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ACQUITTED CONDUCT TESTIMONY

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POAG is unanimously opposed to the adoption of the proposed amendment to create an acquitted conduct exception to relevant conduct. While POAG is incredibly empathetic to the concerns of the various interested parties and stakeholders about the appearance of unfairness in considering acquitted conduct, POAG's position on this issue may best be described as emanating from an abiding trust in the judiciaries' ability to balance the evidentiary issues presented. Acquitted conduct has a special distinction, when compared to other types of relevant conduct, of having already met a preponderance of the evidence threshold when the charge was filed. During the sentencing process, Judges, who have been present and attentive throughout the trial, are in the best position to ascribe the appropriate weight of the evidence of the defendant's conduct. The Court *may* rely on acquitted conduct, *if* the Court finds that the government has proven such conduct based upon a preponderance of the evidence. POAG advocates that the Commission continue to entrust Judges with the discretion they retain regarding all other sentencing matters and will act appropriately with the information available, which is subject to appellate review.

Much as a Judge must, POAG believes it is important to distinguish the process of conviction from the process of sentencing. The very first explanatory commentary under USSG §1B1.3 provides that the principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. It further directs that, under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator. This distinction is the core issue – acquitted conduct pertains to statutory considerations, while sentencing liability pertains to information that can be used to determine the advisory guideline imprisonment range within the statutory limits for the offense of conviction. This dichotomy is

already a criminal justice mental structure that sentencing Judges are familiar with and operate within.

POAG believes precluding the use of acquitted conduct would present ongoing and significant application issues that would need further consideration before such an amendment could be adopted. POAG's concerns about adoption of the proposed amendment are based on issues of workability, the impact on victims, concerns of unintentionally incentivizing defendants to go to trial, and the likelihood exclusions of acquitted conduct will lead to further exclusions from relevant conduct consideration.

In considering this amendment, POAG discussed likely hypothetical cases that created difficulty with "overlapping" conduct. One such example was if a defendant, in a multiple count Indictment, was found guilty of a Conspiracy to Distribute a Controlled Substance charge but acquitted of the substantive Distribution of a Controlled Substance charges. How would the overlapping conduct be tabulated and what further rules would be available to resolve the inquiry? An additional likely hypothetical case involved an Indictment with multiple defendants in which one of them pleads guilty to various shared counts, but another defendant takes the same conduct to trial and is acquitted of some of the shared counts. POAG was unclear as to how a probation officer or Court could go about fairly assessing the culpability of the two defendants, who were involved in the intertwined illicit conduct, but for whom one of the guidelines explicitly directs that some conduct is not to be considered. With this proposed amendment, if Defendant A is acquitted of a certain count, the conduct underlying that count could not be used to determine Defendant A's advisory guideline imprisonment range, but could Defendant A's acquitted conduct be used to determine the advisory guideline imprisonment range for Defendant B under USSG §1B1.3(a)(1)(B) because it was within the scope of their jointly undertaken criminal activity?

The effect of this proposed guideline may also have further consequences. If a defendant, convicted of a qualifying sex offense, has been previously charged by the state with sexual abuse of a minor in an unrelated case, but the case resulted in acquittal, that prior conduct would no longer be considered as a predicate under USSG §4B1.5(b). As such, a defendant, who would otherwise be deemed a repeat and dangerous sex offender, would not be. Had such conduct never been charged or been charged and then dismissed, the defendant would be considered a repeat and dangerous sex offender. This outcome under this proposed amendment is not reflective of the previous harm the defendant caused or the specific risk of the defendant's recidivism and the inherent risk that represents to the community.

POAG's concerns mounted during our consideration of the impact this amendment could have on victims. Victim considerations are often at the heart of criminal justice initiatives and efforts at creating a fair result. Here is another likely hypothetical situation: A defendant who unlawfully possessed a firearm that he used to murder a victim. The defendant was charged in state court with the murder and acquitted. Law enforcement later furthered their investigation, gathered additional evidence, and obtained additional witness testimony. The defendant was then charged in federal court with unlawfully possessing a firearm. However, after hearing evidence and testimony at a contested sentencing hearing, the Court makes a finding based upon a preponderance of the evidence that the defendant had committed the murder and applied the cross reference under USSG

§2K2.1(c) to USSG §2A1.1 (First Degree Murder), resulting in a guideline range at the statutory maximum for the firearms offense of 180-months. In this hypothetical, the recommended guideline sentence would be more reflective of the sentencing factors, such as the seriousness of the offense and the need to protect the public from further criminal conduct by the defendant. The adversarial process would remain intact, allowing the defendant due process, and the government attorney, who was not involved with the state case, an opportunity to present evidence of the aggravating circumstances of the instant federal offense. Additionally, the victim's family could get a sense of justice for the harm their family suffered as a result of the murder of their loved one.

There are other less extreme hypotheticals, one involves a defendant who may be held accountable for Conspiracy to Commit Wire Fraud, but they are acquitted of several substantive counts that involve some of the transactions with some of the victims. It seems equally unfair to tell a victim of an offense that the impact of the offense, as to them, will have no consideration or reduced consideration at sentencing because of an acquittal, when had that conduct not been included in the charging instrument in the first place, it would have garnered full consideration as relevant conduct under the guidelines by the Judge at sentencing. As such, POAG observed that the proposed amendment could impact defendants' decisions to go to trial and prosecutorial decisions would necessarily shift to address this approach.

POAG is also concerned that this proposed amendment will lead to further areas where conduct is removed from relevant conduct consideration. The public comment provided to the Commission largely advocated for abolishing the practice of allowing the Court to consider whether acquitted conduct qualifies as relevant conduct. Some of the letters submitted for public comment were written by federal inmates who have already raised the issue that this amendment should be extended to relevant conduct, uncharged conduct, and dismissed conduct. To them, acquitted conduct and the principle of relevant conduct are a distinction without a difference. In fact, one very astute inmate made the relevant point that, when it comes to uncharged conduct being used as relevant conduct, defendants do not even have the opportunity to ask for a jury trial because the charge was never filed. Yet, uncharged conduct is used to determine relevant conduct. Another inmate pointed out that the drug quantity he was held accountable for under relevant conduct, which significantly increased his sentence, was "worse than [sic] acquitted conduct because acquitted conduct has at least been presented to a grand jury and or charged." POAG concurs and notes that acquitted conduct has actually been subject to a higher level of scrutiny than other types of relevant conduct, yet these types of conduct are used to determine the guideline range. POAG recognizes the narrow nature of this proposed amendment is geared specifically toward acquitted conduct, but there are already arguments that, if acquitted conduct should not be used, it is arguably just as valid to not rely on uncharged conduct and dismissed conduct. Once this first step is taken, the logic of the next steps becomes hard to advocate against. Making an exception for acquitted conduct has broad implications and cannot be considered without also analyzing the entire process and information used to determine the advisory guideline imprisonment range.

As previously noted, Judges are in a central position to hear and observe evidence on acquitted conduct and ascribe the appropriate weight to give that evidence when fashioning a sentence. The guidelines already empower them to do so, thus POAG does not recommend the adoption of the

amendment. However, should the Commission adopt this proposed amendment, POAG believes additional application instructions are essential given the manner in which such an amendment alters the long-standing foundational concept of relevant conduct. For instance, the new provision would define “acquitted conduct” as conduct 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. POAG envisions the argument that this provision should be extended to situations in which a charge has been dismissed due to insufficient evidence, contending that such a dismissal is the functional equivalent of an acquittal. Court records vary in their amount of detail, so if this argument prevails, it will only benefit cases where defendants are fortunate enough to have been charged in a jurisdiction that customarily provides sufficient detail within the court record. Further, if such was the underlying intent of this amendment and that argument prevails, in each case where a state charge has been dismissed, it would necessitate the actual court records be obtained in every case to determine if the basis for the dismissal was insufficient evidence. POAG would note that relevant conduct regularly involves conduct underlying a dismissed state charge.

One of the other issues for comment related to this proposed amendment was whether the Commission should account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence. POAG notes there could be other reasons for acquittal and inquired if any additional investigation into the offense after the acquittal would be permitted for the court’s consideration. Therefore, POAG believes additional scenarios, like the many other illustrative examples included in USSG §1B1.3, would be instrumental in determining relevant conduct in instances where acquitted conduct was an issue, including if acquitted conduct can be used as reasonably foreseeable relevant conduct for another defendant in a multi-defendant case. Especially because, to date, as required under USSG §1B1.3, relevant conduct relies on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained. POAG would also seek examples dealing with convictions under 18 U.S.C. § 924(c), wherein a defendant is convicted of a drug offense under Title 21, but the defendant is acquitted of the count charging a violation of 18 U.S.C. § 924(c) for possessing a firearm in connection with a federal drug trafficking offense. Would an acquittal in this instance suggest that the defendant did not possess a firearm, or would the acquittal suggest that the firearm was present but not possessed in furtherance of the drug trafficking offense, or does the acquittal disavow each and every element from relevant conduct consideration? Consequently, this issue, as well as several other issues raised within this testimony, have already been thoroughly addressed by the Supreme Court in *United States v. Watts*, 519 U.S. 148 (1997). However, if the amendment to use acquitted conduct is adopted, POAG recommends the Commission address these types of acquittals as well, so as to relieve the application difficulties placed upon the probation office to sort this issue out before they could commence preparing the presentence report.

In closing, POAG would note that the synopsis of this proposed amendment provides that, in fiscal year 2021, 157 offenders (0.3% of all offenders) were acquitted of at least one offense. POAG observes that this statistic pertains to only federal offenses involving both convicted and acquitted counts, but it does not include circumstances where an acquitted state offense qualifies as relevant

conduct for a federal offense. Therefore, this issue is more prevalent than this statistic suggests, but it is still rather rare to rely on acquitted conduct at the time of sentencing. Presently, both types of acquitted conduct may be used to determine the advisory guideline imprisonment range, such as application of a specific offense characteristic. However, with this amendment, acquitted conduct remains a factor at sentencing under USSG §1B1.4 in determining the sentence to impose within the guideline range or whether a departure from the guidelines is warranted, neither of which are subject to the same level of application criteria and appellate review that is present when applying a specific offense characteristic. With this proposed amendment, the use of acquitted conduct wouldn't impact the determination of the advisory guideline imprisonment range, but it would remain a factor in determining the final sentence. As such, POAG respectfully suggests that any such amendment to this process would function more as a symbolic gesture than a substantive change.