



February 22, 2024

The Honorable Carlton Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Request for Public Comment on Proposed 2024 Amendments to Sentencing Guidelines (88 FR 89142)

Dear Judge Reeves:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, we are pleased to submit the following comments and suggestions regarding the proposed amendments to the federal sentencing guidelines on acquitted conduct. For the reasons discussed below, we strongly urge the commission to select ‘Option 1,’ which would amend USSG §1B1.3 to provide that acquitted conduct is not relevant conduct for purposes of determining the sentencing guideline range. This amendment will diminish racial inequities, show proper deference to the role of juries, and enhance public confidence in our system.

I. **Racial disparities are evident throughout the criminal-legal system and manifest in the overcharging of Black defendants.**

The Leadership Conference is deeply invested in promoting fair and lawful policies that further the goal of equality under law and has fought for years to eliminate the inequalities in our criminal-legal system. It is no secret that over the past five decades, U.S. criminal justice policies have driven an increase in incarceration rates that is unprecedented in this country’s history and unmatched globally: The United States incarcerates more people than any other country in the world, with nearly 2 million people currently incarcerated in U.S. prisons and jails.¹ The racial inequities rooted in slavery and discrimination that permeate every aspect of our lives are likewise sharp in our criminal-legal system. People of color are disproportionately affected by policies in every aspect of the criminal-legal system.

Officers
Chair
Judith L. Lichtman
National Partnership for
Women & Families
Vice Chairs
Margaret Huang
Southern Poverty Law Center
Derrick Johnson
NAACP
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Secretary
Fatima Goss Graves
National Women’s Law Center
Treasurer
Lee A. Saunders
American Federation of State,
County and Municipal Employees

Board of Directors
Abed Ayoub
American-Arab
Anti-Discrimination Committee
Gloria L. Blackwell
AAUW
Shawn Fain
International Union, UAW
Jocelyn Frye
National Partnership for
Women & Families
Jonathan Greenblatt
Anti-Defamation League
Mary Kay Henry
Service Employees International Union
Damon Hewitt
Lawyers’ Committee for
Civil Rights Under Law
David H. Inoue
Japanese American Citizens League
Virginia Kase Solomon
League of Women Voters of the
United States
Marc Morial
National Urban League
Janet Murguía
UnidosUS
Svante Myrick
People For the American Way
Janai Nelson
NAACP Legal Defense and
Educational Fund, Inc.
Christian F. Nunes
National Organization for Women
Rabbi Jonah Pesner
Religious Action Center
of Reform Judaism
Rebecca Pringle
National Education Association
Lisa Rice
National Fair Housing Alliance
Kelley Robinson
Human Rights Campaign
Anthony Romero
American Civil Liberties Union
Liz Shuler
AFL-CIO
Fawn Sharp
National Congress of American Indians
Maria Town
American Association of
People with Disabilities
Randi Weingarten
American Federation of Teachers
John C. Yang
Asian Americans Advancing Justice |
AAJC

President and CEO
Maya Wiley

¹ Nellis, Ashley. “Mass Incarceration Trends.” *The Sentencing Project*. Jan. 25, 2023.
<https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

Of particular relevance in this instance, these inequities manifest in prosecutors routinely overcharging Black defendants as compared to White defendants with similar conduct.² For example, one study uncovered that prosecutors filed charges for low-level drug offenses more frequently against Black defendants than White defendants, despite higher drug use rates among White people.³ Hispanic and Black people account for a majority of those convicted with an offense carrying a drug mandatory minimum,⁴ despite the fact that White and Black people use illicit substances at roughly the same rate, and Hispanic people use such substances at a lower rate.⁵ A 2017 report found that Wisconsin prosecutors were more lenient with White defendants than Black defendants, dropping or lessening charges in plea deals at a higher rate for White defendants than for their Black counterparts — meaning that Black defendants would be more likely to be convicted of a felony or of a charge carrying incarceration than their White counterparts.⁶ Additionally, a 2014 study found that Black defendants receive federal sentences that are nearly 10 percent longer than similarly situated White defendants.⁷ The authors of that study concluded that “[m]ost of this disparity can be explained by prosecutors’ initial charging decisions.”⁸ There is no question that racial disparities persist in our criminal-legal system, undermining

² See, e.g., Williams, Timothy. “Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn’t Know Their Race?” *New York Times*. June 12, 2019. <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html>. See also Fernandez, Lisa. “Judge finds Contra Costa County DA overcharged Black defendants in watershed racial-bias ruling.” *KTVU Fox 2*. May 30, 2023. <https://www.ktvu.com/news/judge-finds-contra-costa-county-da-overcharged-black-defendants-in-watershed-racial-bias-ruling>; Lekhtman, Alexander. “Baltimore Prosecutors Have Been Inflating Charges for Black Defendants.” *Filter*. March 22, 2022. <https://filtermag.org/baltimore-prosecutors-black-defendants/>; Bishop, Elizabeth Tsai, et al. “Racial Disparities in the Massachusetts Criminal System.” *Criminal Justice Policy Program, Harvard Law School*. Sept. 2020. <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (finding that Black and Latino defendants are overcharged, as they face more serious initial charges but are convicted of offenses approximately equal in severity to their white counterparts).

³ Rosenberg, Alana, et al. “Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming.” *J. Drug Issues*. Vol. 47, Issue 1. 2017. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5614457/>.

⁴ “Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System.” *United States Sentencing Commission*. Oct. 2017. Pg. 57. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

⁵ “Results from the 2018 Nat’l Survey on Drug Use and Health: Detailed Tables.” *Substance Abuse and Mental Health Service Administration*. 2018. Table 1.23B. <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2018R2/NSDUHDetailedTabs2018.pdf>.

⁶ Berdejó, Carlos. “Criminalizing Race: Racial Disparities in Plea Bargaining.” *Boston College Law Review*. 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036726.

⁷ Starr, Sonja B. & M. Marit Rehavi. “Racial Disparity in Federal Criminal Sentences.” *University of Michigan Law School Scholarship Repository*. 2014.

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles>. According to Commission data, Black and Hispanic males receive federal sentences that are, respectively, 13.4 and 11.2 percent longer than White males. “Demographic Differences in Federal Sentencing.” *U.S. Sentencing Commission*. Nov. 2023. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

⁸ Starr at 1320.

the very foundation of justice in our country. As Judge Reeves has said, “we all have a duty to eradicate racial and other unwarranted disparities from every part of our criminal justice system.”⁹

II. Acquitted conduct sentencing is deeply unfair and could exacerbate racial inequities in the criminal-legal system.

The Leadership Conference has long believed that acquitted conduct sentencing is an inherently flawed and unfair practice that should be eliminated. Using acquitted conduct at sentencing amplifies the racial injustices described above. Consider a hypothetical example with two defendants, both of whom were found in possession of the same amount of cocaine, but one was charged with possession only and the other with possession with intent to distribute. If both defendants went to trial, and both were found guilty of possession only (the latter acquitted on intent to distribute), one could say that the system had worked equitably, with the same results following from the same conduct. But under the current guidelines, the defendant who received a partial acquittal could receive a longer sentence related to the distribution charge — even though he had been acquitted. In other words, these two defendants would receive different penalties for the same conduct, even though juries had viewed them the same way. The only difference between them lies in how the prosecutors chose to charge them. Further, as detailed above, because of disparities in charging, it is much more likely that the former defendant in this hypothetical is White and that the latter defendant is Black. As the amicus brief of Professor Douglas Berman and the Due Process Institute for the petitioner in *Allums v. United States* noted, acquitted conduct sentencing incentivizes prosecutors to overcharge, allowing them to “charge any and all offenses for which there is a sliver of evidence, then pursue those charges throughout trial without fear of any consequences when seeking later to make out their case to a sentencing judge.”¹⁰

Moreover, although the use of acquitted conduct at sentencing has been permitted by the courts thus far, its use raises serious constitutional concerns and undermines public trust in the jury system. As this commission well knows, the Fifth Amendment of the Constitution prohibits the deprivation of life, liberty, or property without due process of law, while the Sixth Amendment guarantees a defendant the right to trial by an impartial jury.¹¹ The use of acquitted conduct sentencing, where a judge can base sentencing on a standard of preponderance of the evidence, inhibits true due process and effectively nullifies the grant of a jury trial. If a jury has determined that a criminal charge cannot be proven beyond a reasonable doubt and therefore acquits the defendant of that charge, it is inherently violative of the Sixth Amendment for a judge to “make findings of fact that either ignore or countermand those made by the jury and then rely on these factual findings to enhance the defendant’s sentence.”¹² Furthermore, while the Supreme Court has ruled that the preponderance-of-the-evidence standard at sentencing satisfies due process,¹³ acquitted conduct sentencing as a whole is at odds with the fundamental fairness that is also

⁹ Raymond, Nate. “Study finds racial disparities in whether US judges impose prison.” *Reuters*. Nov. 14, 2023. <https://www.reuters.com/legal/government/study-finds-racial-disparities-whether-us-judges-impose-prison-2023-11-14/>.

¹⁰ Brief for Professor Douglas Berman and Due Process Institute as Amici Curiae supporting Petitioner at 17, *Allums v. United States*, 858 F. App’x 420 (Mem), *cert. denied*, 142 S.Ct. 1128 (2022).

¹¹ U.S. Const. Amends. V, VI.

¹² *U.S. v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

¹³ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

guaranteed by the due process clause.¹⁴ It is therefore unsurprising that “[m]any federal judges have expressed the view that the use of acquitted conduct to enhance a defendant’s sentence should be deemed to violate the Sixth Amendment and the Due Process Clause of the Fifth Amendment.”¹⁵ The practice is, quite simply, unfair, and it undermines the community’s trust in the legal system — a trust that is necessary for the system to function at all.¹⁶

III. Conclusion

The practice of acquitted conduct sentencing is plainly unjust. While the Supreme Court delays reconsideration of its precedents on the issue,¹⁷ the Sentencing Commission should step up and work to end the practice. The commission should select Option 1, as it is the most comprehensive of the options, and should further ensure that the definition of acquitted conduct is as broad as possible to make clear that the practice should be eliminated. This option is critical to advancing civil rights and redressing inequalities and inequities within the criminal-legal system. There is a long road ahead to fully eradicate racial and other disparities within the system, but this measure would serve as an important step forward on that journey. Please direct any questions about these comments to Chloé White, senior counsel, justice, at white@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights

¹⁴ U.S. v. Faust, 456 F.3d 1342, 1352-53 (11th Cir. 2006) (Barkett, J., concurring).

¹⁵ United States v. Lasley, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases).

¹⁶ As Justice Sotomayor recently said, “acquitted-conduct sentencing also raises questions about the public’s perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system.” United States v. McClinton, 23 F.4th 732, 734 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 2400 (2023) (statement of Sotomayor, J.). See also Quinones v. United States, Case No. 18-6052020 WL 1509386, *15 (S.D.W Va. Jan. 9, 2020) (“If I maximize the defendant’s sentence based principally on that acquitted conduct, it would, in my view, undermine the public’s confidence in our system of justice.”); United States v. Lombard, 102 F.3d 1 (1st Cir. 1996) (“A lawyer can explain the distinction logically but, as a matter of public perception and acceptance, the result can often invite disrespect for the sentencing process.”).

¹⁷ The Supreme Court has declined to take up cases examining its precedents on acquitted conduct in recent years. See, e.g., United States v. McClinton, 23 F.4th 732, 734 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 2400 (2023); Allums v. United States, 858 F. App’x 420 (Mem), *cert. denied*, 142 S.Ct. 1128 (2022).