U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.[1] We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come to improve public safety and further the cause of justice for all.

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[1] U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at Federal Register : Sentencing Guidelines for United States Courts.

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II. Acquitted Conduct

a. *Summary*

As it did during the last amendment year, the Commission has proposed amendments limiting the use of acquitted conduct in determining the guidelines range. Consistent with federal statutes, the proposals would continue to allow district courts to consider acquitted conduct when determining where within the applicable guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 ("[N]o 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.").

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with an amendment, the Department believes the definition of acquitted conduct should be amended. Of the Commission's proposed options, we believe that Option Two, with the Department's revised definition, would present fewer administrability concerns, litigation risks, and uncertainty.

b. *Background*

The Supreme Court has long recognized a judge's broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., Watts*, 519 U.S. at 157 ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as the conduct has been proven by a preponderance"); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"). The Court in *Watts* reiterated its holding in *Williams v. New York*, that "[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 151-52 (quoting *Williams,* 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of conduct underlying acquitted counts at sentencing would be a significant departure from this longstanding sentencing principle. *Watts*, 519 U.S. at 152 (noting that even "[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted").

Section 3553(a) requires the sentencing judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. Section 3661 codifies the longstanding principle that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a sentencing judge may receive and consider.

c. *Option One Would Be Difficult for Courts to Administer*

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Likewise, §6A1.3(a) specifies that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility

under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Citing 18 U.S.C. § 3661 and the Court's decision in *Watts*, the commentary to that provision explains that "a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

Option One would make four changes to the Guidelines and commentary. It would –

- add a new subsection (c)(1) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3;

- add a new subsection (c)(2) to §1B1.3, in the Guidelines text, defining "acquitted conduct" as "conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure." A consistent definition would also apply under Options Two and Three;

- propose, if the new subsection (c)(2) to §1B1.3 is adopted, excluding from the definition, conduct that was either "admitted by the defendant during a guilty plea colloquy" or "found by the trier of fact beyond a reasonable doubt" and "establish[es] in whole or in part, the instant offense of conviction [regardless, of whether such conduct also underlies a charge of which the defendant has been acquitted]"; and

- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that "[a]cquitted conduct, however, is not relevant conduct for purposes of determining the guideline range;" remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine "the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4."

We appreciate the Commission's changes to the definition of acquitted conduct that was published for comment last year in response to commentators' concerns: combining the exceptions with the definition; adding *"constituting an element of a charge"*[9]; limiting the definition to federal acquittals to address concerns regarding parallel state and federal prosecutions; and adding clarification for overlapping verdicts ("*regardless of whether such conduct also underlies a charge of which the defendant has been acquitted*").

We continue to believe, however, that the Commission cannot practicably prohibit the consideration of acquitted conduct in determining the guidelines range. Though well intentioned, Option One will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a

[9] We appreciate the Commission's inclusion of "*a charge"* to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase "*underlying a charge"* adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct, and for the reasons we stated last year, *"underlying a charge"* would not provide sufficient guidance.

defendant's conduct.[10] As the Supreme Court recognized in *Watts*, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define "acquitted conduct," the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

If adopted, Option One (and the corresponding definitions in Options Two and Three) would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as "*underlying a charge of which the defendant has been acquitted*" will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.[11] The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission's proposal fails to account for an acquittal unrelated to the defendant's innocence as to the conduct at issue – for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence was established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the guidelines range.

Option One and the corresponding definitions in Options Two and Three also fail to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of

[10] Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would "be unsound as a practical matter." *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022). "It will frequently be "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *McClinton v. United States*, 143 S. Ct. 2400, 2405 (2023) (Alito, J., concurrence respecting denial of *certiorari*) (*quoting Watts*, 519 U.S. at 155).

[11] Like last year, we appreciate the Commission's inclusion of "*a charge*" to recognize that triers of fact decide charges, not conduct. Juries generally do not acquit defendants of conduct, they acquit on charges. We also recognize that the phrase "*underlying a charge*" adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion from the definition conduct either "admitted by the defendant during a guilty plea colloquy" or that was "found by the trier of fact beyond a reasonable doubt" and "establish[es], in whole or in part, the instant offense of conviction" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in to both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

d. *A More Workable Definition for (c)(2), Applicable to All Three Options*

Many commentators from last year's consideration of this issue shared our concerns with the Commission's proposed definition.[12] If the Commission proceeds with some amendment nonetheless,[13] defining "acquitted conduct" as clearly as possible is essential. While only Option One of the published proposals contains a definition with exceptions, we believe all three of the Commission's options necessitate a definition that is as clear, calibrated, and workable as it can be. We recommend a narrower definition of "acquitted conduct" for each option that would: (1) include specific exceptions; (2) clarify the definition to reduce administrability concerns; and (3) focus on the conduct that the evidence proves rather than what the trier of fact found. This narrower definition will not fully resolve our concerns. But it would better account for overlapping, split, or inconsistent verdicts, and verdicts unrelated to factual innocence. It would also better protect victims' rights. Should the Commission proceed with any of the three options, we recommend incorporating our definition below.

Our recommended changes are <u>underlined</u> and explained below.

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[12] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf.

[13] Beyond the citation to *Watts* already in §6A1.3.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(2) DEFINITION OF ACQUITTED CONDUCT. For the purposes of this guideline, "***acquitted conduct"*** means conduct (*i.e.*, any acts or omissions) constituting an element of a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

"Acquitted conduct" does not include any conduct (*i.e.*, any acts or omissions) that—

A) was admitted by the defendant under oath ~~during a guilty plea colloquy;~~ or

B) was determined by the court to have been established at trial beyond a reasonable doubt ~~was found by the trier of fact~~;[14]

~~to establish~~, and relates, in whole or in part, to the instant offense of conviction, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted.

"Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771.

The Department recommends these changes for the following reasons:

First, separating the definition of acquitted conduct from any rule governing its use would help reduce confusion. Conduct which the evidence at trial established beyond a reasonable doubt and relates to the instant offense of conviction is not acquitted conduct, even if the same conduct also underlies a count of acquittal. Reframing the exclusion as to what the evidence shows, *i.e.,* whether the trial evidence established the conduct beyond a reasonable doubt accomplishes the Commission's goals of affording due respect to the jury's verdict while allowing the judge to properly sentence the defendant for conduct found proven. These changes will help clarify that the Commission's proposal is not intended to prevent a sentencing judge from considering conduct underlying the elements of a charge for which the defendant was convicted and thus which a jury necessarily found beyond a reasonable doubt. Because a defendant may also properly admit to conduct during testimony under oath, we recommend deleting the limitation regarding an admission made "*during a guilty plea colloquy*."

Second, our reframing of subsection B so that it would exclude from the definition of acquitted conduct, conduct that *was determined by the court to have been established at trial*

[14] We share the concerns expressed by Justice Alito in his denial of certiorari in *McClinton v. United States* that "while the *[United States v.] Watts* regime has been shown to be eminently workable, significant practical concerns pervade the alternatives," identifying, among other issues, that "it will frequently be 'impossible to know exactly why a jury found a defendant not guilty on a certain charge,'" which will lead to a proliferation of special-verdict forms, "despite the fact that they are generally disfavored in criminal cases and thought to disadvantage defendants." *McClinton v. United States*, 143 S. Ct. 2400, 2405-06 (2023) (Alito, J., concurring).

beyond a reasonable doubt, would, in addition to accounting for overlapping, split or inconsistent verdicts, also account for an acquittal unrelated to the defendant's conduct.

Finally, we recommend adding language to ensure that limiting a sentencing judge's ability to consider acquitted conduct does not unintentionally limit the ability of a victim to be "reasonably heard" under 18 U.S.C. § 3771(a)(4) or unduly limit the judge's discretion to consider any information concerning the conduct of a defendant.

e. ***A More Workable Construction for (c)(1)***

If the Commission decides to proceed with Option One, we recommend two changes. First, we recommend incorporating our revised definition discussed above. Second, because of the evolving case law questioning the validity of certain guideline commentary, we also recommend moving from the commentary in §6A1.3 the permitted use of acquitted conduct to the text of §1B1.3. While these changes will not fully resolve the Department's administrability concerns, splitting the prohibited use in the guideline from the permitted use in the commentary would add unnecessary complexity, invite additional litigation over the authoritativeness of guideline commentary, and be inconsistent with actions to preserve the validity of the commentary. The Department's recommended changes are underlined below.

> (C) ACQUITTED CONDUCT. (1) EXCLUSION. Acquitted Conduct is not relevant conduct for the purposes of determining the guideline range. The court is not precluded from considering acquitted conduct in determining the sentence to impose within the Guidelines range, or whether a departure or a variance from the Guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

The Commission also solicited comments on whether it should completely ban consideration of acquitted conduct for all purposes when imposing a sentence – including for § 3553(a) considerations – and whether it has the legal authority to do so. We think that the answer to both is: no. Congress created the Commission and charged it with promulgating the Guidelines.[15] In addition to directing the Commission to meet general goals for federal sentencing, *see Neal v. United States*, 516 U.S. 284, 290–91 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply, 28 U.S.C. § 994(a) - (y). Among those requirements is the provision stating that the Commission "shall promulgate" the Guidelines "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). As the Supreme Court has noted, Congress did not grant the Commission "unbounded discretion" and "broad as that discretion may be, however, it must bow to the specific directives of Congress."[16] A blanket prohibition against consideration of acquitted conduct would be inconsistent with federal statutes, including §§ 3661 and 3553(a), and outside the bounds of Congress's specific grant of authority. *See Concepcion v. United States*, 597 U.S. 481, 494 (2022) ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution."); *see generally United States v. Booker*, 543 U.S. 220, 250 (2005) ("Congress'

[15] 28 U.S.C. § 991; *Mistretta v. United States*, 488 U.S. 361, 366 (1989).
[16] *United States v. LaBonte*, 520 U.S. 751, 753, 757 (1997).

basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.").

f. *Option Two's More Workable Alternative*

If the Commission proceeds with an amendment now, we recommend Option Two with our revised definition. Option Two would allow courts to consider a downward departure if the use of acquitted conduct results in a disproportionate guidelines range relative to the offense of conviction. This option would preserve judicial discretion to determine how much – if any – weight to accord conduct underlying an acquitted count, address unfairness concerns about acquitted conduct driving sentences, and present fewer operational challenges. As opposed to a bright-line rule, it would also raise fewer legal concerns regarding the interplay with federal statutes such as 18 U.S.C. §§ 3661, 3771, and 3553(a). Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Two would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. For consistency and to avoid unintended consequences,[17] we recommend modeling the downward departure provision on the language currently in Application Note 2 to §4C1.1. If the Commission eliminates departures under its simplification proposal, we recommend restyling the departure provision as an "additional consideration." The Department's recommended changes are underlined below:

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range).

10. Downward Departure Consideration for Acquitted Conduct.—If the use of acquitted conduct (*i.e.*, conduct ~~[underlying] [~~constituting an element of~~]~~ a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure) results in a guideline range that overrepresents the seriousness of the defendant's conduct ~~has [an extremely] [a] disproportionate impact in determining the guideline range~~ relative to the offense of conviction, a downward departure may be warranted.

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[We recommend incorporating our full revised definition discussed in part d, above].

[17] We note that the "disproportionate impact" language comes from *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (holding that facts supporting guidelines enhancements that have a "disproportionate impact" on the sentence require proof by clear and convincing evidence). *Staten* was not about acquitted conduct, decided before *Apprendi* and *Alleyne*, and other circuits have declined to follow this rule post-*Booker*. *See, e.g., United States v. Reuter*, 463 F.3d 797, 793 (7th Cir. 2006); *United States v. Mohammed*, 2023 WL 8853035 (D.C. Cir. 2023). Because we do not understand the Commission to be adopting any rule as what constitutes a "disproportionate impact," we recommend that the Commission avoid any potential unintended consequences from introducing this language into the guidelines and instead use the "overrepresents" (and "underrepresents") language used in existing departure provisions. *See, e.g.,* app. n. 6(i) §2G2.3; app. n. 3(B) §4A1.2; §4A1.3(a)(1); app. n. 2 §4C1.1; app. n. 4. §4B1.1.

g. *Option Three's Elevated Standard of Proof and Administrability Challenges*

Compared to Option Two, Option Three presents far greater administrability challenges. Many of these concerns are similar to those for Option One. Option Three would require acquitted conduct to be proven by clear and convincing evidence before the court could consider that conduct for Guidelines purposes. Raising the standard of proof to clear and convincing evidence would distinguish acquitted conduct from other relevant conduct, which may address some concerns, but also lead to more litigation. Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Three would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. On balance, it would retain judicial discretion to consider acquitted conduct sufficiently proven and shift the focus from what the trier of fact found to what the evidence shows, making it a more viable option than Option One. But because it still requires judges to siphon off acquitted conduct from relevant conduct, it will result in many of the same administrability concerns outlined above.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW
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Director, Office of Policy and Legislation
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