Statement on Retroactivity of Acquitted-Conduct Amendment
Eric G. Olshan (7/15/2024)

Good morning and thank you for the opportunity to discuss the potential retroactive application of the Commission's recent acquitted-conduct amendment. Although the Department appreciates that the Commission tailored the scope of the final amendment—in recognition of some of the challenges inherent in its general application—we believe there are compelling reasons weighing against making this amendment retroactive.

- First, retroactivity should be the rare exception, not the rule; otherwise, finality is lost.
- Second, retroactivity will be more difficult to administer with respect to acquitted conduct compared to other recent amendments; and
- Third—and perhaps most importantly—retroactivity of this amendment risks compounding the harm and trauma experienced by crime victims.

First, retroactive amendments have historically been the exception, not the rule, and we believe it should remain that way. Although the Commission's own rules recognize generally that "promulgated amendments will be given prospective application only," its recent actions suggest that retroactivity is now becoming the rule. As a result, federal courts are already addressing over 5,000 motions for sentence modifications following last year's retroactive amendment on status points, another 4,000 motions following the retroactive amendment on zero criminal history

points, and over 600 motions for sentence reductions under the Commission's new compassionate release policy statement.

That's just shy of 10,000 motions in the first three months of this fiscal year alone.

Adding thousands more motions by making the acquitted-conduct amendment retroactive—at a time, I might add, that Congress is cutting funding to handle even existing cases—will impose an intolerable burden on the justice system, and all participants in it. That includes the bench, the government and defense bars, and our colleagues in probation offices around the country. And this ever-increasing volume of retroactive litigation will further undermine the Supreme Court's admonishment that "without finality, the criminal law is deprived of much of its deterrent effect."

Second, regarding administrability, this proposal is fundamentally different from the retroactive criminal history and status points amendments, which involved straightforward Guideline calculations. In contrast applying the acquitted conduct amendment retroactively would require a district court to review all of the substantive evidence at the defendant's past trial to determine whether the movant is even eligible for an adjustment. The Commission has already acknowledged the administrability concerns that the amendment presents when applied <u>prospectively</u>, emphasizing the important role of the original presiding district court judge in determining what conduct is permissibly included as relevant conduct. But when

the amendment is applied retroactively, that critical feature may very well be lost, either because the passage of time makes it harder for the presiding judge to recall with clarity the trial proceedings—or because the presiding judge is no longer on the bench at all. The turnover in defense and government counsel will only exacerbate the difficulty in applying the amendment retroactively.

Consider a complex, months-long, multi-defendant RICO trial from years ago that resulted in a defendant's acquittal on certain substantive counts but a conviction on the overarching conspiracy. Now imagine the presiding judge is retired. Retroactive application of this amendment would require a new judge to comb through, analyze, and make findings on a substantial trial record—one that may be difficult to reconstitute—to determine, among other things, whether the conduct underlying the acquitted counts is still relevant conduct under the revised Guidelines because it established in whole or in part the offense of conviction. There is no doubt that this is a substantial undertaking, raising novel legal and factual issues that will need to be litigated and decided.

Third, and perhaps most importantly, applying this amendment retroactively risks retraumatizing crime victims, including victims who testified at trial or a sentencing hearing many years earlier. In our letter, we ask the Commission to consider a case in which a defendant is convicted of producing Child Sexual Abuse Material (CSAM) but acquitted of sex trafficking the same minor victim. In any

retroactive sentencing reduction proceedings, the district court would need to confront whether the victim should be asked—possibly many years after suffering this horrendous abuse—to provide new testimony in order to distinguish the harm from the CSAM production from the harm associated with the sex trafficking conduct. I have worked to protect the rights of crime victims during my career, including the families of murder victims, and I can't overstate the trauma that these proceedings could visit upon victims and their families, and I would not be surprised if some victims simply refused to participate at all.

The Commission estimates that making this amendment retroactive will affect about 2,000 defendants, nearly 40% of whom were convicted of murder, robbery, sexual abuse, child pornography, assault, or kidnapping—all offenses involving victims. And, of course, that doesn't include the thousands of other defendants who were not acquitted of any charges but will file motions anyway, clogging the judicial system and retraumatizing victims with yet another deluge of requests to revisit final sentences.

In conclusion, while we recognize that the Commission has leaned into retroactivity for recent amendments, we believe there are compelling reasons not to continue that trend with the acquitted-conduct amendment. Thank you.