June 20, 2024

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments to the Sentencing Guidelines

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on whether recently promulgated amendments should be included in the Guidelines Manual as changes that may be applied retroactively to previously sentenced defendants. These comments address Amendment 1 (relating to acquitted conduct). NACDL also supports retroactivity for Parts A and B of Amendment 3 and Part D of Amendment 5 and adopts the comments of the Federal Defenders on those amendments.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL supports retroactive application of the Sentencing Guideline amendment to Section 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), which is being amended to exclude certain acquitted conduct from the scope of relevant conduct used in calculating an individual's guideline range.[1] With retroactivity, nearly two thousand people may be eligible for release or sentence reductions over the next several years. Without it, these same people may continue to serve terms of imprisonment for conduct they were acquitted of at trial—

[1] *See* U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines, 89 Fed. Reg. 36853 (May 3, 2024).

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at great cost to themselves, their families and communities, the prisons that house them, and the integrity of the criminal justice system.

The Commission has set forth its policy statement regarding retroactive application of amendments in Section 1B1.10 of the Guidelines. Among the key factors to consider when determining whether this amendment shall be retroactive are the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.[2] NACDL supports retroactive application because it would help correct a serious miscarriage of justice, will have a significant impact on affected persons, will not be burdensome to apply, and will help to redress unfair racial disparities in federal sentencing.

The use of acquitted conduct in sentencing is a glaring injustice in federal sentencing. It offends procedural rights, undermines the constitutional rights to due process and trial by jury, and is disrespectful to the esteemed role that jury trials and jury service have within American jurisprudence. It also undermines the legitimacy of and public respect for the criminal legal system.[3]

Unsurprisingly, acquitted conduct sentencing has been roundly and consistently criticized by NACDL, numerous other advocacy groups, many Members of Congress, several U.S. Supreme Court Justices, and the many lawyers and impacted people that the Sentencing Commission has heard from in written and oral testimony. It is clear now that the Commission itself agrees, as evidenced by the fact that the acquitted conduct amendment received top billing in the Commission's press statement announcing the final proposed changes for this Guideline amendments cycle.[4] In the press release, Chair Reeves called the change "an important step to protect the credibility of our courts and criminal justice system."[5] NACDL strongly agrees.

Making this change retroactive would, to a significant extent, correct this injustice for those who are still incarcerated and were sentenced based on acquitted conduct. It would also help to achieve the Chair's and the Commission's goal of protecting the credibility of the courts and justice system, by righting a now-acknowledged wrong.

Retroactive application of the amended Section 1B1.10 Guideline is also warranted because acquitted conduct often has a significant impact on sentences in the cases where it is considered as relevant conduct. In considering the possible impact of a Senate bill that would limit the use of acquitted conduct in sentencing in a similar, but arguably slightly more

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[2] *See* U.S. Sent'g Comm'n, Guidelines Manual § 1B1.10 (2023).
[3] *See generally* NACDL, Comments to the U.S. Sent'g Comm'n re: Proposed Priorities for the 2023-2024 Amendment Cycle (Aug. 1, 2023), *available at* https://www.nacdl.org/Document/CommentUSSCPriorities2024AmendmentCycle-08012023; NACDL, Comments to the U.S. Sent'g Comm'n re: Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary (Mar. 14, 2023), *available at* https://www.nacdl.org/Document/CommentsUSSCProposedAmendments-03142023.
[4] U.S. Sent'g Comm'n, News Release, "Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines" (Apr. 17, 2024), https://www.ussc.gov/about/news/press-releases/april-17-2024.
[5] *Id.*

significant way than the Commission's proposed Guideline amendment, the Sentencing Commission's Office of Research and Data has suggested that acquitted conduct may increase a sentence by 25% to 50%.[6] A Congressional Budget Office analysis of a very similar House of Representatives bill estimated that acquitted conduct adds an average of 30 months to sentences when it is imposed.[7]

While acknowledging that these estimates are necessarily imprecise, it is worth noting that anecdotal evidence also supports the notion that acquitted conduct—when imposed—has a major impact on sentence length. Indeed, a brief review of just a few of the most recent, highest-profile cases indicates that, in many cases, the impact of acquitted conduct in sentencing is even greater.

For example, in the well-known case *Jones v. United States*, a group of defendants were charged with federal drug conspiracy and distribution, RICO conspiracy, firearms offenses, and crimes under D.C. law.[8] After an 8-month trial, a jury acquitted three defendants on all charges except distributing small quantities of crack cocaine. However, based on acquitted conduct, these defendants received sentences that were many times more than their Guidelines range sentences:

Defendant	Guideline Range	Sentence Imposed
Antwuan Ball	51-71 months	225 months
Desmond Thurston	27-33 months	194 months
Joseph Jones	33-41 months	180 months[9]

These sentences are not a mere 25-50% greater—they are many times greater than the sentences that would have been imposed had acquitted conduct not been considered.

In a more recent case before the U.S. Supreme Court, Erick Osby faced 7 charges based on guns and drugs that were found after searches of a hotel room where he stayed and a car

[6] *See* Letter from Glenn R. Schmitt, Director, U.S. Sent'g Comm'n Office of Research and Data, to Jon Sperl, Budget Analyst, Congressional Budget Office, re: S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021 (Aug. 4, 2022) (suggesting this increase as a likely "lower and upper bound of sorts") [hereinafter, "Schmitt Letter on Impact"]. The Office also acknowledges that cases where acquitted conduct is considered by a judge in sentencing is relatively rare within the federal system, and that it is difficult to determine the exact impact it has as far as the additional months or years in an average affected sentence. *See id.*
[7] Congressional Budget Office, Cost Estimate, H.R. 5430, Prohibiting Punishment of Acquitted Conduct (Feb. 29, 2024).
[8] Petition for a writ of certiorari, at 3, *Jones v. United States*, 135 S. Ct. 8, 9 (2014).
[9] *Id.* at 5. It is also worth noting that the jury foreperson wrote in a letter, "It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty." *Id.* at 4 (internal citation omitted).

where he was a passenger.[10] Osby was convicted on just two and acquitted on five of those charges. Based on these two convictions, his Guidelines range was 24-30 months. But, at sentencing, the judge considered conduct from his acquitted counts and increased his offense level by 12.[11] He was sentenced to 87 months, nearly triple the high end of his sentencing range if acquitted conduct had not been considered.[12]

These cases indicate that acquitted conduct has a major impact on cases where it is considered in sentencing. Retroactive application of the Guideline amendment is warranted to address this injustice.

Additionally, retroactive application will not impose a significant burden on the courts. With few exceptions, the consideration of acquitted conduct in sentencing only occurs in the relatively rare instance where a defendant in federal court goes to trial on multiple charges and is convicted on one or more of those counts and acquitted on one or more of those counts. To begin, less than 3% of federal convictions are the result of trials and, of those fewer than 2,000 cases per year, only a small portion also include an acquittal as well as a conviction. For 2021, the Sentencing Commission found that only 157 cases went to trial and included both a conviction and an acquittal.[13] But, as small as this number is compared to the roughly 60,000 persons sentenced in federal court each year, it is not even likely that all 157 of these cases involved acquitted conduct sentencing—it merely means that these are the only cases that *could* have.

Similarly, in its Retroactivity Analysis of this Guideline Amendment, the Commission estimated that 1,971 persons currently in BOP custody were acquitted of one or more of the charges against them.[14] On its own, this is a tiny fraction of the over 140,000 people currently in federal prison.[15] But, even that 1,971 number is likely a significant overstatement of the number of possible cases involving acquitted conduct sentencing, because acquitted conduct is not considered in sentencing for every split verdict. Thus, the number of currently incarcerated people impacted by this change is even less than the already relatively small number the Commission cites.

In addition to the very small number of potential cases, retroactive application of this amendment will not be burdensome on the courts or difficult to apply. Any information required for sentencing or resentencing should already be in the record for any eligible cases. Applying

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[10] Petition for Writ of Certiorari, *Osby v. United States*, No. 20-1693 (denied Oct. 4, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1693/180707/20210601193931887_210601%20osby%20FILE.pdf.
[11] *Id.*
[12] *Id.* at 7.
[13] *See* Schmitt Letter on Impact, *supra* n.6.
[14] U.S. Sent'g Comm'n, Memorandum re: Retroactivity Impact Analysis of Certain 2024 Amendments, at 7 (May 17, 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/2024-amendments/2024_Amdts-Retro.pdf [hereinafter "2024 Retroactivity Analysis"].
[15] *See* Fed. Bureau of Prisons, Population Statistics, https://www.bop.gov/mobile/about/population_statistics.jsp (last accessed June 10, 2024) (showing 144,527 persons in BOP custody).

the amended Guideline is merely a matter of considering that same information while not considering the previously considered acquitted conduct. Because the amendment doesn't require considering new information, it only requires excluding the consideration of certain information, no additional and potentially burdensome factfinding or evidentiary hearing should be needed. Past instances of retroactive guideline application included greater numbers and complexity and did not cause undo difficulties.[16]

Despite the relatively small number of cases, retroactive application of this amended Guideline will also help somewhat in ameliorating the significant racial disparities in sentencing. The Commission is well aware of these disparities and, thankfully, devotes significant resources to documenting and publicizing them.[17] The Commission's Retroactivity Impact Analysis shows that of the roughly 13,488 persons currently incarcerated after a trial, 47.5% are Black, despite being only 12.4% of the U.S. population.[18] Thus, retroactive application may help in ameliorating the unjust racial disparities in federal sentencing.

Because retroactive application of the acquitted conduct amendment would help to correct a grave injustice, will have significant impact on the prison sentences of those impacted, and would not be unduly burdensome, NACDL strongly urges the Sentencing Commission to apply this amendment retroactively.

Respectfully Submitted,

JaneAnne Murray
Co-Chair, NACDL Sentencing Committee

Nathan Pysno
Director, NACDL Economic Crime & Procedural Justice

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[16] In the unlikely event that review of this small number of cases is more cumbersome than anticipated, cases could initially be reviewed by staff attorneys within a district court or other lawyers, as was done for reviewing retroactive claims under *Johnson v. United States*, 576 U.S. 591 (2015) (finding the Armed Career Criminal Act's "residual clause" unconstitutional) and *Welch v. United States*, 578 U.S. 120 (2016) (finding *Johnson* to be a substantive rule change and therefore retroactive). *See* Caryn Davis, Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782, 10 Fed. Cts. L. Rev. 39, 71, 74 (2018).

[17] *E.g.*, U.S. Sent'g Comm'n, Demographic Differences in Federal Sentencing, at 4 (Nov. 2023) (noting, for example, that Black males receive sentences 13.4% longer and Hispanic males 11.2% longer than white males).

[18] *See* 2024 Retroactivity Analysis, *supra* n.14, at 9. For population statistics, see U.S. Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census, https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html (last accessed June 12, 2024).