UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

MICAELA ALVAREZ
SENIOR U.S. DISTRICT JUDGE

1701 W. Bus. Hwy. 83, Suite 911
MCALLEN, TEXAS 78501
Tel: (956) 928-8270

February 26, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Written Testimony for Public Hearing on Proposed Amendment to the Federal Sentencing Guidelines Relating to Acquitted Conduct

Dear Judge Reeves, Vice Chairs and Commissioners:

Thank you for the opportunity to address the Commission on the proposed amendments on the use of acquitted conduct under the federal sentencing guidelines. I present my testimony from the perspective of a United States District judge who must determine the correct guideline application in the first instance and who has sentenced over fourteen thousand defendants in my twenty years on the bench. While my opinion is my own, I have spoken to various colleagues who share the same concerns I express here.

Under the current statutory sentencing provisions, I am required to consider many factors but of significance here, the nature and circumstances of the offense and the history and characteristics of the defendant.[1] This is to be done without limitation on the information

[1] 18 U.S.C. § 3553(a)(1).

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received concerning the background, character, and conduct of a defendant.[2] Under the current sentencing guidelines, one mechanism for incorporating such information is through consideration of relevant conduct.[3] Relevant conduct is often a factor in the cases that come before me, so I frame my comments by reference to such cases.

Some years ago, I started seeing many instances of alien smuggling cases that also involved sexual assaults. In most of those cases, the United States Attorney did not charge the sexual assault, he charged only the alien smuggling. One particular case was written up in the New York Times because at sentencing I considered the testimony of the rape victim.[4] She was terrified and barely able to get through her testimony, despite the fact that the courtroom was virtually empty. I repeatedly assured her that she was safe. I am not sure she would have been able to get through her testimony in front of a jury and I strongly believe she would have shut down under cross examination. Yet I was able to consider her testimony as I found her credible and, by a preponderance of the evidence, found that a rape had occurred.

While all three proposed amendments would still permit me to consider the evidence of this rape because the defendant was charged only with alien smuggling, consider a two-defendant scenario in which both participate in the rape and are charged with alien smuggling

[2] 18 U.S.C. § 3661.
[3] Federal Sentencing Guidelines Manual, § 1B1.3 (U.S. Sentencing Comm'n 2023).
[4] Manny Fernandez, *A Migrant Describes Border Rape: Facing Her Fears to Speak in Court*, N.Y. TIMES, March 5, 2019, at A15.

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under 8 U.S.C. § 1324(a)(1)(A) and the penalty provisions of both § 1324(a)(1)(B)(i)[5] and (iii)[6] Defendant One chooses to plead guilty to the alien smuggling while Defendant Two chooses to go to trial. Defendant Two is found guilty by the jury at trial of alien smuggling, but not of having inflicted "serious bodily injury"[7] as is required for the enhanced penalty under § 1324(a)(1)(B)(iii). Under Option 1[8] for Defendant One, I could apply an enhancement for bodily injury or serious bodily injury based on the rape, provided it was proven by a preponderance of the evidence. For Defendant Two however, it is not clear whether I could consider the rape at all. While Defendant Two may have been acquitted of causing "serious bodily injury," he was not acquitted of rape. Rape and "serious bodily injury" are not necessarily synonymous, and the guidelines include criminal sexual assault in the definition of "serious bodily injury."[9]

The point here is that the elements of § 1324(a)(1)(B)(iii) are not identical to the guideline provisions for a bodily injury or serious bodily injury enhancement. Would a court

[5] 8 U.S.C. § 1324(a)(1)(B)(i) (Providing for a ten-year maximum term of imprisonment).
[6] 8 U.S.C. § 1324(a)(1)(B)(iii) (Requiring proof of serious bodily injury and increasing the penalty to twenty years imprisonment).
[7] 8 U.S.C. § 1324 defines "serious bodily injury" by reference to 18 U.S.C. § 1365 which in turn provides:

> (3) the term "serious bodily injury" means bodily injury which involves—
> (A) a substantial risk of death;
> (B) extreme physical pain;
> (C) protracted and obvious disfigurement; or
> (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

[8] Sentencing Guidelines for United States Courts; Notice, 88 Fed. Reg. 89151 (Dec. 26, 2023).
[9] Federal Sentencing Guidelines Manual, § 1B1.1(1)(M) (U.S. Sentencing Comm'n 2023).

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need to determine all possible guideline enhancements before trial, compare those to the elements of an offense and submit those to a jury by use of special interrogatories? If adopted, I believe Option 1 would necessitate such special interrogatories, with resulting jury confusion, or require protracted sentencing hearings. This is especially true if the bracketed language now proposed in Option 1 subpart (c)(2)(B) excluding from the definition of acquitted conduct that found by the trier of fact, is ultimately included.[10] Without special interrogatories, a court would have no way of determining whether the failure to prove the particular conduct warranting an enhancement was the basis of an acquittal. As the Fifth Circuit has noted, "[t]o determine which issues, if any were 'necessarily decided' in the defendant's favor during a [] trial following an acquittal by a general verdict, the court must examine the record of the [] proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and determine whether a rational jury could have grounded its verdict of acquittal upon an issue other than that which the defendant seeks to foreclose from consideration."[11] This is no simple task as I remind the Commission that an acquittal is offense specific, not conduct specific.

This bracketed language is also problematic in another way. Since acquitted conduct is only an issue when a defendant proceeds to trial, including subpart "(A) was admitted by the

[10] Sentencing Guidelines for United States Courts; Notice, 88 Fed. Reg. 89151 (Dec. 26, 2023).
[11] *United States v. Garcia*, 432 Fed. App'x. 365 (5th Cir. 2011) *sub nom. United States v. Castillo-Chavez*, 555 F. App'x 389, 399 (5th Cir. 2014).

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defendant during a guilty plea colloquy" makes little sense.[12] If the objective here is to make an exception for conduct which the defendant admits, deleting "during a guilty plea colloquy" and substituting "under oath" would make better sense.

Furthermore, I believe restricting the court from considering acquitted conduct is contrary to 18 U.S.C. § 3553 requiring a sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant."[13] Alien smuggling is obviously a serious offense, but an alien smuggler who preys on his vulnerable victims is especially reprehensible. Additionally, 18 U.S.C. § 3661 states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offence which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[14] Rape speaks more to a defendant's character and conduct than the smuggling of aliens for profit.

Yet, Option I provides that even if not considered in calculating the guideline range, a court is not prohibited from considering the conduct within the guideline range, or for a departure.[15] While I am opposed to the adoption of Option 1, if adopted, it should include this commentary note. A guideline restriction on a court's consideration of acquitted conduct

[12] Sentencing Guidelines for United States Courts; Notice, 88 Fed. Reg. 89151 (Dec. 26, 2023).
[13] 18 U.S.C. § 3553(a)(1).
[14] 18 U.S.C. § 3661.
[15] Sentencing Guidelines for United States Courts; Notice, 88 Fed. Reg. 89151 (Dec. 26, 2023).

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altogether, will simply result in courts imposing a sentence that varies from the guidelines (i.e. a variance).

Additionally, considering that in fiscal year 2022, only "0.4% of all sentenced individuals were acquitted of at least one offense or found guilty of only a lesser included offense,"[16] Option 1 would create more problems than it solves. If an acquittal is to be prohibited from consideration at sentencing, a different vehicle must be formulated.

"The Commission further seeks comment on whether alternatively it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps."[17] While still not completely without concern, a policy *recommending against* the consideration of acquitted conduct for the purposes of determining any step other than the guideline calculation would avoid the implementation problems referenced here. It would better safeguard the discretion afforded to district courts through consideration of all 18 U.S.C § 3553(a) factors and would avoid unwarranted disparities within a case. Furthermore, such a policy would not contravene Supreme Court precedent set out in both *Watts*[18] and *Booker*.[19] While Option 2 speaks to departures, it too at least recognizes the district court's discretion to impose a sentence that is not greater than necessary.

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[16] *Id*. at 89150.
[17] *Id.* at 89152.
[18] *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997).
[19] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

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Additionally, "[t]he Commission seeks comment on whether it should expand the proposed definition of 'acquitted conduct' to also include acquittals from state, local, or tribal jurisdictions."[20] I am reminded of the difficulties district courts faced before the 2016 Amendments to U.S.S.G. § 2L1.2.[21] The earlier guidelines for re-entry after deportation required a court to determine the nature of an alien defendant's prior criminal history.[22] Most often, this necessitated obtaining that defendant's state court records. This placed a heavy burden on probation offices and often delayed the case both pre-trial and in the sentencing phase. The same will happen here if the term "acquitted conduct" in expanded to include acquittals from state, local, or tribal jurisdictions.

The proposed amendments and much of the discourse focus on defendants who proceed to trial. However, the proposals and discussion give little consideration to the impact that will be felt by defendants who wish to plead and avoid a trial. For example, in multi-defendant drug trafficking cases, it is not uncommon for some defendants to plead and others to proceed to trial. Such defendants generally are charged with a conspiracy charge as well as several substantive possession/distribution charges. A defendant who wishes to plead will rightly be concerned that he may be held accountable for more drugs than one who proceeds to trial. It is not uncommon

[20] Sentencing Guidelines for United States Courts; Notice, 88 Fed. Reg. 89152 (Dec. 26, 2023).
[21] Federal Sentencing Guidelines Manual, § 2L1.2 (U.S. Sentencing Comm'n 2015).
[22] *Id.*

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for a defendant to be convicted of an overall conspiracy count yet be acquitted of a substantive possession/distribution count. Often, the defendant who pled and the defendant who proceeded to trial may have been equally involved. The plea colloquy for the defendant who wishes to plead may then turn into a mini trial where all relevant conduct but that essential to the plea will be contested. The evidentiary burden will also be contested as relevant conduct need only be proven by a preponderance of the evidence. Yet, conduct which has failed to be proven beyond a reasonable doubt for the defendant who proceeds to trial may be proven by a preponderance of the evidence for the defendant who entered a plea. In many such multiple defendant cases, relevant conduct for one defendant may be acquitted conduct for another, resulting in unwarranted sentencing disparities in the same case.

While I appreciate that "the woman on the street would be quite taken aback to learn"[23] that courts may consider acquitted conduct, I believe she would be equally taken aback to learn that a court may consider relevant conduct (conduct not admitted to or found beyond a reasonable doubt, and sometimes not even charged). Prohibiting the consideration of acquitted conduct will be the first step in prohibiting the consideration of all but the specific facts admitted to or found by the trier of fact.

[23] *McClinton v. United States*, 143 S. Ct. 2400, 2403 216 L.Ed.2d (2023)(Sotomayor, J) (respecting the denial of certiorari) (citing *United States v. Canania*, 532 F.3d 764, 778 (CA8 2008) (Bright, J., concurring)).

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Ultimately, I urge the Commission to allow the district courts the discretion to consider all relevant conduct, even if some of that relevant conduct is also acquitted conduct. As the Supreme Court has recognized, "the sentencing judge, [] has 'greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.' He is therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case."[24]

I thank the Commission for allowing me to present the perspective of a district court judge on these important issues.

Sincerely,

Micaela Alvarez
Senior United States District Judge
Southern District of Texas

[24] *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S. Ct. 558, 574–75, 169 L. Ed. 2d 481 (2007) (Internal citations omitted).