TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION ON PROPOSED AMENDMENTS TO THE GUIDELINES

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Good Morning, my name is Natasha Sen, and on behalf of the Practitioners Advisory Group, I thank you for the opportunity to provide testimony to the Commission regarding three proposed amendments to the U.S. Sentencing Guidelines that the Commission is currently considering. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We appreciate the Commission's willingness to consider our positions on the Commission's proposed amendments to the Guidelines.

My testimony will address the PAG's positions on proposed amendments regarding: (1) motions for compassionate release; (2) the use of acquitted conduct in calculating a defendant's guidelines range; and (3) offenses where law enforcement or correctional officers sexually abuse individuals in their care, custody or supervision.

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II. Proposed Amendment to U.S.S.G. §1B1.3, Use of Acquitted Conduct

The PAG supports the Commission's proposal to revise §1B1.3, the relevant conduct guideline, by adding a new subsection (c) that states that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range, unless the conduct was admitted by the defendant in a plea colloquy or found by the trier of fact beyond a reasonable doubt. The PAG welcomes this proposal as one that comports with the principles of due process and fundamental fairness enshrined in the Constitution. The PAG asks the Commission to consider revising this guideline to also preclude the use of uncharged conduct at sentencing.

The use of acquitted conduct in sentencing is repugnant to the Fifth Amendment right to due process of law and the Sixth Amendment right to have one's guilt or innocence decided by a jury employing the beyond a reasonable doubt standard. Arguably, the use at sentencing of uncharged conduct that has not been subjected to the rigors of trial and that a jury has never heard is even more constitutionally infirm. A lodestar tenet of our democracy is that the jury is "the great bulwark of our civil and political liberties"[5] and treating a jury acquittal as a nullity – or sidestepping the jury entirely by sentencing on uncharged conduct – is contrary to our constitutional principles and fundamentally unfair.

Significantly, courts' reliance on acquitted conduct has resulted in sentences that can only be described as unjust. A good example is reflected in a petition for writ of certiorari now pending before the Supreme Court. In *McClinton v. United States*,[6] the defendant was charged with robbery of a drugstore, as well as robbery of a codefendant and use of a firearm during the robbery of the codefendant, causing death. At trial, he was found guilty of the robbery of the drugstore but acquitted of robbing and causing the death of the codefendant. The advisory guideline for the robbery was five years, but the guideline for murder was life. Despite the defendant's acquittal on the causing death charge, the government sought a 30-year sentence. The court found by a preponderance of the evidence that the defendant had committed murder and imposed a sentence of 20 years, four times longer than the applicable guideline sentence for robbery.

Amending the relevant conduct guideline to preclude the use of acquitted conduct in determining the advisory guideline range would be a significant first step toward the goal of preventing unjust sentences. The PAG further requests that the Commission not include its proposed language in the commentary to §6A1.3 that "[a]cquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." The PAG believes that permitting the use of acquitted conduct in these circumstances undermines the very purpose of adopting this amendment. Permitting an upward departure on the basis of acquitted conduct would render the Commission's proposed revision meaningless.

In a similar vein, acquittals on grounds of jurisdiction, venue, or statutes of limitations are permitted in our system of jurisprudence because these due process protections ensure the fairness

[5] *Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000) (internal citation omitted).

[6] Case No. 21-1557.

of the proceedings. Permitting the use at sentencing of acquitted conduct that is based upon these "non-substantive" issues signals that these principles of fairness do not matter.

With regard to whether courts ought to be permitted to consider "overlapping conduct" at sentencing, as a practical matter, this seems like an unworkable task for a sentencing court to undertake. The PAG's position is that a bright-line rule precluding the use of acquitted conduct in determining a defendant's sentence will address this concern and eliminate the need for time-consuming mini-trials at sentencing to determine the significance, if any, of "overlapping" conduct.

Finally, revising the relevant conduct guideline as the Commission proposes is consistent with parallel efforts to preclude the use of acquitted conduct in sentencing more broadly. In addition to possible Supreme Court review, Congress has proposed legislation to do the same.[7] These efforts reflect a growing movement of jurists, practitioners and legislators who have seen first-hand the inequitable impact of acquitted conduct in sentencing. Even beyond the legal community, laypeople routinely react with shock and incomprehension upon learning that criminal defendants in American courts may be – and indeed routinely are – sentenced for crimes of which they were acquitted or with which they were never charged. Accordingly, adopting this proposed amendment will have the salutary effect of increasing public confidence in our judicial system, and the PAG supports this proposal.

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[7] *See, e.g.*, Prohibiting Punishment of Acquitted Conduct Act of 2021, 117 S.601.