
Written Statement of
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President-Elect, NACDL

on behalf of the
**National Association of Criminal Defense Lawyers**

before the
United States Sentencing Commission

Re: Proposed Amendments to the Federal Sentencing Guidelines
Relating to Acquitted Conduct

February 24, 2023

NACDL Written Testimony Before the U.S. Sentencing Commission on Acquitted Conduct

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Chair Reeves and Members of the Commission: Thank you for inviting the National Association of Criminal Defense Lawyers (NACDL) to participate in this important public hearing. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for individuals accused of crimes. Founded as a professional bar association in 1958, NACDL has over 10,000 direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling approximately 40,000 attorneys. Our members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

I write to you in my capacity as President-Elect of NACDL. I practice as a criminal defense lawyer at Johnson Vaughn & Heiskell in the Fort Worth/Dallas area. As a former state and federal prosecutor, my practice focuses on criminal defense. I also represent civil rights litigants. I am a past President of the Texas Criminal Defense Lawyers Association, former Chair of the Advisory Committee for the Northern District of Texas, and Trustee of the Bar Foundation.

To begin, NACDL is pleased to see the U.S. Sentencing Commission proposing amendments the Sentencing Guidelines that seek to address the unfair practice of allowing acquitted conduct to be considered as relevant conduct under Sentencing Guideline Section 1B1.3.

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to our criminal justice system. However, as you

know, current federal law allows judges to override a jury's not-guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury.[1] This is because while a jury must find a defendant's guilt based on the standard of "beyond a reasonable doubt", a judge may apply the relevant conduct factors in the Sentencing Guidelines using the less demanding standard of preponderance of the evidence.

Punishing a defendant for acquitted crimes undermines the essential role of the jury and violates the defendant's Sixth Amendment rights. The Supreme Court has been clear that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are essential elements of a crime and that the Sixth Amendment requires that such facts be either admitted by the defendant or proven beyond a reasonable doubt before a jury at trial.[2] Permitting acquitted conduct sentencing is inconsistent with this principle. It is also a rejection of a defendant's right to trial as it permits a judge to override or nullify a jury's acquittal by sentencing a defendant based on conduct they were acquitted of.

The right to jury trial was sacrosanct to our nation's Framers and was considered among the most important constitutional bulwarks against tyranny. John Adams said that "[r]epresentative government and trial by jury are the heart and lungs of liberty."[3] Thomas Jefferson called the right to jury trial "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[4] Unsurprisingly, the right to trial

[1] *United States v. Watts*, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."). To be clear, however, *Watts* considered only a very narrow question "regarding the interaction of the Guidelines with the Double Jeopardy Clause." *United States v. Booker*, 543 U.S. 220, 240 & n.4. (2005). It did not consider whether acquitted conduct sentence violates the Fifth Amendment right to due process or the Sixth Amendment right to jury trial.
[2] *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[3] John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000).
[4] Thomas Jefferson, Letter to Thomas Paine (July 11, 1789), in *The Life and Selected Writings of Thomas Jefferson* (Adrienne Koch & William Peden, eds., 1998).

holds a vaunted place in the Constitution itself; it is the only right established and guaranteed in both the original text of the Constitution and in the Bill of Rights.[5] Cases affirming the importance of the jury and its independence from the judge are replete throughout the history of Anglo-American law.[6] Permitting a judge to ignore or override a jury's verdict undermines centuries of jurisprudence and, more importantly, the principles on which it stands.

The right to jury trial is not just important for the defendant. It is also an important part of public oversight of the legal system. Jury participation is a civic obligation and it acts as a community check on the power of the government.[7] In my over 45 years as a practicing lawyer, I have observed that judges typically have great respect for the role the jury plays in our system and for the seriousness with which jurors undertake their duty in individual cases. Allowing a judge to override a jury's verdict by sentencing a defendant based on acquitted conduct is disrespectful to those jurors[8]—to the time, effort, and careful consideration they provided to exercise their civic duty and deliver a verdict in their case. Indeed, submitting separate counts to the jury—when their careful consideration of those counts can be disregarded at sentencing—is deeply misleading.

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[5] U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[6] *E.g.*, *Bushel's Case*, 124 E.R. 1006 (1670) (overruling a trial judge's contempt finding against a juror for coming to a verdict the judge did not agree with).

[7] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 10 (2018), https://nacdl.org/TrialPenaltyReport [hereinafter, NACDL Trial Penalty Report]; *see also* Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Emp. L. Studies 973, 974 (2004) ("In its political aspect, the jury is a 'republican' body that 'places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.").

[8] *See, e.g.*, William T. Pizzi, Watts*: The Decline of the Jury*, 9 Fed. Sent. R. 303 (1997) (calling the use of acquitted conduct "disrespectful to jury verdicts").

Sentencing based on acquitted conduct also undermines the legitimacy and public respect for the legal system.[9] Its use robs the process of the democratic legitimacy conferred by jury participation. It conveys the message to jurors that their carefully considered decision was wrong and that their jury service was inconsequential. It reduces public confidence in the legal system, and communicates to the jury, the defendant, and the public that the courts are skewed in favor of the prosecution and that verdicts in favor of the accused need not be respected. This understandable sense of unfairness and loss in public legitimacy is particularly felt in impacted communities, which have also unfairly borne the brunt of other inequitable aspects of the criminal legal system.[10]

Acquitted conduct sentencing is also a major contributor to the trial penalty. My organization, NACDL, has helped lead the fight against the trial penalty in statehouses, in the courts, and in the Halls of Congress through our research and advocacy efforts. The trial penalty is broadly defined as the massive difference between the severe sentence a defendant typically receives if convicted at trial versus the much lower sentence a defendant typically receives after a plea. The huge delta between post-trial and post-plea sentencing has virtually eliminated trials from the federal criminal system, with less than 2% of federal convictions resulting from trials in 2021 according to the Sentencing Commission's own statistics.[11]

NACDL's 2018 report on the trial penalty in the federal system used Sentencing Commission data to show that post-trial sentences were, on average, triple the length of

[9] *See R. v Sussex Justices ex p. McCarthy*, 1 K.B. 256, 259 (1923) (Eng.) (Lord Hewart, C.J.). The use of acquitted conduct in sentencing, however, is perhaps an even easier case than what was before Lord Hewart. Its use does not merely *seem* unjust; it *is* unjust.

[10] *See* Tom Tyler, *Why People Obey the Law* (2006) (arguing that the perception that the law is fair is critical to engendering respect for the law, thus promoting public safety).

[11] U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics, at 56, table 11 (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

sentences handed down after a plea.[12] For some types of crimes they were over eight times higher.[13] This enormous difference has coerced thousands of defendants into pleas, as even those with a strong case understandably choose not to risk the often exponentially higher sentence they may receive if convicted at trial.[14] For this reason, the trial penalty can and often does coerce even innocent defendants into pleading guilty.[15]

Additionally, the trial penalty has also opened the door to myriad coercive practices used by some prosecutors designed to induce guilty pleas, including piling on charges, exploding plea offers, threats to indict family members[16], and refusal to provide discovery, including constitutionally required *Brady* material, prior to plea negotiations. Indeed, the extreme prevalence of plea bargaining has concentrated discretion and power in the criminal legal system in the hands of prosecutors and away from judges.[17]

Acquitted conduct sentencing contributes to the trial penalty in two crucial ways. First, it disincentivizes a defendant from exercising their right to trial when they may be sentenced based on conduct of which they are acquitted. Of course, a partial acquittal at trial may be considered a partial victory for the defense. But it is no victory at all if the defendant may still be sentenced based on conduct in the acquitted counts, conduct the jury found the defendant not guilty of

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[12] *See* NACDL Trial Penalty Report, *supra* n.7 at 20-21 fig. 1.
[13] *See id.* at 15, 17.
[14] *See* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev.. 51, 95 ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer.")
[15] Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely exonerated of the crime they were once convicted of—pleaded guilty. *See* The National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P.
[16] *See United States v. Yong*, 926 F.3d 582 (9th Cir. 2019).
[17] *See* NACDL Trial Penalty Report, *supra* n.7 at 9 ("The trial penalty has made the government the most powerful player in the criminal justice system. Although the defendant is cloaked in the presumption of innocence and the prosecutor theoretically has the burden of proof . . . the mere decision to charge triggers a domino effect making a guilty plea the only rational choice in most cases.").

committing. Second, it constitutes an actual penalty for going to trial because it permits the judge to consider and sentence a defendant based on additional evidence heard at trial that would likely not have been included in a guilty plea. It gives the government—which has failed to meet its burden before the jury—a second bite at the apple, a second opportunity to seek a sentence against a defendant before a new audience, the judge, even on a count where the jury has rendered an affirmative verdict in the defendant's favor.[18] For these reasons, amending USSG § 1B1.3 to prohibit the use of acquitted conduct as relevant conduct was the very first recommendation of the NACDL Trial Penalty Recommendation Task Force in its 2018 report.[19]

Perhaps unsurprisingly, the use of acquitted conduct sentencing has come under increasing scrutiny. It is vehemently opposed by a wide variety of prominent advocacy groups from across the political spectrum, including NACDL, Americans for Prosperity, the Cato Institute, FAMM, Niskanen Center, Right on Crime, R Street Institute, and the Sentencing Project.[20]

This growing opposition is not limited to research and advocacy groups. A bill with bipartisan support, the Prohibiting Punishment of Acquitted Conduct Act, was introduced in the Senate last Congress and was marked up by the Senate Judiciary Committee.[21] Additionally, a significant number of Supreme Court Justices have expressed skepticism and downright criticism of acquitted conduct sentencing. In 2015, while he was on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Kavanuagh wrote of his "concern about the use of acquitted conduct at

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[18] *See* Barry L. Johnson, *If at First You Don't Succeed-Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C.L.Rev. 153, 182-183 (1996).
[19] *Id.* at 12.
[20] Brief of Amici Curiae Ams. for Prosperity Found., Dream Corps Justice, Nat'l Ass'n of Crim. Defense Lawyers, Niskanen Ctr., Right on Crime, R Street Inst. & Sent'g Proj. in Support of Pet'r., *McClinton v. United States*, No. 21-1557 (June 30, 2022); Brief of Cato Inst. As Amicus Curiae Supporting Pet'r, *McClinton v. United States*, No. 21-1557 (July 14, 2022); Brief of Nat'l Ass'n of Fed. Defenders & FAMM Supporting Pet'r, *McClinton v. United States*, No. 21-1557 (July 14, 2022).
[21] S. 601, 117th Congress (2021).

sentencing."[22] In 2014, also while on the Court of Appeals, then-Judge Gorsuch said that it was "far from certain whether the Constitution allows" sentence enhancement based on facts a jury did not find.[23]

In one particularly egregious case, *Jones v. United States*, a group of defendants had been charged with federal drug conspiracy and distribution, RICO conspiracy, firearms offenses, and some crimes under local District of Columbia law.[24] After an 8-month trial, a jury acquitted the defendants on all charges except distributing small quantities of crack cocaine.[25] The Guidelines base offense levels for the defendants who sought Supreme Court review were: Antwuan Ball, 51-71 months for selling 11 grams; Joseph Jones, 33-41 months for selling 2 grams; and Desmond Thurston, 27-33 months for selling 1.6 grams.[26] The Government nevertheless sought sentences of 480 months for Ball, 324-405 months for Thurston, and 360 months for Jones, largely based on a theory that their "Relevant Conduct" for Guidelines purposes should include participation in the conspiracy charges for which they were acquitted.[27] Upon discovering this, the jury foreperson wrote the judge a letter, stating, "It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty."[28] The jury foreperson also lamented that the jury's "work may not be given the credit it deserves."[29] Ultimately, the District Court did consider the conspiracy and sentenced these three defendants

[22] *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing *en banc*).
[23] *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014).
[24] Petition for a writ of certiorari, at 3, *Jones v. United States*, 135 S. Ct. 8, 9 (2014)
[25] *Id.*
[26] *Id.*
[27] *Id.* at 4.
[28] *Id.* (internal citation omitted).
[29] *Id.*

to terms that were multitudes higher than the Guidelines range for the offenses for which they were actually found guilty by the jury.

| Defendant | Guideline Range | Sentence |
|---|---|---|
| Mr. Ball | 51-71 months | 225 months |
| Mr. Thurston | 27-33 months | 194 months |
| Mr. Jones | 33-41 months | 180 months[30] |

Despite the egregious unfairness of this case, *certiorari* was denied. In dissent, Justice Scalia was joined by Justices Thomas and Ginsburg in writing, "The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt . . . Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," which cannot be found by a judge at sentencing."[31]

NACDL acknowledges that the use of acquitted conduct sentencing is not terribly widespread, given that less than 2% of federal criminal convictions result from trial. However, of those 957 trials in fiscal year 2021, over 16% of them (157) also included an acquittal on at least one offense.[32] Obviously, this issue is of great importance to those defendants. As further evidence that this is a persistent issue, it is worth noting that acquitted conduct sentencing is a perennial topic for petitions for writs of *certiorari* before the U.S. Supreme Court.[33]

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[30] *Id.* at 5.
[31] *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari, joined by Thomas and Ginsburg, JJ.).
[32] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 212 (Feb. 2, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.
[33] *See*, e.g., *McClinton v. United States*, No. 21-1557 (2023) (pending); *Osby v. United States*, 142 S. Ct. 97, No. 20-1693, *cert. denied* (2021); *Asaro v. United States*, 140 S. Ct. 1104, No. 19-107, *cert. denied* (2020).

While NACDL is pleased to see the Sentencing Commission's interest in addressing the use of acquitted conduct as relevant conduct, we are very concerned by the limited scope of the Commission's proposed amendment. The Commission has proposed amending §1B1.3(c) to bar the use of acquitted conduct as relevant conduct for purposes of determining the guideline range.[34] The Commission acknowledges that this would still permit the consideration of acquitted conduct as relevant conduct "in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted."[35]

This change is extraordinarily narrow. Given the myriad harms inflicted by the use of acquitted conduct in sentencing—its fundamental unfairness to the defendants, its rejection of the constitutional rights to due process and trial by jury, its rejection of jury verdicts, its subversion of the jury's crucial role in our legal system, its undermining of public respect and legitimacy for our legal system—it is concerning to see the Commission seek to limit its use in such a narrow and, I fear, ineffectual way. Even with this amendment, acquitted conduct may still be relied upon to unfairly sentence defendants, either within the guidelines range or through upward departures. The harms caused by its use, as described herein, will remain.

While the rationale for this proposed amendment is not stated in the proposed Amendments, if the Commission finds the use of acquitted conduct to be unfair in certain circumstances, it is unclear why that same normative rationale would not apply in other circumstances. That is, if it is unfair to use acquitted conduct to determine the Guidelines range, why is it not also unfair to consider it to determine a sentence within the range or to impose an upward departure?

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[34] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 213 (Feb. 2, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf.
[35] *Id.* at 224.

For the same reason, NACDL opposes the proposed limitations on the prohibition of using acquitted conduct at sentencing. Where there is overlapping conduct involving acquitted and convicted counts, the principle of not sentencing on acquitted conduct dictates that the benefit should go to the defendant. To hold otherwise creates a back-door mechanism to countermand the impact of the acquittal, and the fundamental unfairness of using acquitted conduct at sentencing—and the resulting appearance of unfairness—persists. Better that all acquitted conduct be eliminated at sentencing than risk that a carefully considered acquittal was effectively annulled through punishment. Where the task of carving out acquitted conduct from convicted conduct is complex in an individual case, the Commission should trust the district judges to do a careful analysis in light of the prohibition contained in this guideline. And, consistent with its traditional role, the Commission can always revisit the guideline and its commentary in the future in light of experience and feedback. NACDL also opposes any exception for procedural acquittal.[36] An acquittal on procedural grounds is still an acquittal, in the eyes of the jury, the defendant and the public.

The only way that the unfair practice of acquitted conduct sentencing can be fully addressed and the harms it has caused in our system can be diminished is by disallowing it entirely. NACDL asks the Commission to amend §1B1.3 to prohibit the consideration of acquitted conduct as relevant conduct for any purpose. This would be fair to defendants and would restore respect for the jury and its role within our system.

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[36] We also respectfully disagree with the characterization that an acquittal on the basis of an expired statute of limitations is "unrelated to the substantive evidence." U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines, at 224 (Feb. 2, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf. Rather, the primary rationale of statutes of limitations is to ensure that fresh evidence is reliable and available. Criminal statutes of limitations, therefore, prevent wrongful convictions. *See* Wayne LaFave et al., 5 Crim. Proc. § 18.5(a) (4th ed. Nov. 2022 Update) (calling preventing wrongful convictions the "foremost" purpose of statutes of limitations); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348–49 (1944) (statutes of limitations prevent cases where "has been lost, memories have faded, and witnesses have disappeared.").