

United States Sentencing Commission

Written Testimony

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I. Introduction

The Victims Advisory Group (“VAG”) appreciates the opportunity to provide information to the Sentencing Commission (“Commission”) regarding its proposed amendments to the Sentencing Guidelines (“Guidelines”). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from around the country. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars.

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II. Acquitted Conduct

It is axiomatic that a core aspect of sentencing is individualized sentencing which allows courts to consider the full context of the offense, the defendant, and the impact of the crime to craft an appropriate sentence. It is equally as clear that when a defendant is found not guilty of some offenses and convicted of others, those offenses for which he was found not guilty should not be treated as though the defendant was convicted of them. The proposed amendments regarding acquitted conduct would, however, deprive the court from considering - with appropriate weight and in the context of the offense - such conduct, forcing the sentencing court into artificially craft a sentence based on a fictional framing.

During federal prosecutions, a crime victim has a right “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”¹ Currently, 18 U.S.C. § 3661 provides: “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.”² The consideration of acquitted conduct fits within this and is not without a safeguard for the accused. The Supreme Court has previously considered the issue, holding that acquitted conduct may be considered so long as it has been proven by the preponderance of the evidence standard.³ “Highly relevant—if not essential to [the judge's] selection

¹ 18 U.S.C. § 3771(a)(4).

² 18 U.S.C. § 3661.

³ *See, United States v. Watts*, 519 U.S. 148 (1997).

of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.”⁴

In considering whether the Guidelines should be amended to prohibit the consideration of acquitted conduct in determining the appropriate guideline range, the VAG requests the Commission consider the impact on the victim and victim advocacy. The VAG members, many of whom represent and otherwise advocate for victims of crime, agree that most victims would oppose a prohibition on considering acquitted conduct especially when the information related to that conduct is relevant. If the Guidelines are amended to preclude consideration of acquitted conduct in determining the appropriate range, the right of the victim to be reasonably heard at sentencing may be severely limited. A victim who has standing to assert the right to be reasonably heard at sentencing, may have information related to the emotional, physical, and financial harm they have endured because of the criminal conduct. Such a proposal could deny the ability to include this information in their Victim Impact Statement (VIS). VIS's are important to all participants in the criminal justice system. VIS's “provide information to the sentencing judge or jury about the true harm of the crime-information that the sentencer can use to craft an appropriate penalty.”⁵ VIS's “may have therapeutic aspects, helping crime victims recover from crimes committed against them.”⁶ VIS's “help to educate the defendant about the full consequences of their crime, perhaps leading to greater acceptance of responsibility and rehabilitation.”⁷ VIS's “create a perception of fairness at sentencing, by ensuring that all relevant parties-the state, the defendant, and the victim-are heard.”⁸ Consequently, excluding references to such conduct if established by the preponderance of the evidence is unfair to victim survivors.

Additionally, the VAG notes the juxtaposition between the implications of this proposal and that regarding extraordinary and compelling release. In the former, the Commission assumes, to the benefit of offenders, the sentencing court cannot give the appropriate weight to acquitted conduct, and thus considers it necessary to remove that conduct entirely from consideration. However, the proposed amendments for extraordinary and compelling release arguably take the opposite position which in turn benefits offenders – not victim survivors. It provides broad and nearly unbridled discretion with very little guidance or specific examples to courts to properly weigh any situation brought before it for early release without the benefit of the victim survivor's perspective. The sentencing system must be

⁴ *Id.* at 152 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (upholding a sentence, the court relied on 30 burglaries of which defendant had not been convicted)).

⁵ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

consistent. When judges have sufficient guidance, as they do through the *Watts* case, the law presumes they are able to follow the law, especially where, as here, there is Supreme Court precedent on this issue allowing courts to properly weigh acquitted conduct where relevant. This proposal is inconsistent with that law and with the purpose of sentencing to comprehensively sentence offenders fairly and accurately.

Because a prohibition on acquitted conduct may infringe on a victim's right to be heard at sentencing and limit what can be said in a VIS, possibly hindering emotional recovery, the VAG opposes this proposed change.

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