June 21, 2024

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

Re: Comments Supporting Retroactivity 0f 2024 Amendments

Dear Judge Reeves,

FAMM supports retroactivity of all 2024 guideline amendments that will reduce calculated guidelines and result in lower sentences. We focus this letter on Amendment 1 that ends the inclusion of acquitted conduct as relevant conduct. This reform has long been a priority for FAMM and our members.

FAMM is grateful to the Commission for curtailing the use of acquitted conduct as relevant conduct when calculating a guideline range. Ending the practice will benefit many people going forward, enhance public confidence in the guidelines, and help bolster the integrity and fairness of our criminal justice system. Retroactivity is called for in light of the relevant considerations – purpose, magnitude, and administrability – outlined in USSG §1B1.10.

I. Retroactivity is Warranted in Light of the Relevant Considerations.

Section 1B1.10 directs the Commission to consider "the purposes of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively . . . ."[1] These considerations support retroactivity of Amendment 1.

A. The Purpose of the Amendment Supports Retroactivity.

Relevant conduct, which is used when calculating a federal sentencing guideline range, will no longer include federal acquitted conduct, except when, in the view of the sentencing court, that conduct also establishes the instant offense of conviction.

The Commission opened its rationale for the amendment by stating that acquitted conduct has been a "persistent concern for many within the criminal justice system and the subject of robust

[1] USSG §1B1.10, comments. (backg'd).

debate over the last several years."[2] The Commission explained that its amendment addressing those concerns "seeks to promote respect for the law, which is a statutory obligation of the Commission."[3] The Commission illustrated its stance on acquitted conduct by referring to statements from Supreme Court Justices, bills introduced in Congress, and prohibitions in a number of states.

FAMM agrees that the amendment will enhance stakeholder confidence in the federal sentencing guideline system. It will also increase public trust in and respect for the law. Ordinary people take it as an article of faith that juries have the final word on innocence, guilt and, by extension, the consequences when a person has done something for which they merit punishment.[4] Jurors who learn their verdicts of not guilty have little or no impact on the outcome at sentencing express disbelief and frustration.[5] And, FAMM members who have been harmed by acquitted conduct, have told us of their dismay in learning that it is a feature of federal guideline sentencing.

- Raul Villarreal felt "devastated and betrayed by the justice system" because he was treated as "'guilty' when [he] was declared 'not guilty' in a public trial by a jury of [his] peers."
- Davon Kemp called the system "foul for stripping me of my right to a jury trial."
- Mr. Kemp's mother described herself as "shocked" at the enhancement her son received based on acquitted conduct and said it made his right to a trial "worthless."[6]
- Allen Peithman described the "horror" he and his mother felt when they "learned that even though we had proven our innocence, having stood before a jury of our peers, faced judgment, and been cleared of all the conduct we maintain[ed] our innocence of, it simply didn't matter."[7]

Our criminal justice system holds the immense power to deprive the governed of liberty. Its legitimacy depends on the trust of the people. As bond for that trust, the system provides significant procedural protections against the misuse of punishment. One of those is the right to trial by jury. Acquitted conduct is an abuse of trust that goes to the heart of the system.

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[2] U.S. Sentencing Comm'n, Amendments to the Guidelines at 1 (Apr. 30, 2024).
[3] U.S. Sentencing Comm'n, Amendments to the Guidelines at 1 (citing 28 U.S.C. §§ 994(a)(2); 991(b)(1)(A) & (B); 18 U.S.C. § 3553(a)(2)) (Apr. 30, 2024),
[4] *McClinton v. United States*, No. 21-1557, 600 U.S. ____ (2023) (Sotomayor, J.) *denial of certiorari* at 4.
[5] *See e.g.*, *McClinton v. United States*, No. 21-1557, Brief of 17 Former Federal Judges as Amicus Curiae in Support of Petitioner, at 15 (Aug. 10, 2023) (quoting letter from juror angered on learning that the defendant they had acquitted was nonetheless sentenced on the acquitted charge).
[6] Letter to Hon. Carlton W. Reeves from Mary Price and Shanna Rifkin at 10 (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=376.
[7] Statement of Mr. Allen Peithman Before the United States Sentencing Comm'n, Hearing on 2023-2024 Proposed Amendment on Acquitted Conduct at 1 (March 6-7, 2024) (Peithman Statement); https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/peithman.pdf.

The use of acquitted conduct did not simply undermine confidence in the fairness of the criminal justice system, it weaponized charging. Prosecutors could and did lard indictments, confident that the hapless defendant who elected to go to trial and prevailed on some but not all charges, would not benefit from acquittal. The government knew it could extract more punishment, by way of an increased guideline range, than the jury verdict called for.[8] The practice also sent people acquitted of crimes, very likely including people factually innocent of those crimes,[9] to prison where hundreds likely remain.[10] As Judge Patricia Millett testified, now is the time for the Commission to "ensure that the Sentencing Guidelines will no longer deprive a defendant of liberty based on alleged conduct that a jury found he did not commit."[11] The Commission has answered that call for people facing juries starting in November.

By ending the use of acquitted conduct, the Commission has done crucial work toward restoring public trust in the legitimacy of the trial system. But that work will not be complete without retroactivity. The Commission must now finish the job of restoring confidence in the system, by giving everyone whose guidelines were increased a chance to regain the liberty they were wrongfully deprived of. Retroactivity is necessary to ensure that the promise of Amendment 1 is fully realized – to promote respect for and confidence in the law.

B. The Magnitude in the Change to the Guideline Range Supports Retroactivity.

When Congress empowered the Commission to make retroactive a reduced guideline change, it explained that "the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the [amended] guidelines."[12] Consequently, amendments that would reduce the maximum of the calculated guideline range by less than six months are not included in USSG §1B1.10.[13]

Commission research staff were unable to conduct their usual data analysis that could have helped the Commissioners evaluate the magnitude of the change to a class of people whose

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[8] *McClinton v. United States*, No. 21-1557, Brief of National Ass'n of Federal Public Defenders and FAMM at 7-8 (July 14, 2022).
[9] Letter to Honorable Carlton W. Reeves from Sen. Dick Durbin, *et al*. at 5 (March 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=14; *see also* Letter from Jonathan J. Wroblewski to Hon. Carlton W. Reeves at 14 (Feb. 15, 2023) (explaining that jury decisions are often opaque with respect to the underlying reasons for acquittal), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=47.
[10] Memorandum to Chair Reeves from Office of Research and Data, U.S. Sentencing Comm'n, at 7.
[11] Patricia A. Millett, Written Testimony for the Public Hearing on the Proposed Acquitted-Conduct Amendment to the Federal Sentencing Guidelines at 1 (Feb. 27, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/millett.pdf.
[12] USSG §1B1.10, comments. (backg'd), quoting S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).
[13] USSG §1B1.10, comments. (backg'd).

guideline range was increased by acquitted conduct. That should not prevent the Commission from granting retroactivity.

First, it is very likely that the maximum range for all or nearly all eligible individuals will exceed six months. The *average* sentence for all people with counts of acquittal serving sentences imposed following trial is a whopping *294 months*. From individual cases and personal accounts it is clear that acquitted conduct routinely and dramatically increased the sentence imposed, likely due to the operation of relevant conduct rather than the court's exercise of discretion under 18 U.S.C. § 3553(a).

- In 2015, Vincent Asaro was tried and acquitted of robbery and murder, allegedly committed decades earlier. Two years later, he pled guilty to different charges before the judge who had presided over his trial in 2015. The guideline range for the 2017 conviction was 33 to 41 months. The government argued that the judge should consider the acquitted conduct and cited *Watts* "for the proposition that basically the Court is not bound by the jury's verdict." The judge sentenced Mr. Asaro to 96 months, relying on her notes and recollections from the trial and stating her firm conviction that the government had proven the robbery and murder charges, notwithstanding the jury's verdict. The delta separating Mr. Asaro's calculated guideline range and sentence was more than four and a half years, lapping the 42-month top of the calculated guideline range.[14]
- The jury in Gregory Bell's case found him guilty of three crack cocaine distribution charges and not guilty on 10 additional charges that included narcotics and racketeering counts. Bell's guideline range for the counts of conviction was 51 – 63 months. The court used acquitted conduct to add 129 months, imposing a sentence of 192 months in prison. His sentence represented a 300 percent increase over the top of the guideline range for his conviction.[15]
- The government charged Erick Osby with seven counts, five addressing possession with intent to distribute drugs and two of possessing a firearm in furtherance of drug trafficking. Following trial, the jury convicted Mr. Osby of two drug counts and acquitted him of the other five charges. The guidelines for the two counts of conviction called for a sentence of 24 to 30 months in prison. Relying on acquitted conduct, the court recalculated the range to 87-108 months, more than three times the guideline range for the conviction. Sentencing Mr. Osby to 87 months, the judge said with respect to *Watts v. United States*, "If the Supreme Court tells me they have changed that law at some point in the future, that's fine, and that's what I'll do."[16]
- Dayonta McClinton was sentenced to 228 months, three times longer than the guideline sentence of 57-71 based on his count of conviction for robbery. The judge enhanced his sentence based on the murder of which he had been acquitted.[17]

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[14] *Asaro v. United States*, No. 18-48, *Petition for Certiorari* at 3-5 (July 22, 2019).
[15] *United States v. Bell*, 808 F.3d 926, 929 (Millett concurring in denial of rehearing en banc) (Dec. 22, 2015).
[16] *Osby v. United States*, No. 19-4789, *Petition for Certiorari* at 4-7 (June 1, 2021).
[17] *McClinton v. United States*, No. 21-1557, *Petition for Certiorari* at 3-4 (March 15, 2022).

At its hearing on the proposed amendment, the Commission heard directly from two people whose sentences had been increased by the use of acquitted conduct. Allen Peithman explained that he and his mother were both harmed by the practice. The guideline range for the counts on which his mother was found guilty called for probation; she received instead more than five years. Mr. Peithman was sentenced to ten years, although the top of the guideline range for his conviction was 36 months.[18] Jesse Ailsworth told of the toll his 30-year sentence took on him and his family. That term, 25 years longer than any codefendants, flew in the face of the jury's decision to acquit him on more than two dozen charges *and* the jury's special verdict limiting his conduct to the sale of 38 grams of crack cocaine.[19]

For guideline retroactivity purposes, magnitude is measured in time. These cases and accounts clearly demonstrate that acquitted conduct sentencing had a significant impact on the length of the imposed sentence, well beyond the Commission's six month cut-off for retroactivity. They meet the magnitude threshold.

The damage that has been done to our system of justice should also be accounted for in magnitude. The constitutional guarantee of the right to be found not guilty by a jury of one's peers was set aside *by operation of law* in hundreds of federal cases. Ending that practice is no small correction. Instead, the amendment this Commission has made is aimed at enhancing trust in the fairness of our sentencing system. That trust was broken every time a defendant discovered that they were to be sentenced for conduct the jury found them not guilty of. Denying retroactivity because we cannot locate with certainty whether enough people were sentenced to enough time would miss the important principle the Commission has elevated. Healing the damage done by decades of acquitted conduct sentencing will not be complete if the Commission declines to ensure that the people whose sentences compelled this amendment are left to serve them. The Commission's clear commitment to justice and fairness compels retroactivity.

C. Retroactivity is Warranted in Light of the Ease of Administrability.

FAMM will defer to defense practitioners on the question of the burden of administering retroactivity for people serving sentences enhanced by acquitted conduct. It appears from the staff analysis that a relatively small number of individuals will be eligible for retroactivity, though perhaps some number may apply who believe they are eligible, but in fact are not because of overlapping conduct. It is possible in some cases that the court exercised its discretion under 18 U.S.C. § 3553(a) to vary upward based on the acquitted conduct. It is likely, according to the staff, that some courts may need to conduct additional fact-finding to determine if

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[18] Peithman Statement at 1-2.
[19] Statement of Jesse Ailsworth before the United States Sentencing Commission at 1 – 2 (March 6, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/ailsworth.pdf; *see also* Federal and Public Community Defenders Comment on Acquitted Conduct (Proposal 3) at 19 (Feb. 22, 2024) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=47.

acquitted conduct had an impact on the sentence and whether it might overlapped and served to prove other counts of conviction.

That work, while additional, should be welcomed by a judiciary that embraces the Commission's commitment to secure the trust and respect of the public in the administration of sentencing justice.

II. Conclusion

Dayonta McClinton is the man whose petition for certiorari moved Justice Sotomayor to call on the Commission to revisit the rule requiring the use of acquitted conduct. He is not due to be released until the Fall of 2032.[20] He is 26 years old.

Mr. McClinton deserves to be more than a poster child. Acquitted conduct sentencing is a stain on the federal sentencing system. Enabling people whose incarceration was lengthened by the practice to seek a sentence reduction is necessary to fully cure the damage done to them and to restore the reputation of the justice system. FAMM calls on the Commission to ensure that everyone serving a sentenced enhanced by acquitted conduct has the chance to experience the justice this remarkable and long-overdue amendment promises future defendants.

Thank you for considering our comments.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

[20] Bureau of Prisons Inmate Locator, https://www.bop.gov/inmateloc/ (visited June 20, 2024).