UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Hon. Stephen R. Bough
District Judge

M E M O R A N D U M

TO: U.S. Sentencing Commissioners

RE: Acquitted Conduct

DATE: February 28, 2024

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Based upon *United States v. Watts*, 519 U.S. 148 (1997), the Guidelines currently allow acquitted conduct to be used during sentencing, I, however, urge the Commission to set new precedent, as this practice violates the Constitutional rights of defendants, including both their Fifth and Sixth Amendment rights. Please consider adopting Option 1 of the proposed amendments, prohibiting the use of acquitted conduct in determining guideline ranges.

"[The Supreme Court has] indicate[d] that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship,* 397 U.S. 358, 362 (1970). The dissenters in *Jones v. United States* wrote: "The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.'" 574 U.S. 948 (2014) (Scalia, J., dissenting)(quoting *Alleyne v. United States*, 570 U.S. 99, 100 (2013)). The dissenters continued by stating "[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime… and 'must be found by a jury, not a judge.'" *Id.* (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007)). Using acquitted conduct means the elements of the crime are not proven beyond a reasonable doubt to a jury, but rather a judge uses acquitted conduct that only must be proven by a preponderance of the evidence. The beyond a reasonable doubt standard is essentially neutralized as "the district court then may find sentencing facts under a lesser preponderance of the evidence standard." *United States v. Brown,* 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

Judge Millett states in *United States v. Bell* "as the law now stands, prosecutors can brush off the jury's judgment by persuading judges to use the very same facts the jury rejected at trial to multiply the duration of a defendant's loss of liberty threefold." 808 F.3d 926, 930 (D.C. Cir. 2015) (Millett, J., concurring). "A basic rule of our system is that a defendant is presumed innocent until proven guilty." *United States v. Polouizzi*, 697 F. Supp. 2d 381, 394 (E.D. N.Y. 2010). Using acquitted conduct in sentencing nullifies the conclusion reached by a jury, which violates a defendant's constitutional right to have a trial by jury while also stripping them of the

right to be innocent until proven guilty. This practice takes someone who was said to be not guilty by a jury and still punishes them as though they were not acquitted.

Finally, a criminal defendant's Fifth Amendment right is violated as this practice scrutinizes a defendant's conduct twice. "[T]he Constitution generally affords the prosecution one shot at convicting a defendant of charged conduct. But counting acquitted conduct at sentencing gives the government a second bite at the apple." *Bell*, 808 F.3d at 932 (Millett, J., concurring). "[U]nder the guise of 'judicial discretion,' we have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury; the second before a judge." *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). This practice deprives defendants the protection from double jeopardy and continues to use conduct that the defendant has been tried for against them.

Please consider the adoption of Option 1 to the proposed amendments, prohibiting acquitted conduct from being used in determining guideline ranges.