United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

We write in response to the Sentencing Commission's request for comment on its Proposed 2024 Amendment to the *Guidelines Manual* for Acquitted Conduct. Specifically, we write to express our views on Proposed Amendment #3 – Acquitted Conduct.

We applaud the Commission for again proposing amendments to the Sentencing Guidelines to limit consideration of acquitted conduct for purposes of federal sentencing proceedings. During the 2022–2023 amendment cycle, the Commission identified this issue as a priority.

Since that time, cases challenging the problematic use of acquitted conduct for sentencing purposes have continued to percolate through the courts, and widespread criticism of the practice still exists. However, the Supreme Court has declined to hear these cases, with several justices signaling support for the Commission to address the issue before the Court does.[1] Accordingly, we write in support of the Commission amending U.S.S.G. § 1B1.3 to preclude consideration of acquitted conduct when determining the Sentencing Guidelines range.

We urge the Commission to implement Option 1, which if enacted would "add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range." Options 2 and 3, which continue to permit consideration of acquitted conduct in the guideline range calculation, would not adequately ensure that important procedural safeguards—such as due process and the right to jury trial—are preserved throughout the sentencing stage of criminal proceedings.

Fifth Amendment Right to Due Process and Sixth Amendment Right to a Jury Trial

[1] *McClinton v. United States*, 143 S. Ct. 2400, 2401-03 (2023) (Sotomayor, J., respecting the denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari).

When the government fails to discharge its burden of proof—whether reflected in a jury verdict or meritorious motion for acquittal—subsequent use of such acquitted conduct offends the principles underlying the Fifth and Sixth Amendments to the Constitution.

The presumption that an accused is innocent until proven guilty beyond a reasonable doubt is a fundamental precept of due process—a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law."[2] Relatedly, the right to trial by jury serves as "an inestimable safeguard against" arbitrary governmental power that might otherwise undermine a fair and just process of criminal adjudication.[3] Together, these protections ensure the fair and reliable administration of justice.

When a prosecution ends in acquittal, the result indicates that the government failed to prove each element of the charge beyond a reasonable doubt.[4] The finality of this result "is unassailable."[5] Yet, at sentencing for separate charges, a judge may consider relevant conduct by a mere preponderance of the evidence. When relevant conduct encompasses acquitted conduct, the judge effectively reevaluates the jury's verdict—under a significantly lower standard of proof and without the same procedural safeguards. Stated differently, to nevertheless use the underlying conduct for which an accused was acquitted to enhance a sentence for which he was not would allow a judge to penalize a defendant as if the acquittal had not occurred, thereby stripping an accused of the right to due process and a jury trial.[6]

Use of acquitted conduct to increase the severity of sentences seriously damages the appearance of fairness and accuracy in our criminal justice system. Numerous Supreme Court justices, both former and current, have questioned the perceived legitimacy of such a practice in a system affording acquittals "special weight."[7] For example, in a 2005 dissent from denial of certiorari, then-Justice Scalia, joined by then-Justice Ginsburg and Justice Thomas, wrote, "not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense."[8] Scalia decried the practice, writing, "this has gone on long enough."[9] By excluding acquitted conduct from the definition of relevant conduct under § 1B1.3, Option 1 best adheres to the animating principles of our criminal justice system.

Purposes of Sentencing

The statutory mission of the Sentencing Guidelines is to, through a rationalized process, further goals such as deterrence, incapacitation, just punishment, and rehabilitation through use of an effective and fair sentencing system.

Using acquitted conduct to increase a defendant's sentencing range largely frustrates these goals. For example, many people are unaware that conduct for which they have been found not guilty might nevertheless be used to increase a separate sentence. Without such knowledge, the practice has no meaningful deterrent effect. And permitting the use of acquitted conduct affirmatively cuts against both fairness and justice, as the punishment is tailored (at least in part) to an offense for which the defendant is

[2] *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted).

[3] *Duncan v. State of La.*, 391 U.S. 145, 155–56 (1968).

[4] Whether the result of a trial of one's peers or a motion for acquittal, acquitted conduct should be treated similarly for sentencing purposes.

[5] *Yeager v. United States*, 557 U.S. 110, 123 (2009).

[6] We note that acquitted conduct stands apart from uncharged conduct, which has not been affirmatively passed upon by a judge or jury. While the appropriateness of including uncharged conduct in determining the Sentencing Guidelines range may be important to consider in the future, the Commission need not grapple with this question for purposes of Proposed Amendment #3.

[7] *McClinton*, 143 S. Ct. at 2401-02 (Sotomayor, J., respecting the denial of certiorari); *United States v. Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

[8] *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from the denial of certiorari).

[9] *Id.*

legally not criminally liable. Indeed, defendants are often factually innocent of the conduct for which they have been acquitted, eliminating any rehabilitative, penal, or deterrent value from the punishment.

Punishing a defendant for acquitted conduct is a fundamentally unfair practice, which fails to uphold the goals of sentencing and promote respect for the law.

Scope of Acquitted Conduct

We urge the Commission, in defining "acquitted conduct," to adopt the bracketed language "underlying" (as opposed to the bracketed language "constituting an element of") when determining the scope of excluded conduct and to expand the provision to cover state, local, and tribal jurisdictions. An acquittal obtained in any jurisdiction should carry the same weight and finality as an acquittal in federal proceedings.

Moreover, the Commission should refrain from promulgating any exceptions to the "acquitted conduct" definition. Explicit exceptions are unnecessary because the extent to which § 1B1.3 limits "acquitted conduct" is clear based on the Commission's new definition of the term. To the extent the Commission proposes language that would permit consideration of conduct admitted by the defendant at a subsequent plea colloquy, we urge the Commission to decline this exception in particular. Defendants may plead guilty for reasons sometimes unrelated to actual guilt, and thus an acquittal by a trier of fact should supersede statements made during such plea colloquies.

Finally, the Commission should decline the proposed bracketed language exempting acquitted conduct which underlies the instant offense "regardless of whether such conduct also underlies a charge of which the defendant has been acquitted." To consider such conduct when determining the sentencing range implicates the same constitutional and policy concerns discussed above. At most, the Commission should consider limiting such an exception to apply only when the overlapping conduct is essential to establish an element of the crime of conviction—such as if the defendant has been convicted of a lesser-included offense, but acquitted of the greater offense.

Thank you for considering our views.

Sincerely,

Richard J. Durbin
United States Senator

Cory A. Booker
United States Senator