

September 26, 2019

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

Re: Prohibiting Punishment of Acquitted Conduct Act of 2019

Dear Chairman Graham and Ranking Member Feinstein:

The undersigned organizations write in support of the Prohibiting Punishment of Acquitted Conduct Act of 2019, which was introduced this week by Senators Durbin and Grassley, and cosponsored by Senators Leahy, Tillis, Booker, and Lee. This bill would end the unjust practice of judges increasing sentences based on conduct for which a defendant has been acquitted by a jury.

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to our criminal justice system. These guarantees require the government to prove a defendant's guilt to a jury beyond a reasonable doubt.

Despite this, current federal law allows judges to override a jury's not guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury. This is because the law requires a jury to convict beyond a reasonable doubt, but allows a judge to impose sentencing enhancements based on the less demanding standard of preponderance of the evidence.

Permitting sentencing based on acquitted conduct is unjust, undermines due process, and subverts the critical function of jury trials in our legal system. This practice has been roundly criticized by practitioners, judges, and scholars. In one case, three defendants were convicted of possessing small amounts of crack cocaine, but were acquitted by the jury on conspiracy to distribute charges. Nevertheless, the judge increased their sentences based on them engaging in a conspiracy. Though the Supreme Court did not take the case, Justice Scalia, joined by Justice Ginsburg and Justice Thomas, stated that the practice of sentencing based on acquitted conduct "has gone on long enough" and constituted a likely violation of the Sixth Amendment.¹ Additionally, former Judiciary Committee Chairman Hatch introduced the original version of

¹ *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari).

this bill in 2018, and has persuasively argued that justice depends on conviction by a jury, not a judge.

Allowing acquitted conduct to be considered in sentencing also exacerbates the trial penalty, which is generally manifested in the significant difference in sentence between what a defendant receives via plea bargain and what his or her sentence would be if convicted at trial. This trial penalty has virtually eliminated the constitutional right to a trial in the federal system.² It also contributes to the possibility of innocent people pleading guilty, because they fear the long and harsh sentence they would receive if convicted at trial, even if the chance of conviction is remote. Unsurprisingly, the crucial constitutional protection that the right to trial by jury provides is weakened when a defendant may be sentenced based on conduct even when he or she is acquitted of that conduct by a jury. This contributes to coercive plea bargaining and to the trial penalty.

We urge you to support this bill, which would eliminate an unjust practice and would strengthen the protections our Constitution provides.

If you have further questions, feel free to contact Nathan Pysno, Director of Economic Crime and Procedural Justice at the National Association of Criminal Defense Lawyers, at 202-465-7627 or npysno@nacdl.org.

Respectfully,

National Association of Criminal Defense Lawyers

#Cut50

Aleph Institute

American Civil Liberties Union

American Conservative Union

ALEC Action

Americans for Prosperity

² National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), <http://www.nacdl.org/trialpenaltyreport>.

Americans for Tax Reform

Church of Scientology National Affairs Office

Digital Liberty

Drug Policy Alliance

Due Process Institute

Fair Trials

Faith and Freedom Coalition

FAMM

Federal Public and Community Defenders

Innocence Project

National Legal Aid & Defender Association

Prison Fellowship

R Street Institute

Right on Crime

The Sentencing Project

Texas Public Policy Foundation

Tzedek Association