

October 17, 2022

United States Sentencing Commission  
One Columbus Circle, NE  
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**RE: Public Comment on Sentencing Commission’s Proposed Priority (9)**

Dear Members of the Commission:

I am a third-year law student currently writing an academic research paper on the consideration of acquitted conduct at sentencing and hope to offer helpful commentary here on the Commission’s proposed priority number (9) “Consideration of possible amendments to the Guidelines Manual to prohibit the use of acquitted conduct in applying the guidelines.”<sup>1</sup> Based on my research, we believe the practice of considering acquitted conduct at sentencing encroaches upon due process and the right to trial by jury, and undermines the jury’s role and finality of verdicts.

Once a defendant has been acquitted of a crime, it should be improper to thereafter assume he is guilty in a separate sentencing proceeding. This view has been expressed by the federal appellate bench and legal academia.<sup>2</sup> An acquitted defendant has been absolved of the crime and cannot be sentenced for it. That a judge in another case thereafter need only find by a preponderance of evidence that the defendant committed the acquitted conduct contravenes the protections afforded by due process and the Sixth Amendment<sup>3</sup> because the sentencing judge suddenly supplants a jury’s factfinding in weighing the evidence related to an acquittal.<sup>4</sup>

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<sup>1</sup> My work is supervised by adjunct professor and law lecturer John N. Sharifi at The Catholic University of America, Columbus School of Law in Washington, D.C.

<sup>2</sup> Enhancing a sentence based on acquitted conduct “seems a dubious infringement of the rights to due process and to a jury trial.” *United States v. Bell*, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring); *United States v. Brady*, 928 F.2d 845, 851 (9th Cir. 1991) (expressing concern that defendant is punished despite acquittal when sentencing court considers facts underlying acquitted charge); see also Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk Univ. L. Rev. 1, 30 (2016) (“In this view, while any reliance on unadjudicated conduct to enhance an offender’s sentence is constitutionally suspect, reliance on acquitted conduct is a particularly egregious affront to Sixth Amendment principles.”).

<sup>3</sup> *State v. Melvin*, 258 A.3d 1075, 1087 (N.J. 2021) (“In order to protect the integrity of [the right to a jury trial], a jury’s verdict cannot be ignored through judicial fact-finding, under the lower preponderance of the evidence standard [used] at sentencing.”).

<sup>4</sup> Johnson, *supra* note 2 at 30 (“It is a greater offense to the Sixth Amendment for a judge to supplant the will of the jury after it has considered ‘the truth of the accusation’ and decided to

The process erodes the finality of the jury’s verdict.<sup>5</sup> An acquittal is a final determination that should forever release a defendant from the possibility of incarceration based on the alleged underlying criminal conduct. A sentencing scheme that essentially permits reconsideration of a jury’s acquittal provides an unconstitutional second chance at punishment but with fewer evidentiary and procedural protections. The concept is detrimental to public trust in the finality of verdicts and the significance of jury verdicts.

Based on the above, it is our hope that the Committee reconsiders the current policy and hereafter proscribes the use of acquitted conduct in sentencing.

Respectfully,

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acquit. Indeed, allowing arbitrary punishment upon non-conviction or worse, upon an affirmative refusal to convict represents the ultimate form of judicial despotism.”).

<sup>5</sup> *See id.* at 26 (“A related, but distinct, concern about acquitted conduct is the way in which it undermines the defendant’s interest in verdict finality, giving prosecutors a proverbial second bite at the apple by permitting factors already rejected by the jury to influence the defendant’s punishment.”).