Argument

Given the constitutional bases of Mr. O'Hara's PSR objections, Mr. O'Hara agrees with the government that his guidelines range should be calculated based on the proposed amended guidelines, under which the Court may not consider acquitted conduct as relevant conduct. *See* Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index, 89 Fed. Reg. 36,853, 36,854 (to be codified at USSG § 1B1.3) (adopted April 30, 2024, published May 3, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf. He also agrees with the government's summary of the proposed amendment in Part II of its brief. He disagrees with the government about the amendment's effect on his guidelines calculation. Under the amended guidelines, Mr. O'Hara's base offense level is 26.

The Superseding Indictment charged Mr. O'Hara with possessing with intent to distribute and conspiring with Ms. Dick and others to distribute and possess with intent to distribute methamphetamine, at any time up to and including June 1, 2021. The jury found Mr. O'Hara guilty, but as the government concedes, it also found that both the possession with intent and the conspiracy involved no more than 500g of a mixture or substance containing methamphetamine. ECF 277 at 6. Mr. O'Hara was acquitted of possessing with intent to distribute and conspiring to distribute or possess with intent to distribute more than 500g of methamphetamine at any time up to and including June 1, 2021. ECF 211 at 2. Any methamphetamine over 500g that Mr. O'Hara is alleged to have possessed with the intent to distribute, or conspired to distribute or possess with intent to distribute on or before June 1, 2021 is acquitted conduct the Court may not consider.

Response Argument

I. The Court should apply the amended guidelines.

In Mr. O'Hara's objections to the presentence report, he quoted at length from arguments presented to the Supreme Court that the current version of the guidelines violates the Fifth and Sixth Amendments by permitting a sentencing court to consider acquitted conduct. ECF 267 at 3-5. He further quoted and cited to numerous Supreme Court Justices responses to these arguments calling into question the constitutionality of a sentencing court considering acquitted conduct. *Id.* at 2-3. The Sentencing Commission's proposed amendment prohibits consideration of acquitted conduct precisely because of these constitutional issues. Amendments to the Sentencing Guidelines, 89 Fed. Reg. 36,853, 36,854. For Mr. O'Hara's sentence to be constitutional, the Court must do the same. Likely for this reason, the government does not object to applying the amended guidelines. With the parties' agreement, the Court should apply the amended guidelines at Mr. O'Hara's sentencing.

II. Under the amended guidelines, all alleged methamphetamine over 500g is acquitted conduct that is not relevant conduct under the guidelines.

Under amended USSG § 1B1.3(c), “Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.” Any allegation of Mr. O’Hara being involved with possessing or distributing over 500g of methamphetamine on or before June 1, 2021 represents conduct for which Mr. O’Hara was charged and acquitted in federal court. Such allegations also do not establish any part of the offenses of conviction: (1) possession with intent to distribute 50g to 500g of methamphetamine or (2) conspiracy to distribute or possess with intent to distribute 50g to 500g of methamphetamine. Under amended USSG § 1B1.3(c), any alleged methamphetamine quantities over 500g represent acquitted conduct that must be excluded from the relevant conduct the Court may consider at sentencing.

First, any allegation that amounts to participation in a conspiracy to possess or distribute over 500g of methamphetamine at any time on or before June 1, 2021 is conduct for which Mr. O’Hara was tried and acquitted in this Court. In Count 1 of the Superseding Indictment, the government charged Mr. O’Hara with conspiring with Ms. Dick, R.P., and others to distribute and possess with the intent to distribute over 500g of a substance containing methamphetamine, at any time up to and including June 1, 2021. ECF 193 at 1. At trial, the government presented the evidence it believed was helpful to its attempt to prove this charge. Despite this, the jury convicted Mr. O’Hara of possessing with intent to distribute and conspiring to distribute or possess with the intent to distribute only 50g to 500g of methamphetamine. ECF 211 at 2. The jury acquitted Mr. O’Hara of possessing with intent to distribute and conspiring to distribute or possess with the intent to distribute over 500g of methamphetamine on or before June 1, 2021. Given the jury’s verdicts, any alleged possession or

conspiracy to possess or distribute over 500g of methamphetamine is “conduct for which the defendant was criminally charged and acquitted in federal court.” USSG § 1B1.3(c).

Second, based on the jury’s verdicts, any allegation that would amount to Mr. O’Hara possessing or participating in a conspiracy to possess or distribute over 500g of methamphetamine at any time on or before June 1, 2021 does not establish any part of the offense of conviction. The jury found Mr. O’Hara guilty of possessing with intent to distribute and conspiring to distribute or possess with intent to distribute only between 50g and 500g of methamphetamine. By the very terms of the jury’s verdict, any methamphetamine the government believes Mr. O’Hara possessed with the intent to distribute or conspired to distribute or possess with the intent to distribute on or before June 1, 2021 that exceeds 500g represents an allegation for which Mr. O’Hara was tried and acquitted. Such alleged conduct falls outside any part the offense of conviction.

III. Under the amended guidelines, the government’s calculation of Mr. O’Hara’s base offense level is incorrect.

Under amended USSG § 1B1.3(c), the government’s calculation of Mr. O’Hara’s base offense level erroneously incorporates conduct that is not relevant conduct for the offenses of conviction. For the reasons stated herein as well as in Mr. O’Hara’s objection to the PSR, the base offense level is 26.

A. Alleged methamphetamine and heroin from R.P.

Mr. O’Hara’s alleged receipt of copious amounts of methamphetamine from R.P., which was presented to the jury at trial, constituted participation in a conspiracy to distribute and to possess with the intent to distribute methamphetamine on or before June 1, 2021. The jury acquitted Mr. O’Hara of this alleged conduct. Under amended USSG § 1B1.3(c), for the reasons stated in Part II, it is not relevant conduct and should not factor into the Court’s calculation of Mr. O’Hara’s guidelines range.

Additionally, under USSG § 1B1.3(a) and (b), for the reasons stated in Mr. O'Hara's objection to the PSR, ECF 267 at 6-9, these alleged methamphetamine and heroin transactions were far too remote and irregular to be relevant conduct. Regarding remoteness, this conduct is alleged to have taken place in or before 2006, over 15 years before the allegations for which Mr. O'Hara was convicted. Further, Mr. O'Hara was already tried, convicted, and imprisoned for 12 years for drug-related conduct from 2006 and before in El Paso County case 2006CR5149. ECF 257 at 17, ¶ 62. Regarding regularity, there is no evidence Mr. O'Hara engaged in drug-related activity during that incarceration. There is also no evidence Mr. O'Hara took part in drug-related activity in the fifteen months between January 2019 and March 2020. Based on this alleged conduct's remoteness and irregularity, the methamphetamine and heroin Mr. O'Hara is alleged to have purchased from R.P. in 2006 and before is not relevant conduct and should not factor into the Court's calculation of Mr. O'Hara's guidelines range.

B. Ms. Dick's methamphetamine

At trial, the government asked the jury to convict Mr. O'Hara of possessing with the intent to distribute and conspiring to distribute and to possess with the intent to distribute the methamphetamine the government seized from Ms. Dick's house at 2236 Split Rock Drive. To do this, the government presented Ms. Dick's testimony that the approximately three kilograms of methamphetamine seized at her house on June 1, 2021 was Mr. O'Hara's. After hearing this testimony, the jury acquitted Mr. O'Hara of Count 2, which alleged that he possessed with the intent to distribute over 500g of methamphetamine on June 1, 2021. Under amended USSG § 1B1.3(c), for the reasons stated in Part II, the methamphetamine seized from Ms. Dick's house is acquitted conduct and therefore is excluded from the relevant conduct the Court may consider at sentencing.

The same is true for the methamphetamine Ms. Dick claimed Mr. O'Hara had previously stored at her house. The jury heard Ms. Dick's testimony on this issue and acquitted Mr. O'Hara of conspiring to distribute or possess with the intent to distribute over 500g of methamphetamine at any time prior to June 1, 2021. Under amended USSG § 1B1.3(c), for the reasons stated in Part II, the methamphetamine Ms. Dick claimed Mr. O'Hara stored at her house prior to June 1, 2021 is acquitted conduct and therefore is excluded from the relevant conduct the Court may consider at sentencing.

C. The methamphetamine Mr. Hogan claimed he saw

At trial, the government presented Mr. Hogan's testimony, in which he told the jury that he saw Mr. O'Hara in possession of 100 pounds of methamphetamine. After hearing this testimony, the jury acquitted Mr. O'Hara of conspiring to distribute or possess with the intent to distribute over 500g of methamphetamine at any time prior to June 1, 2021. Under amended USSG § 1B1.3(c), for the reasons stated in Part II, the methamphetamine Mr. Hogan claimed Mr. O'Hara showed him prior to June 1, 2021 is acquitted conduct and therefore is excluded from the relevant conduct the Court may consider at sentencing.

D. Methamphetamine over 500g seized from 1770 Sawyer Way

At trial, the government argued that Mr. O'Hara possessed with the intent to distribute the approximately 650g of methamphetamine it seized from 1770 Sawyer Way on June 1, 2021. The jury rejected this contention, finding Mr. O'Hara guilty of possessing with the intent to distribute only 50g to 500g of methamphetamine that day. Under amended USSG § 1B1.3(c), for the reasons stated in Part II, the methamphetamine over 500g the government seized from 1770 Sawyer Way on June 1, 2021 is acquitted conduct and therefore is excluded from the relevant conduct the Court may consider at sentencing.

E. Methamphetamine over 317.7g seized from 1770 Sawyer Way

Based on the evidence produced at trial, the only reasonable interpretation of the jury's verdict is that it found Mr. O'Hara guilty of possessing only the 317.7g of methamphetamine depicted in trial exhibit 23. All other amounts represent acquitted conduct. Under amended USSG § 1B1.3(c), the Court should calculate Mr. O'Hara's guidelines range based solely on this amount.

Under USSG § 2D1.1(c)(7), a drug quantity of between 200g and 350g of methamphetamine results in a base offense level of 26.¹ This is the proper calculation of Mr. O'Hara's base offense level.

IV. The Fifth and Sixth Amendment bar sentencing Mr. O'Hara for acquitted conduct.

Former and current Supreme Court Justices Scalia, Thomas, Ginsburg, Sotomayor, Kavanaugh, Gorsuch, and Kennedy have each written, at varying times, that considering acquitted conduct at sentencing is likely unconstitutional under the Fifth and/or Sixth Amendments. *See* ECF 267 at 2 (citations in Mr. O'Hara's PSR objections). While each's writings on the issue have been nuanced, the underlying principle is simple: it is fundamentally wrong and unfair for a person to go to trial, be acquitted of a charge at trial, yet be sentenced as if they had been found guilty. The government would have the Court ignore this principle and sentence Mr. O'Hara as if he had been found guilty of the quantities the government alleged. Mr. O'Hara asks that the Court follow the Constitution by respecting the jury's verdict and sentencing him according to the jury's findings, not the government's allegations.

Respectfully submitted, May 17, 2024.

¹ In Mr. O'Hara's objection to the PSR, he objected to the application of the 10-to-1 sentencing disparity in the guidelines between methamphetamine and methamphetamine (actual). ECF 267 at 14-15. If the Court agrees with the arguments presented herein but overrules Mr. O'Hara's objection to the application of the 10-to-1 sentencing disparity, then based on the jury's finding that he possessed with the intent to distribute a minimum of 50g of methamphetamine (actual), his base offense level would be 30.

/s Adam Frank

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Certificate of Service

I hereby certify that on May 17, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I further certify that a copy of the foregoing was served via electronic mail through the CM/ECF system, addressed to the following:

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/s Adam Frank
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