PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed amendments issued on December 26, 2023.

* * *

* * *

Proposed Amendment No. 3: Acquitted Conduct

POAG remains unanimously opposed to the adoption of any proposed amendment to create an acquitted conduct exception to using relevant conduct to determine the sentencing guideline range or to determine the ultimate sentence imposed. As such, POAG incorporates its prior testimony and linked written submission (Probation Officer's Advisory Group March 13, 2023) as part of the response for the instant amendment cycle.

Following POAG's 2023 submission and testimony on this issue, the Supreme Court denied cert in *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) and cited that the Sentencing Commission would potentially continue to assess the use of acquitted conduct at sentencing. Consequently, the issue of acquitted conduct has been identified as a proposed amendment as part of this subsequent amendment cycle. While POAG remains unanimously opposed to any of the proposed options to amend how the sentencing guidelines lawfully rely on acquitted conduct as part of relevant conduct, POAG seeks to fulfill our role as an advisory group to the Sentencing Commission. Therefore, POAG provides the following analysis of all three options and makes the recommendation that Option 2 would be preferred of the options presented.

Option 1 would amend USSG §1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range. This option closely tracks the proposed amendment identified during the previous amendment cycle. POAG observes that Option 1 is the only option that would fully resolve the various interested parties and stakeholders concerns in considering acquitted conduct, as Options 2 and 3 allow for the consideration of acquitted conduct, albeit through different procedural mechanisms. Though, Option 1 introduces a host of additional problems, many of which we initially covered in our response during last year's amendment cycle.

POAG's position regarding acquitted conduct is best described as being in alignment with Justice Alito's concurring denial of *certiorari* in *McClinton,* wherein Justice Alito cites the ruling in *United States v. Watts*, 117 S. Ct. 633 (1997) and indicates "It cannot be inferred that the facts needed to convict were not shown by even a preponderance of the evidence, and that is why, it has been thought, acquitted conduct may be considered at sentencing." Justice Alito further notes that "If holding that the Constitution prohibits the consideration of acquitted conduct at sentencing would require us to overrule *Watts*, we would also have to assess whether the resulting rule would be workable." The bulk of POAG's prior submission on this issue related to issues of workability, the impact on victims, and the likelihood that exclusions of acquitted conduct will lead to further exclusions from relevant conduct consideration. Justice Alito provided compelling hypothetical situations in which it would be important to consider acquitted conduct for the purposes of sentencing, much like the several hypotheticals POAG identified in its prior submission. *McClinton*, at 2403-4. However, if the amendment to preclude the use of acquitted conduct were adopted, those hypotheticals would present as actual issues in actual cases that would need

litigation. As POAG indicated in its prior submission, 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.

Option 1 of the proposed amendment also brackets language that would exclude from the definition of "acquitted conduct" conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. POAG does not believe the proposal adequately addresses the issue and such an admission in a case may be uncommon and would not resolve the numerous other application issues previously identified.

Option 2 would amend the Commentary to §1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction. Option 2 highlights the Court's authority it already has to impose a sentence below the guideline range by way of a variance if acquitted conduct was used in determining the guideline range, but formalizes the criteria within the Guidelines Manual as a departure. POAG preferred Option 2 as it provides the Court with the discretion to determine if and to what extent the sentence should reflect acquitted conduct in rendering a just outcome. As POAG noted in its previous submission, departures are not subject to the same level of application criteria and appellant review that is present when applying a specific offense characteristic. The parties in a criminal case likely have varying opinions of departures in that they provide flexibility in application, but that same flexibility is present upon appellate review, making it less likely that any such departure would be subject to remand.

With Option 2, POAG believes defining acquitted conduct as conduct "*constituting an element of* a charge of which the defendant has been acquitted…," would necessitate a complex element analysis that is inconsistent with the spirit of addressing acquitted conduct through a departure rather than a mechanical guideline application. Therefore, POAG recommends adopting the definition that relies upon conduct "underlying" such charges. While it is broader than the element option, it is less mechanical and provides the most flexibility in approaching what is an imperfect situation. The "constituting an element of" definition seems more suited to Options 1 or 3 in its application. In those options, the need for a more mechanical and rigid definition is better suited to the specificity required for determining base offense levels and specific offense characteristics.

POAG also recommends eliminating the bracketed language that limits the potential departure grounds to cases in which there is an "extremely" or "disproportionate" impact, as both of those options are uniquely vague to the extent that it may lead to disparity that the Sentencing Commission is routinely seeking to diminish. Instead, POAG recommends a more easily measured assessment of when such a departure may apply and recommends a departure may apply in any case in which consideration of acquitted conduct had *an impact* in determining the guideline range.

Those who were not in favor of Option 2 cited the application issues related to overlapping relevant conduct and other workability issues identified in POAG's prior submission would remain. Specifically, the presentence report would need to identify what conduct constituted conduct

"underlying" an acquitted charge and then identify how it impacted the guideline range before determining if a departure may apply.

Option 3 would amend §6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors. It provides that a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving such disputes. However, it further provides that acquitted conduct should not be considered unless it is established by clear and convincing evidence.

POAG received feedback that district and circuit representatives were overwhelmingly not in favor of Option 3 out of concern that it introduces a new evidentiary standard to the guideline analysis, adding another layer of complexity to an already rather intricate process. This option essentially involves re-litigation of disputed facts under the standard of clear and convincing evidence, which is lower than the beyond a reasonable doubt standard applicable at trial. However, this is not significantly different than the present process in that there is a re-litigation of disputed facts under the lower standard of preponderance of the evidence.

Those who favor Option 3 believe it closely tracks POAG's prior submission and current position that acquitted conduct is lawfully considered in determining the guideline range. With Option 3, there would be no significant changes to the presentence report and there would not be a need to parse out what conduct constitutes acquitted conduct, thereby resolving the workability issues POAG previously identified and were highlighted by Justice Alito in *McClinton*. Option 3 also builds upon our existing trust in the judiciary's ability to balance the evidentiary issues presented. Judges as a matter of practice routinely ascribe the appropriate standard at each stage in the process and are particularly attune to the weight of the evidence when assessing cases involving acquitted conduct. In fact, the procedures within Option 3 are likely already at play in the courtroom, as the evidence presented may already meet both the preponderance and the clear and convincing standard at sentencing, depending on the facts of the case.

POAG's other concern with Option 3 is that probation officers, who need to know what information they can use when they start the presentence report, are not experts in the mental construct of balancing the preponderance and the clear and convincing standards. Therefore, if the Sentencing Commission adopts Option 3, POAG recommends specific instructions directing that the presentence report be prepared based upon the preponderance of evidence standard, but that if there is an objection to acquitted conduct being included as relevant conduct, the Court applies the clear and convincing standard when ruling on that objection after hearing the evidence presented. However, even with that suggestion, probation officers voiced concern that it would become the expectation that they assess the clear and convincing standard when reviewing the evidence to include in the presentence report, regardless of whether it was specified that the standard only applied when the Court made a finding at sentencing on the disputed issue.

The Commission also seeks comment on whether any or all of the options presented should be revised to specifically address acquittals based on reasons unrelated to the substantive evidence, such as jurisdiction, venue, or statute of limitations. Barring acquitted conduct from consideration may produce the unintended consequence of excluding factors from consideration in cases in which there is ample evidence of the conduct itself, but the defendant is acquitted based on issues

pertaining to jurisdiction or statute of limitations, or cases in which a defendant is acquitted due to a state nexus element, while the underlying conduct (for instance of possessing a firearm) is well-established by the evidence. POAG believes it would be difficult, in some cases, to discern the reasons for acquittal, particularly in jury trials, where the Court may not be privy to the basis for such acquittal, and even more so in state, local, and tribal acquittals, should the proposed amendments be expanded to include them. While acquitted conduct is the result of a prosecutor's inability to persuade a jury, a case that is moved for dismissal by the prosecutor or uncharged is, perhaps, the result of the prosecutor not being convinced that his or her argument would or should prevail.

Another issue for comment pertains to expanding the definition of acquitted conduct to include acquittals from state, local, and tribal jurisdictions. POAG cautions against this, as discerning the specific conduct "underlying" or "constituting an element of" a state, local, or tribal offense would be far more difficult and involve particularly complex analysis of a wide variety of offenses and may require reliance upon records that are unavailable or unclear. However, POAG also recognizes the difficulty courts may have reconciling consideration of conduct associated with acquittals from other jurisdictions with excluding or otherwise accounting for the impact of conduct associated with federal court acquittals. State acquitted conduct and federal acquitted conduct is a distinction without a difference. If it is deemed unfair to use acquitted federal conduct, would it not also be unfair to use state acquitted conduct? Notwithstanding that observation, POAG does not support consideration of expanding the definition of acquitted conduct to include state conduct. POAG continues to maintain that the use of acquitted conduct is procedurally allowed and properly vetted information that is used to determine a sentence. Therefore, POAG would propose limiting any such changes to acquitted conduct to federal counts.

And finally, the Commission is seeking comment as to whether the Commission should prohibit a court from considering acquitted conduct in determining the sentence to impose within the guideline range or prohibit the consideration of acquitted conduct for all purposes when imposing a sentence. POAG believes that it is within the Commission's purview to recommend, rather than prohibit, that acquitted conduct not be used in determining the sentence, which is essentially the approach applicable with Option 2. However, POAG believes prohibiting consideration of acquitted conduct would run afoul of 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the use of information concerning the background, character, and conduct" of a defendant.

* * *

* * *

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
February 2024