National Association of Assistant United States Attorneys

Safeguarding Justice for All Americans

February 15, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Written Testimony for Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

The National Association of Assistant United States Attorneys (NAAUSA)–representing the interests of over 6,400 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices–provides the following comments regarding the Proposed Amendments to the U.S. Sentencing Guidelines.

AUSAs are dutifully committed to defending the innocent and prosecuting the guilty through our federal criminal justice system. The system relies on public trust to succeed. The U.S. Sentencing Guidelines foster this trust by promoting the predictable and fair application of the law. While individualized determinations are necessary, the guidelines are designed to encourage a degree of uniformity among similarly situated offenders. This uniformity ensures offenders across the country, regardless of case outcome, can understand their sentence and feel their sentence is fair compared to their peers.

The uniformity the U.S. Sentencing Guidelines provide also guard against other potential ills. When the guidelines are clear and well-structured, there is less room for personal bias in decision-making. Offenders from Mississippi to California can look to the guidelines and know their sentence was fair. For these reasons, we encourage judges to heed the guidelines and encourage the Commission to adopt our recommendations below.

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II. Acquitted Conduct

Currently, a judge may consider conduct proved by a preponderance of evidence when determining an appropriate sentence for a convicted individual. Judicial discretion to consider "acquitted conduct" acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual. Protections are already in place to ensure individuals are not improperly held accountable for unrelated conduct during sentencing. Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea or which has not been found to be proven by a jury beyond a reasonable doubt ensures the court has a full picture of the individual's conduct. The proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing a sentence under 18 U.S.C. § 3553(a) and constitutes a bridge to the eventual elimination of consideration of relevant conduct at sentencing.

It is important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term simply refers to any conduct that was determined by the factfinder to not have been proven beyond a reasonable doubt. Judges are more than capable of appropriately exercising their discretion when deciding at sentencing whether or not to consider acquitted conduct or conduct not otherwise admitted to by the defendant. Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence to even be considered. This burden of proof ensures the defendant is not held responsible for conduct based on insufficient evidence, while at the same time enabling the court to understand the full scope of the defendant's criminal activity.

This proposal would essentially bar the court from considering any evidence of an offense for which the defendant was acquitted or did not specifically admit to as part of a plea. It also severely and unfairly limits the court's view of the defendant's conduct. Given the frequent overlapping nature of evidence applicable to different offenses charged within a single case, there is a significant likelihood that the proposed amendment will generate massive amounts of litigation about whether something qualifies as "acquitted conduct," disparate results among similarly situated offenders, and a lack of predictability at sentencing.

The proposed Guideline would also result in illogical and unjust outcomes. For example, consider the case of a defendant who is charged with five counts of being a felon in possession of a firearm for being in constructive possession of five firearms found in his vehicle. The defendant could be acquitted of all but one count, because there was DNA found on only one gun; however, under the proposed amendment, the court could not consider the four additional firearms recovered from the defendant's vehicle for purposes of enhancing the defendant's base offense level because he was acquitted of possessing the four other firearms. Such a result nullifies provisions found throughout the Sentencing Guidelines that account for relevant conduct.

Finally, this proposal seems to rely on misconceptions about the role of conduct history in charging, plea bargaining and sentencing.

Charging and plea bargaining are distinct steps in the criminal justice process from sentencing. During the sentencing phase, the prosecution seeks to achieve a variety of objectives, such as seeking imposition of punishment, restoration to victims, facilitating rehabilitation, and deterring unlawful conduct. While charging is crime-specific, the unique goals of sentencing require a fuller picture of an individual's past conduct, including *all* aspects of an offender's characteristics, background and offense conduct. Conduct that can be proved by a preponderance of evidence is critical to this picture, even if the individual was acquitted on certain offenses or did not specifically admit guilt to certain facts as part of a plea.

The proposed amendment does nothing more than allow defendants to cherry pick those facts that reflect positively on the offender at sentencing while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

For these reasons, NAAUSA opposes the proposed inclusion of § 1B1.3(c).

III. Conclusion

As the voice of federal prosecutors and civil attorneys, NAAUSA appreciates the opportunity to share our perspective with the Commission. Thank you for considering our comments.

If you have any additional questions or wish to set up a meeting to discuss the issues raised in these comments, please reach out to our Washington Representative, Natalia Castro, at ncastro@shawbransford.com.

Sincerely,

Steven Wasserman
President