DUE PROCESS

INSTITUTE

March 14, 2023

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

RE: *Comment to U.S.S.C's proposed amendment to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to generally limit the use of acquitted conduct*

Chair Reeves and Members of the Commission:

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. Procedural due process concerns transcend "liberal" and "conservative" political labels and therefore we focus our efforts on these core principles and values that are shared by all Americans. Guided by a bipartisan Board of Directors, and supported by bipartisan staff, we create and support achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

We unequivocally support eliminating the use of acquitted conduct at sentencing, which punishes someone based on unproven allegations that were rejected by a jury (or sometimes, a judge). It has been a priority item on our reform agenda since our founding. We have helped lawmakers draft, introduce, and advance bipartisan legislation that would eliminate acquitted conduct sentencing and filed numerous *amicus* briefs in support of petitions seeking review by the U.S. Supreme Court that advocated the end of this pernicious practice.

We write in support of the Commission's complete elimination of acquitted conduct sentencing, however, rather than a "limitation" of its use as is presented by the current proposal.

The Sixth Amendment jury trial right is one of the critical pillars of our criminal justice system as it enshrines the founders' vision of the jury as a "protection against arbitrary rule." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). The Framers "appreciated the danger inherent in allowing 'justices named by the crown' to 'imprison, dispatch or exile any man that was obnoxious to the

government, by an instant declaration, that such is their will and pleasure.'"[1] Disregarding the jury's acquittal for the purpose of sentencing ignores the jury's historic role in our criminal legal system. In fact, colonial and early-American juries were often the sentencing authority, not the Court.[2] The punishment was directly tied to the findings of the jury, which could mitigate a sentence by refusing to convict or by convicting the Defendant of a lesser offense.[3] The Founders envisioned this powerful role for the jury based on their inherent skepticism of government power and their commitment to popular sovereignty as a check on this power[4]. Because of the jury's crucial role in protecting individual rights, "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'"[5] Importantly, a jury trial is not "a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish."[6] In fact, the Sixth Amendment's "core concern" is to reserve critical facts for determination by the jury.[7] And where a jury rejects the truth of the government's accusations by acquitting, that decision is "accorded special weight" under the Constitution.[8] A jury's power to acquit is so sacrosanct that it is unreviewable by prosecutors or judges. Indeed, "we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision . . . ."[9] Therefore, insulating a jury's verdict of acquittal is crucial to maintaining the jury's constitutional role as a necessary and integral independent check on governmental power.

It seems highly unlikely that the Framers who adopted the Sixth Amendment intended to guard against governmental oppression through criminal juries with the ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, only to allow a judge to nullify the jury's acquittal at sentencing. If sentencing judges cannot go beyond a jury's verdict, we believe they cannot contravene a jury's verdict and still comply with the Sixth Amendment guarantee of a jury trial. As the written and oral testimony of other supporters of this proposal has already indicated, an extremely wide and diverse number of scholars, academics, legislators, and judges agree with our assessment. Indeed, the Commission's own work illustrates that overwhelmingly federal judges are in agreement that acquitted conduct should not be considered "relevant conduct" at sentencing.[10]

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[1] *Alleyne v. United States*, 570 U.S 99, 127 (2013) (Roberts, C.J., dissenting) (quoting in part, 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (alteration omitted)).
[2] Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. of Crim. L. and Criminology 691, 692 (2010).
[3] *Id*. at 692—94.
[4] Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-75 (1994).
[5] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).
[6] *Blakely v. Washington*, 542 U.S. 296, 306- 07 (2004).
[7] *S. Union Co. v. United States*, 567 U.S. 343, 350 (2012).
[8] *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal.").
[9] *Burks v. United States*, 437 U.S. 1, 16 (1978).
[10] U.S. Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 5: Relevant Conduct.

In addition to undermining the role and purpose of the jury as well as disrespecting the public's service to their community, acquitted conduct sentencing[11] incentivizes prosecutors to overcharge and to bring even weak charges to trial since they have more than one "bite at the apple." The existence of acquitted conduct sentencing also serves as a profound disincentive to an accused person to challenge either the government's factual allegations or legal theories via a trial. As almost every American criminal defense lawyer has personally experienced, the fact that you must explain to your client that, even if a jury refuses to convict on particular counts (or even in a particular case[12]), it does not limit the government's ability to rely on any of their unproven allegations at any future sentencing for any other crime is frequently the lynchpin in your client's decision to accept a plea bargain—even an unjust one—because the stakes of challenging unjust or overreaching criminal charges at trial under such circumstances is simply too high. The phenomenon of prosecutorial overcharging combined with the fact that a defendant must "win" their federal trial on every count that was charged or face punishment that can be assessed as if they lost on every count in large part explains why the number of federal jury trials has, as the Commission's own data show—dwindled to almost zero. ("In fiscal year 2021, nearly all offenders (56,324; 98.3%) were convicted through a guilty plea."[13])

We write in support of the Commission's complete elimination of acquitted conduct sentencing, rather than a "limitation" of its use as is presented by the current proposal. We have serious concerns about the proposal in so far that it would still allow acquitted conduct to be relied upon in sentencing when "such conduct was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt…." We strongly oppose the portion of the proposed revision to §6A1.3 that invites courts to consider acquitted conduct in determining the sentence to impose within the Guideline range or in determining whether a departure from the range is warranted. And we further oppose the proposed limitation to exclude acquittals "unrelated to the substantive evidence" (i.e. jurisdiction, venue, statute of limitations). In our

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[11] While we focus our statement on the abolishment of acquitted conduct sentencing because that is the subject of the Commission's proposal, we urge the Commission to consider eliminating the use of uncharged or dismissed conduct in sentencing as well.

[12] The typical acquitted conduct sentencing case arises when a defendant is indicted on some charges but acquitted on others during the same trial. But in *Asaro v. United States*, No. 18-48-cr (2d Cir. Apr. 23, 2019) (*cert. denied* Apr. 23, 2019), the defendant was acquitted of several serious crimes alleged to have occurred three and four decades earlier, including an alleged robbery and an alleged murder. After a four-week trial, the jury acquitted Asaro of all charges. Approximately two years later, the government again indicted Asaro, this time in connection with property destruction as retribution after a road rage incident. The same prosecutors who had tried Asaro's prior case handled the case. The case was assigned to the same district judge who had presided over Asaro's earlier trial. Before sentencing, the government, the probation office, and the defense all agreed that the range called for by the relevant Sentencing Guidelines was 33 to 41 months' imprisonment. The court nevertheless sentenced Asaro to 96 months—more than double the high end of the range. In so doing, the judge made clear that she was basing the length of Asaro's sentence on the 1978 robbery and 1969 murder for which Asaro was acquitted two years earlier, observing that she was according "particular weight" to those "crimes." In pronouncing Asaro's sentence, the judge explained that she had "reviewed" her notes and the transcript from the earlier trial. In other words, the sentencing judge from the defendant's first trial was now given an opportunity in an unrelated second case a few years later to completely ignore the jury's unanimous multiple "not guilty" verdicts in the first case and replace them with her own opinion in order to sentence Asaro to a prison sentence more than double what was appropriate for the charge to which he had pled guilty.

[13] United States Sentencing Commission, *Federal Register Notice of Proposed 2022-2023 Amendments*, at p. 263.

desire to support the Commission's important mission and substantial agenda in this amendment cycle, we wish to adopt—rather than essentially repeat—the concerns that were well-expressed in the written statements and oral testimony of Melody Brannon, Federal Public Defender for the District of Kansas on Behalf of the Federal Public and Community Defenders and Natasha Sen, Chair of the Practitioners Advisory Group. However, in sum, we believe the proposed limitations would profoundly undermine the Commission's intention in its own proposal designed to increase fairness in sentencing while also reducing sentencing disparities, would lead to further erosions of due process rights, and would lead to unnecessary uncertainty by resulting in numerous legal challenges regarding these limitations.

It is imperative to *all* parties involved in a criminal matter—including the community on whose behalf the prosecution does its work—that an individualized judicial determination of appropriate punishment for crimes which a person has been duly convicted occurs. The relatively modern phenomenon of sentencing laws that allow courts to ignore a jury's findings and punish a person for conduct the government alleged but could not prove beyond a reasonable doubt is abhorrent to that ideal. We thank the Commission for its critical work in considering amendments that would finally bring an end to this practice.

Sincerely,

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