VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Members of the Commission:

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 throughout the nation. 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. During the VAG's consideration of the proposals, two overriding themes emerged. First, the Guidelines must reflect the bedrock principle of our sentencing system of individualized sentencing which accurately captures for both offenders and victim survivors the nature of the offense, the character of the offender, and the scope of the harm caused. Second, the Commission cannot exceed its authority to disrupt settled Supreme Court precedent or Congressional enactments. When either of these maxims is violated, which is the case with many of these proposals, victim survivors' legal rights are compromised and they suffer further harm.

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3. Acquitted Conduct

Before the Commission are three proposed amendments related to bar or limiting sentencing courts from considering conduct related to acquitted counts as relevant conduct when sentencing a defendant for convicted conduct. Any amendment that so limits the court would contradict law and, therefore, be outside the authority of the Commission. Even if the amendments were not inconsistent with law, they should not pass while the matter is pending before Congress. Rather than viewing this as a policy question, the VAG asks the Commission to review the legality of their proposals. Here, rule of law requires that the amendments be denied. If Congress acts and changes the law, the Commission would serve its purpose by then passing the Guidelines to provide the framework for the consistent application of that new law. Similarly, if the Supreme Court rejects its precedent and holds that the legal framework of judicial discretion violates the Constitution, that caselaw would be grounds for the Commission's action. Short of an act of Congress or the Supreme Court, no change should be made.

Specifically, the questions being considered by the Commission are:

- If the Commission proceeds with an amendment, should it prohibit consideration of acquitted conduct in determining the guideline range, as it did in the January 2023 published amendment? Should the Commission prohibit consideration of acquitted conduct under the Guidelines even more broadly than the December 2022 proposed amendment?

- Alternatively, should the Commission promulgate a downward departure provision within §1B1.3? If the Commission were to adopt this approach, should it instead create a new departure provision in Chapter 5? Should it limit the consideration of acquitted conduct in some other way?

- How should the Commission define "acquitted conduct"?

- Are there other issues the Commission should consider, in addition to those raised during the previous amendment cycle?

As we did in 2022, the VAG opposes a bar or heightened standard of proof on a sentencing court's consideration of conduct related to an acquitted count as being inconsistent with federal law and Supreme Court precedent. This Commission cannot pass Option 1 or Option 3 for this reason. The VAG also opposes the proposal that there be a downward departure to the offense level assigned to relevant conduct that is acquitted while the matter is pending before Congress. The Commission should not adopt Option 2 where our lawmakers, most directly representing the people, are poised to either pass this law, prohibiting the consideration of acquitted conduct at sentencing, or to reject the change.[79]

A. This Commission Will Exceed Its Authority If It Bars Judicial Consideration Of Acquitted Conduct.

The Proposed Amendment Option 1 would amend §1B1.3 to add a new subsection (c) providing that "acquitted conduct" is not relevant conduct for purposes of determining the guideline range. Option 3 would amend §6A1.3 to add a new subsection (c) adding a heightened standard of proof, clear and convincing, for conduct related to an acquitted count. Both of these proposed amendments are inconsistent with law. This Commission is limited by law to create Guidelines and policy statements that are "consistent with all pertinent provisions of any Federal statute."[80] Federal statutes require judges to conduct robust fact-finding sentencing hearings when sentencing a defendant. This Commission must not overstep and ignore the law.

Federal sentencing does not require a judge to take a myopic view of the crime. The judge is not called to mechanically employ the Guideline's sentencing chart based on the crime alone.

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[79] To be clear the VAG understands and agrees that a defendant cannot be sentenced for an acquitted count as though he were convicted of it. The VAG simply supports the Supreme Court and Congress's position that a sentencing judge may consider the conduct underlying acquitted counts if proved by a preponderance of the evidence in fashioning a defendant's sentence.

[80] 28 U.S.C. § 994(a).

Instead, the sentencing process requires judges to gather two pools of information. First, the nature and circumstances of the offense – then, meaningfully, the history and characteristics of the defendant. [81] To their benefit or detriment, the defendant's life story, hardships, and choices are laid before the judge for consideration.

Congress has spoken. Federal law 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."[82]

The United States Supreme Court has also spoken. It held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[83] It is noteworthy that for the proposed amendment to exist in the Guidelines, the Commission would strike the current, binding language of the Supreme Court in *Watts*.[84] It is a bedrock principle of jurisprudence that federal courts must follow the pronouncements of the United States Supreme Court.[85]

In its February 24, 2023, public hearing, the Commission raised the legitimate concern of public confidence in the system.[86] The Commission posed the question: does it deteriorate public confidence if a judge has the discretion to consider conduct related to an acquitted count when sentencing a defendant for a convicted count? The answer is that the court is allowed to consider it where the burden of proof is met and it is relevant to the defendant's history or characteristics.[87] An equally important question is: what impact does it have on public confidence in the

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[81] 18 U.S.C. § 3553(a).

[82] 18 U.S.C. § 3661

[83] *United States v. Watts*, 519 U.S. 148, 157 (1997).

[84] USSG, *Proposed Amendments* at 43 (Dec. 26, 2023).

[85] *Pacific Gas & Electric Co. v. United States*, 45 F.2d 708 (9th Cir. 1930).

[86] USSG, Public Meeting Feb. 24, 2023 at 92, transcript available here: https://www.ussc.gov/policymaking/meetings-hearings (last visited Feb. 9, 2024).

[87] Indeed, no Circuit court has gone as far as the Commission seeks to bar the admission of acquitted conduct in its entirety. "Here, there is no circuit split as to whether district courts may use acquitted conduct in sentencing. The circuit courts that have addressed this issue have held that the use of acquitted conduct in sentencing is constitutional. *See United States v. Waltower*, 643 F.3d 572, 577 (7th Cir. 2011) (citations omitted) (citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits and stating that '[e]very circuit to have considered the question post-Booker, including ours, has held that acquitted conduct may be used in calculating a guidelines sentence, so long as proved by a preponderance standard');" *United States v. Ball*, 962 F. Supp. 2d 11 (D.D.C. 2013).

Commission if the Commission passes limitations inconsistent with laws passed by our direct representatives and held by our United States Supreme Court?

Just as the Option 1 amendment barring consideration would violate the Commission's authority, the Option 2 amendment regarding a downward departure oversteps when the matter is pending before Congress.

B. The Commission Should Reject the Amendment Regarding a Downward Departure For Acquitted Conduct Because the Matter is Pending Before Congress.

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.

Although the law is settled allowing judicial consideration, the Commission should especially not act where change may come from Congress or the Court. The Supreme Court's June 30, 2023, 5-4 denial of certiorari of the Seventh Circuit's decision in *United States v. McClinton*,[88] has drawn the nation's attention to the Commission's directive on the use of acquitted conduct. Less than three months after that denial was issued, Congress grabbed the baton and introduced Senate Bill 2788 (Sept. 13, 2023).[89] That Bill, entitled "Prohibiting Punishment of Acquitted Conduct Act of 2023" is in committee. It provides, in pertinent part, "a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct."[90] Where Congress is poised to act – either passing this law or rejecting it, the Commission must wait.

Respectfully, legal process requires the Commission to follow, and not lead, Congress and the Supreme Court. Where Congress and the Supreme Court have settled the law to allow judicial consideration of acquitted conduct, this agency is not permitted to act contrary to the law.

Beyond legal and separation of powers reasons to reject the proposed amendments, the Commission should reject them because they violate victims' rights.

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[88]United States v. McClinton, 23 F.4th 732 (7th Cir. 2022), *cert denied*, 143 S. Ct. 2400 (2023).
[89]S. 2788, 118th Cong. (2023). Available at: https://www.congress.gov/bill/118th-congress/senate-bill/2788/text?s=1&r=5 (last visited Jan. 23, 2024).)
[90] *Id.,* at 2.

C. The Proposed Amendments Will Undo Victims' Rights and Restrict Victims' Right to Be Heard, Contrary to Law.

The Commission is further prohibited from passing any amendment that is inconsistent with the Crime Victims' Rights Act (CVRA).[91] It is important to remember the CVRA defines "victim" as a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[92] This focus on "harm" is key to understanding why the court should not be restricted from considering the full truth[93] of the harm that happened to the victim, even in cases resulting in an acquittal. With rare exceptions, an acquittal does not mean the harm did not occur. It only means the government failed to meet the burden of proof beyond a reasonable doubt. In cases where there exists a preponderance of evidence that the harm to the victim has occurred, justice requires that the truth of the harm be considered in determining the appropriate consequence. This is consistent with the fact that, even upon a showing of probable cause, a victim has the rights "to be reasonably protected from the accused," "to timely notice of any … release or escape of the accused," and "to be treated with fairness and with respect for the victim's dignity and privacy," among other rights. Each of these rights are directly focused on reducing the risk of harm to the victim as a fundamental part of justice.

A victim has a right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[94] Victim Impact Statements (VIS) often include information related to the emotional, physical, and financial harm that victims have endured because of the offender's criminal conduct. The 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."[95] [96] Recent scholarship underscores and reaffirms the substantive value VIS provide to sentencing judges. They provide critical contextual information – often known only to the offender and victim – addressing how he executed his crime and the gravity of

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[91] 18 U.S.C. § 3771.
[92] Id.
[93] Fed. R. Evid. 1101(d)(3).
[94] 18 U.S.C. § 3771(a)(4).
[95] Paul G. Cassell, *In Defense of Victim Impact Statements,* 6 Ohio St. J. Crim. Law 611 (2009).
[96] Julian V. Roberts & Edna Erez, *Victim Impact Statements at Sentencing: Expressive and Instrumental Purposes,* in HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS, AND THE STATE (Anthony Bottoms & Julian V. Roberts, eds. 2010); *see also* Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims*, 65 U. TORONTO L.J. 85, 90-92 (2015).

the impact.[97] Empirical research confirms that such statements "are not considered superfluous by judicial officers who receive them" and do not divert from the sentencing at issue.[98]

The VIS are also beneficial to all involved in the criminal justice system. Making a VIS "may have therapeutic aspects, helping crime victims recover from crimes committed against them."[99] They also "help to educate the defendant about the full consequences of their crime, perhaps leading to greater acceptance of responsibility and rehabilitation."[100] The VIS's "create a perception of fairness at sentencing, by ensuring that all relevant parties - the state, the defendant, and the victim-are heard."[101] Prohibiting the consideration of acquitted conduct will prevent victims from making a true VIS that adequately describes the true emotional, physical, and financial harm they have endured because of the criminal conduct. If a victim cannot ask the court to consider acquitted conduct and the harm that flowed from the acquitted conduct, the benefits of the VIS's are lost.

Prohibiting consideration of acquitted conduct will also contravene the intent of the CVRA "to transform the federal criminal justice system's treatment of crime victims…."[102] Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings."[103] The lead sponsor of the law, Sen. Jon Kyl, made clear, the right to fairness includes the right to due process.[104] The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[105]

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[97] E.g., Cassell, Paul G. and Erez, Edna, How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing (November 3, 2023). 107 MARQUETTE L. REV. __ (Barrock Lecture 2024), Forthcoming, University of Utah College of Law Research Paper No. 576, Available at SSRN: https://ssrn.com/abstract=4622666

[98] *Id.* at 45-47.

[99] *Id*.

[100] *Id.*

[101] *Id.*

[102] Honorable Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act,* 9 Lewis & Clark L.R. 581, 593 (2005).

[103] Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015).

[104] 150 Cong. Rec. S4269 (Apr. 22, 2004) (statement of Sen. Jon Kyl) (explaining that the right to be treated with "fairness" under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, "includes the notion of due process")..

[105] Mathews v. Eldridge, 424 U.S. 319, 333, (1976); *accord* Hamdi v. Rumsfeld, 542 US 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded.") (internal citations omitted).

The VAG offers this not infrequent example to illustrate the critical nature of such conduct in fashioning an appropriate sentence that is both accurate and fulfills the requirements of the CVRA. Often defendants charged with child sex trafficking also face charges of sexual violence and production of Child Sexual Abuse Material (CSAM). If in such a trial the victim is unable to testify or does so but is unclear on dates or locations of the offense, or is so traumatized from the criminal exploitation that she falters as a witness a jury may acquit of the trafficking charge but convict of the CSAM charge. At sentencing on the CSAM charge, it would be illogical and artificial for both the victim to not be able to discuss and the judge to not be able to consider the trafficking context if proved by a preponderance of the evidence. It would be traumatizing for the victim to have to offer a VIS without mentioning the trafficking context which would deny her a right to be reasonably heard. Similarly, the court must be able to sentence the defendant in the context of his crime and CSAM occurring against a backdrop of sex trafficking is certainly an entirely different scenario than CSAM in a different context. It would be artificial and traumatic for a victim to have to experience a sentencing that disaggregates the crime and its impact from reality.

The CVRA provides victims of federal crimes due process by paving the way for victims to participate and to be reasonably heard in a meaningful way. To make a meaningful VIS to a sentencing court, victims must be able to tell the sentencing court the true emotional, physical, and financial harm they have endured and the sentencing court must be able to consider the information victims are providing even if the harm flowed from acquitted conduct. Otherwise, the right to be reasonably heard is no longer meaningful.

D. The Definition of Acquitted Conduct Should Be Rephrased to "Acquitted Count."

If the Commission chooses to amend the Guidelines, acquitted conduct should be retitled "acquitted count." There is no jury verdict related to conduct, but only to counts.[106] We propose, though still maintaining no action should be taken, "acquitted counts" be defined in the Guidelines as "a criminal charge in an Indictment in federal court, presented to a judge or jury for purpose of guilt, where the fact finder reached a verdict of 'Not Guilty' or for which a Rule 29 Motion for Acquittal has been granted."

[106] Fed. R. Crim. Pro. 31.

This definition is broader than that offered by Justice Sotomayor's statement respecting the denial of certiorari.[107] In her statement, she distinguishes acquitted conduct and other conduct not subject the of a conviction and focuses on the participation of a jury. The "Not Guilty" verdict, whether by bench or jury, should receive the same weight.

E. The Commission's Consideration of an Exception to its Bar, Automatic Reduction, or Higher Standard of Proof for Conduct Acquitted for Reasons Other Than Substantive Proof Issues Is Unworkable.

Absent a bench trial, the idea that there will be exceptions based on the *reasons* for the verdict is not practical. The bases of a jury's verdict in a criminal case is not known. A special verdict form or jury polling is unlikely to be unanimous and improperly invades the province of the jury. The proposal fails to consider that acquittals may be the result of jury nullification, dislike of the victim for improper reasons such as race or ethnicity, misunderstanding the jury instructions, or any other non-substantive reason that will not be apparent in the record.

F. The Bar, Automatic Reduction, or Higher Standard of Proof for Acquitted Conduct is an Illogical Limitation of Judicial Consideration.

If any of the three proposed amendments is adopted, the law would still allow judicial consideration of relevant conduct not subject to an acquitted count. This would result in a wholly illogical sentencing hearing. If, for instance, sensing an acquittal the prosecutor dismisses the count during jury deliberations, the conduct may be fully considered by the court as relevant conduct. The problem becomes clear when the criminal procedure process is followed and the proposed amendments' allowance of judicial consideration of the conduct is considered. The holistic approach to sentencing required by federal statute allows courts to consider aspects of a person's history that fall short of the rigorous process that ends in trial. The chart below demonstrates that logical absurdity that results from the proposals:

[107] *McClinton v. United States*, 143 S.Ct. 2400 (2023).

Procedural Posture	Relevant conduct that must be proved by preponderance of the evidence	Judicial consideration barred, reduced, or must be proved by clear and convincing evidence
law enforcement responds to a crime, but decides not to make an arrest	X	
there is an arrest, but law enforcement "scratches" that charge and does not investigate	X	
law enforcement investigates the crime but decides not to submit the count to the prosecutor for charges	X	
law enforcement submits the count to the prosecutor for charges but the prosecutor turns the count down	X	
the prosecutor seeks and receives an indictment for the conduct subject of a count, but dismisses the count short of trial	X	
the charge survives each of the steps above, and the count proceeds to trial, and the jury finds the prosecutor did not meet their burden		X

Consistent with the Supreme Court's holding in *Watts*, consideration of conduct related to acquitted count is permitted under §1B1.3 of the Guidelines.[108] The commentary to §1B1.3

[108] USSG §1B1.3(a)(1) provides that relevant conduct comprises "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and all acts and omissions of others "in the case of a jointly undertaken criminal activity," that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.""

explains that "[c]induct 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."

If the proposed amendments pass, conduct that has not endured the tests of an arrest, a prosecutor's charging decision, a grand jury's decision to indict, and other processes of criminal matters could be considered. Meanwhile conduct that passes each of those but falls short of our system's highest burden cannot or with limitations. As Justice Alito addressed, "the most that can be inferred from a not guilty verdict is that this high standard was not met."[109] The Commission should not adopt this illogical outcome.

G. Conclusion

The proposals should be denied because it is axiomatic that a core aspect of sentencing is individualized sentencing which allows courts to consider the full context of an offense, the defendant, and the impact of the crime to craft an appropriate sentence. 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 these proposals.

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[109] McClinton, 143 S. Ct. at 2403-06 (2023) (Alito, J. *concurring*); *citing* Watts*,* 519 U.S. at 155.

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Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission and to share Victim perspectives on the sentencing process. It respectfully requests the Commission to stay within its authority, avoid defraying individualized sentencing, and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members