



**U.S. Department of Justice**

Criminal Division

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*Office of Policy and Legislation*

*Washington, D.C. 20530*

February 15, 2023

The Honorable Carlton W. Reeves, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.<sup>1</sup> This letter addresses the proposals and issues for comment regarding First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A), Acquitted Conduct, and Sexual Abuse Offenses. We will submit a second letter on the remaining matters before the Commission’s March meeting. This letter also serves as the Department’s written testimony for the Commission’s upcoming hearing on February 23, 2023.

We thank the members of the Commission and the staff for being responsive to the sentencing priorities of the Department of Justice and to the needs and responsibilities, more generally, of the Executive Branch. We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come.

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<sup>1</sup> U.S. Sentencing Comm’n, *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023).

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## **2. Department of Justice Comments on Proposed Amendments and Issues for Comment on Acquitted Conduct**

The Commission has proposed an amendment to the Guidelines limiting the use of acquitted conduct in determining the Guidelines range. Consistent with federal statutes, the proposal would continue to allow district courts to consider acquitted conduct when determining where within the applicable Guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 (“[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”).

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with the amendment, the Department believes the definition of acquitted conduct should be amended.

### **A. Background**

The Supreme Court has long recognized judges’ broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., 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 the conduct has been proven by a preponderance”); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) (“We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment”). The Court in *Watts* reiterated its holding in *Williams v. New York*, that “[h]ighly relevant—if not essential to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics” and that “[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.” *Watts*, 519 U.S. at 151-52 (quoting *Williams*, 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant’s background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of acquitted conduct at sentencing would be a significant departure from longstanding sentencing practice. *See Watts*, 519 U.S. at 152 (noting that even “[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted”) (internal citations omitted).<sup>11</sup>

Section 3553(a) of Title 18, United States Code, meanwhile, requires judges to consider, among other factors, “the nature and circumstances of the offense and the history and characteristics of the defendant” in imposing a “sufficient, but not greater than necessary” sentence. Congress recognized and codified the broad availability of information for judges in imposing sentence in Section 3661, which directs that “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

### **B. The Commission’s Proposal Would Be Difficult for Courts to Administer**

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provide that “[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.” Likewise, §6A1.3 specifies that “[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.” Citing 18 U.S.C. § 3661 and the Court’s decision in *Watts*, the commentary to that provision explains that “a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”

The Commission’s proposed amendment would make three changes to the Guidelines and the commentary. It would –

- add a new subsection (c) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3 “unless such conduct was admitted by the defendant or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction”;

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<sup>11</sup> The Supreme Court has also recognized the constitutionality, under the advisory Guidelines regime, of judicial factfinding within the prescribed statutory range established by the jury verdict. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 116 (2013) (majority opinion) (“[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.”); *United States v. Booker*, 543 U.S. 220, 233 (2005) (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting that nothing in the Court’s history suggests that it is “impermissible for judges to exercise discretion—taking into consideration various factors relating to both offense and offender—in imposing a judgement *within the range* prescribed by statute) (emphasis in the original); *see also* 18 U.S.C. § 3661.

- define acquitted conduct, in the Guidelines text, as, “conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction”; and
- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that “[a]cquitted conduct, however, generally, shall not be considered relevant conduct for the purposes of determining the guideline range;” remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine “the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4.”

The Department does not believe that the Commission can practicably prohibit the consideration of acquitted conduct in determining the Guidelines range. Though well intentioned, the Commission’s proposal will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a defendant’s conduct.<sup>12</sup> As the Supreme Court recognized in *Watts*, “an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt.” *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define “acquitted conduct,” the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

As an initial matter, if adopted, the proposed definition of acquitted conduct would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as conduct “*underlying a charge of which the defendant has been acquitted*” will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant’s innocence.<sup>13</sup> The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission’s proposal fails to account for an acquittal unrelated to the defendant’s innocence as to the conduct at issue—for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue,

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<sup>12</sup> Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would “be unsound as a practical matter.” *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022).

<sup>13</sup> We appreciate the Commission’s inclusion of “*a charge*” to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase “*underlying a charge*” adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

a jurisdictional element, or the conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the Guidelines range.

The Commission's proposal also fails to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the Guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion of conduct "*admitted by the defendant or [that was] found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction*" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

### **C. A Narrower Definition**

Were the Commission to proceed with excluding acquitted conduct from relevant conduct, the Department would recommend a narrower definition of acquitted conduct that would include: (1) specific exceptions, and (2) clarify the definition to reduce administrability concerns, while retaining the Commission's proposed standard. Because some circuits have

questioned the authority and validity of certain provisions of the Sentencing Guidelines commentary, the Department also recommends moving the commentary in §6A1.3 regarding the permitted use of acquitted conduct to the text of §1B1.3.

While these changes will not fully resolve the Department's administrability concerns, changes to the definition of acquitted conduct would better account for overlapping, split, or inconsistent verdicts. The Department's recommended changes are underlined below.

### **1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)**

(C) Acquitted Conduct. (1) Limitation. Acquitted Conduct shall not be considered relevant conduct for the purposes of determining the guideline range. Acquitted conduct may be considered in determining the sentence to impose within the Guidelines range, or whether a departure or a variance from the Guidelines is warranted. See §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

(2) Definition of Acquitted Conduct. For the purposes of this guideline, "***acquitted conduct***" means conduct (*i.e.*, any acts or omissions) underlying the elements of a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion of acquittal under the applicable law of a state, local, or tribal jurisdiction, except that it does not include any conduct (*i.e.*, any acts or omissions):

A) admitted by the defendant or that underlies the elements of a charge of which the defendant has been convicted, including lesser included offenses or related counts; or

B) that the trier of fact found the defendant committed beyond a reasonable doubt, as established by a special verdict form or by a judge's statement after a non-jury trial; or

C) underlying the elements of a charge for which the defendant was acquitted based on the court's determination, by a preponderance of evidence, that the defendant was acquitted for a reason unrelated to his conduct, such as the government's failure to establish venue, prove a jurisdictional element, or overcome an affirmative defense based on the statute of limitations.

The Department recommends changing the language to refocus the sentencing court's inquiry from what the trier of fact found to what the evidence at trial established.

- To account for split or inconsistent verdicts, the Department proposes amending the definition of acquitted conduct to capture acts or omissions "underlying the elements of a charge of which the defendant been acquitted," while also proposing in Subsection A an exception for conduct that "underlies the elements of a charge of which the defendant has been *convicted*." This proposal will help clarify that the Commission's proposal is not intended to prevent a sentencing court from considering conduct underlying the elements of a charge for which the defendant was

convicted, and thus which a jury necessarily found beyond a reasonable doubt. The Department also recommends moving the limitation proposed in (c)(1) to the definition of acquitted conduct in (c)(2) for greater clarity.

- Subsection B accounts for cases where a special verdict form or a judge’s statement after a non-jury trial reflects the trier of fact’s findings as to specific acts or omissions.
- Subsection C accounts for circumstances in which the evidence at trial otherwise establishes that the defendant committed the acts or omissions in question, but the defendant was acquitted of a particular count because of a technical or non-substantive limitation. This language would allow courts to consider conduct underlying a count of acquittal when the court determines that the acquittal was unrelated to the defendant’s factual innocence and instead was based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or the conduct occurring outside the statute of limitations. Allowing for the consideration of conduct otherwise proven beyond a reasonable doubt addresses cases involving particularly vulnerable victims who may not report an offense until after the statute of limitations has run.

To ensure that limiting a sentencing court’s ability to consider acquitted conduct in determining the Guidelines range does not unintentionally limit the ability of a victim to be “reasonably heard” under 18 U.S.C. § 3771(a)(4) or unduly limit the court’s discretion to consider any information concerning the conduct of a defendant, we recommend adding to the commentary of §1B1.13 the following provision:

“Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court’s discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771. See 18 U.S.C. § 3661.

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Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together. We continue to believe that a strong, consistent, and balanced federal sentencing system is important to improving public safety across the country and furthering justice.

Sincerely,



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*ex-officio* Member, U.S. Sentencing Commission

cc: Commissioners  
Kenneth Cohen, Staff Director  
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