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March 13, 2023

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

**Re: Comments on Proposed Amendment to the Guidelines Manual Regarding Acquitted Conduct**

Dear Commissioners:

On behalf of the Federal Courts Committee, Criminal Courts Committee, and White Collar Crime Committee of the New York City Bar Association[1] ("City Bar"), we respectfully submit the

[1] The City Bar, founded in 1870, has over 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Criminal Courts Committee studies the workings of the Criminal Term of the New York State Supreme Court and the New York

**About the Association**
*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

following comments on the United States Sentencing Commission's ("Commission") Proposed 2022–2023 Amendments to the Federal Sentencing Guidelines Manual. More specifically, the City Bar submits its comments concerning Proposed Amendment 8 regarding Acquitted Conduct. The City Bar appreciates this opportunity to comment on the Proposed Amendment.

## I. INTRODUCTION

The City Bar applauds the Commission's effort to limit the use of acquitted conduct in applying the Federal Sentencing Guidelines ("Guidelines"). Previously, the City Bar encouraged legislators to prohibit the consideration of uncharged conduct at federal sentencing, and it endorsed legislation that would have precluded federal courts from considering acquitted conduct, except for purposes of mitigating a sentence.

As detailed in the April 2020 Report of the City Bar's Federal Courts Committee on the Prohibiting Punishment of Acquitted Conduct Act of 2019, jurists, academics, practitioners, and commentators have for years raised concerns that Supreme Court jurisprudence, federal statutory law, and the Guidelines permit sentencing courts to use conduct for which a defendant was acquitted to enhance a convicted defendant's sentence.[2] While legal practitioners and commentators have almost uniformly decried the use of acquitted conduct in federal sentencing, federal courts have continued to consider such conduct in applying the Guidelines. Following the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), every single circuit court has affirmed lower courts' consideration of acquitted conduct when sentencing within the statutory range authorized by the jury verdict.[3] In recent years, however, an increasing number of jurists

City Criminal Court. The White Collar Crime Committee focuses on the white collar criminal space and includes prosecutors and former prosecutors, as well as defense attorneys. The White Color Crime Committee joins in the letter, except for those members who are government lawyers and are not able to take a position.

[2] *See* N.Y. City Bar Ass'n, "Report on Legislation by the Federal Courts Committee: Prohibiting Punishment of Acquitted Conduct Act of 2019" (Apr. 2020); *see also United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases); *United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., specially concurring) ("[M]any individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice."); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1627–28 (2012) (noting that even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), "the Guidelines preserve the problem of acquitted conduct increasing sentences," which "stands in sharp tension with the jury's constitutional role because judges continue to comply with the Guidelines, and the Guidelines continue to instruct judges to consider relevant conduct in sentencing"); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 27 (2016).

[3] *See, e.g.*, *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022) ("The Supreme Court has held that 'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.' The holdings in this circuit have followed this precedent, as they must." (quoting *Watts*, 519 U.S. at 157)); *United States v. Medley*, 34 F.4th 326, 336 (4th Cir. 2022) ("Whether or not we agree or disagree with the precedent from the Supreme Court and this Court, we are bound to follow it."); *see also United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014) (noting that, following *Watts*, the D.C. Circuit and "every numbered circuit ha[ve] addressed the constitutionality of sentencing based on acquitted conduct and reached the same conclusion"); Br. for the United States in Opp'n to Pet. for Writ of Cert. at 11–12, in *McClinton v. United States*, No. 21-1557 (filed October 28, 2022; petition pending) ("[E]very federal court of appeals with criminal jurisdiction has recognized, after *Booker*, that a district court may consider acquitted conduct for sentencing purposes.")

have expressed concerns about the constitutionality of permitting the use of acquitted conduct to factor into and increase a defendant's sentence, including the late Justices Scalia and Ginsburg, and current Justices Thomas, Gorsuch, and Kavanaugh.[4]

For the reasons expressed by these jurists and commenters, the City Bar supports, with the modifications stated below, the proposed amendment's limitation on the use of acquitted conduct for purposes of determining the applicable Guidelines range in individual cases.

## II. PROPOSED AMENDMENT 8

On February 2, 2023, the Commission proposed an amendment to Guidelines Section 1B1.3 that would generally prohibit federal judges from considering acquitted conduct as relevant conduct for purposes of calculating a defendant's advisory Guidelines range. However, the proposed amendment would still allow federal judges to consider conduct that the defendant otherwise admitted during a guilty plea colloquy or that was "found by the trier of fact beyond a reasonable doubt to have established, in whole or in part, the instant offense of conviction." The proposed amendment would define "acquitted conduct" to include both (1) conduct "underlying a charge of which the defendant had been acquitted by the trier of fact;" and (2) conduct that a defendant successfully moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure or an analogous state or local provision. The Commission also proposed an amendment to the Commentary for Section 6A1.3 to conform with the amendment to Section1B1.3.

The Commission has invited any comments on two issues concerning the proposed amendment:

1. To the extent that conduct "underlying an acquitted charge" may overlap with conduct found beyond a reasonable doubt to establish the offense of conviction, does the proposed amendment allow a court to consider such "overlapping conduct"? If so, should the Commission provide additional guidance on such conduct.

2. Whether the proposed limitation on the use of acquitted conduct in sentencing is too broad or too narrow? For example, should the proposed amendment include or exclude acquittals for reasons unrelated to the substantive evidence, such as for lack of jurisdiction or venue or the statute of limitations.

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[4] *See Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of *certiorari*) (calling for a review of consideration of acquitted conduct at sentencing); *United States v. Bell*, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that courts using acquitted conduct to "impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning constitutionality of sentencing judge changing defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent").

## III. THE CITY BAR SUPPORTS, WITH MODIFICATIONS, THE PROPOSED AMENDMENT PRECLUDING THE USE OF ACQUITTED CONDUCT AT SENTENCING

The City Bar supports the proposed amendment to the Guidelines to limit the use of acquitted conduct at sentencing. The City Bar, however, recommends modifications to the proposed amendment to make clear that conduct underlying an acquitted charge that overlaps with conduct found beyond a reasonable doubt to establish an offense of conviction may only be considered for purposes of determining the applicable advisory Guidelines if it is legally necessary to establish the offense of conviction. In addition, the proposed amendment is too narrow in that it still allows the use of conduct for which a defendant was acquitted for enhancing a sentence under the Guidelines. The City Bar encourages the Commission to prohibit more broadly the use of conduct for which a defendant was acquitted as a basis of any enhancement.

### a. Comment on Issue 1: "Overlapping" Conduct

The Commission should provide additional guidance regarding overlapping conduct. Conduct underlying an acquitted charge that overlaps with conduct found beyond a reasonable doubt to establish an offense of conviction should not be considered for purposes of determining the applicable Guidelines range beyond that conduct which was <u>legally necessary</u> to establish the count(s) of conviction. As presently drafted, proposed Guidelines Section 1B1.3(c) is ambiguous. It provides that acquitted conduct shall not be considered relevant conduct for purposes of determining the Guidelines range unless such conduct "establish[ed], in whole or in part, the instant offense of conviction." Absent clarification, it is unclear whether this exception to the prohibition on considering acquitted conduct applies only to conduct that was a necessary element of the offense of conviction, or rather to conduct simply included, among others, in the charges and presented to the trier of fact.

This ambiguity in the definition of "established" could be particularly salient when the offense of conviction is a money laundering or conspiracy charge. For example, a defendant might be convicted of a money laundering offense, but acquitted of charges that he committed the alleged specified unlawful activity.[5] Similarly, a defendant might be convicted of a conspiracy involving numerous alleged overt acts, without the jury specifying which overt act was proven beyond a reasonable doubt, and also acquitted of one or more substantive offenses related to the alleged overt acts.[6] Conversely, the question might arise in a situation where a defendant is acquitted of a

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[5] *See, e.g.*, *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (vacating sentence for money laundering where district court failed to consider defendant's acquitted drug trafficking conduct).

[6] In *United States v. Young*, 09 Cr. 223 (TEJ), 2011 WL 884002 (S.D. W.Va. Mar. 11, 2011), for example, the defendants were convicted of a multi-object conspiracy to possess, transport, and sell stolen property, but were acquitted of a substantive count concerning the possession of a specific stolen vehicle that was found on the property of a co-conspirator. The possession of the stolen vehicle was the only alleged overt act that specifically involved the co-conspirator. At sentencing, the district court included as relevant conduct not only the vehicle, but also all stolen property found in the possession of the co-conspirator. *Id.* at *11; *cf. United States v. Kiel*, 658 F. App'x 701, 711–12 (5th Cir. 2016) (affirming district court's calculation of offense level for multi-object conspiracy based on every bank robbery listed as an overt act, even those not charged as substantive offenses).

conspiracy charge, but convicted of related substantive charges along with his alleged co-conspirator.[7]

Given this ambiguity, the City Bar recommends that the Commission modify the language of the proposed amendment to Section 1B1.3 so that only acquitted conduct that overlaps with conduct legally necessary to the factfinder's determination of guilt on the offense(s) of conviction may be considered for purposes of determining the applicable advisory Guidelines range.[8] In the alternative, the Commission should provide additional guidance for the application of the new provision.

**b. Comment on Issue 2: Breadth of Limitation on the Use of Acquitted Conduct**

The City Bar believes that there is no meaningful distinction between acquittals based on the substantive evidence and acquittals for other reasons, such as lack of jurisdiction, venue, or violations of the statute of limitations. Consideration of all acquittals should be precluded for purposes of determining the applicable advisory Guidelines range.

A contrary rule would lead to inconsistency in the treatment of acquittals rendered by juries and judges for the same reasons. For example, a jury that determined the prosecution had not adequately proven venue could render an acquittal on a general verdict form with no further explanation. Yet, a court, on its own or presented with a motion for acquittal, could enter a judgment of acquittal on the same record for the same reason. If conduct relating to "non-substantive" acquittals could be considered, the defendant acquitted by the court would be unfavorably situated compared to the defendant acquitted by the jury, as the acquitted conduct could be considered for the Guidelines range for the former, but not the latter. There is no principled basis for treating these similarly situated defendants differently.

The proposed amendment is also too narrow in that it permits the continued consideration of acquitted conduct, on a preponderance of the evidence standard,[9] for determination of upward departures. Multiple Guidelines provisions allow for upward departures based on factual circumstances that may be presented to, but rejected by, the jury.[10] To the extent that the proposed amendment allows for upward departures on the basis of acquitted conduct, the amendment does not go far enough to address the concerns that have motivated the amendment itself, and leaves an

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[7] *See, e.g., United States v. Sumerour*, 18 Cr. 582 (KGS), 2020 WL 5983202 (N.D. Tex. Oct. 8, 2020) (rejecting loss amount for health care fraud calculated by the U.S. Probation Office that included losses stemming from an acquitted conspiracy charge).

[8] To avoid confusion regarding the deference to be accorded the Commission's understanding of the proposed Guidelines amendment, the Commission should incorporate such changes into the text of the proposed Guidelines provision itself, and not limit such guidance to the commentary. *Cf. United States v. Banks*, 55 F.4th 246, 255 (3d Cir. 2022) (holding that, following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), courts must exhaust all the traditional tools of construction and conclude that a Guidelines provision is genuinely ambiguous before according deference to the Commission's commentary interpreting the Guidelines).

[9] *See, e.g.*, *United States v. Rasheed*, 981 F.3d 187, 193 (2d Cir. 2020).

[10] *See, e.g.*, U.S.S.G. § 5K2.5 (upward departure for property loss or damage not otherwise taken into account by Guidelines); *id.* § 5K2.6 (upward departure for use of a weapon); *id.* § 5K2.9 (upward departure when offense of conviction was committed to facilitate or conceal another offense).

exception that might, in practice, render the amendment ineffectual. The City Bar recommends that the consideration of acquitted conduct for purposes of upward departures be prohibited under the proposed amendment.

## IV. CONCLUSION

The City Bar fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing, without any distinction between acquittals based on the substantive evidence and acquittals for other reasons. However, the Commission should provide additional clarity for the application of the proposed amendment of Section 1B1.3 to "overlapping" conduct. The City Bar also respectfully requests that the Commission consider whether acquitted conduct, proven only by a preponderance, may continue to be used for determining upward departures.

Respectfully,

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