

No. 22-6386

IN THE
Supreme Court of the United States

FRANK SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Authorities	ii
Introduction	1
Argument	1
I. The Sentencing Commission’s proposed amendments to the Sentencing Guidelines will not resolve the constitutional issues raised by the use of acquitted conduct at sentencing	1
II. Petitioner’s case is a good vehicle for the question presented.....	3
Conclusion	6

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Jones v. United States</i> , 574 U.S. 948 (2014)	3
Other Material	
Letter from Jonathan J. Wroblewski, Director of Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice to Hon. Carlton W. Reeves, Chair, U.S. Sentencing Commission (Feb. 15, 2023), <i>available at</i> https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf	2
Remarks of Jessica D. Aber, U.S. Attorney, E.D. Va., <i>United States Sentencing Commission Public Hearing</i> (Feb. 24, 2023), <i>available at</i> https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0224_Transcript.pdf	2, 3
U.S. Sentencing Commission, <i>Proposed Amendments to the Sentencing Guidelines</i> (Feb. 2, 2023), <i>available at</i> https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf	1, 2
USSG § 4B1.5(b)	2, 4, 5

INTRODUCTION

This case squarely raises the question of whether the use of acquitted conduct to determine a defendant's sentence violates the Fifth and Sixth Amendments. Frank Sanchez was charged with sexually abusing two victims, S.K.M. and J.S. He was acquitted of the counts alleging sexual abuse of S.K.M. but convicted of the count alleging sexual abuse of J.S. Despite the jury's acquittal on the counts involving S.K.M., this conduct was used against him at sentencing in multiple ways.

Contrary to the government's arguments, the Sentencing Commission's proposed amendments to the Sentencing Guidelines cannot and will not resolve the constitutional issues raised by the use of acquitted conduct at sentencing, and this case squarely raises the question presented.

ARGUMENT

I. The Sentencing Commission's proposed amendments to the Sentencing Guidelines will not resolve the constitutional issues raised by the use of acquitted conduct at sentencing.

The government argues that the Sentencing Commission recently proposed amendments to the Sentencing Guidelines that, if adopted, would address the use of acquitted conduct at sentencing. B.I.O. at 6. The proposed amendments do not address the Fifth and Sixth Amendment concerns raised by this practice.

The proposed amendments would merely limit the use of acquitted conduct as relevant conduct in calculating the defendant's offense level. U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines*, at 213-14 (Feb. 2, 2023), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment->

process/reader-friendly-amendments/20230201_RF-proposed.pdf (last accessed Apr. 4, 2023). They would not prohibit the consideration of acquitted conduct under Chapter 4 (including the 5-level enhancement under USSG § 4B1.5(b)), in applying an upward departure, in selecting a sentence within the guideline range, or in imposing a sentence outside the guideline range altogether. *See Proposed Amendments*, at 223-24 (“Acquitted conduct, however, generally shall not be considered relevant conduct for purposes of determining the guideline range. Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted.” (citations omitted)). And they would not address the use of acquitted conduct in *state* sentencings at all.

Moreover, the United States Department of Justice has opposed even the modest proposed amendments. *See generally* Letter from Jonathan J. Wroblewski, Director of Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice to Hon. Carlton W. Reeves, Chair, U.S. Sentencing Commission (Feb. 15, 2023), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf> (last accessed Apr. 4, 2023). The Department of Justice has taken the position that the proposed amendments are “inconsistent with both [18 U.S.C. § 3553(a) and 18 U.S.C. § 3661], as [they] would limit the information a sentencing court could consider and lead to sentences that fail to account for the full range of a defendant’s conduct.” Remarks of Jessica D. Aber, U.S. Attorney, E.D. Va., *United States Sentencing Commission Public Hearing*

(Feb. 24, 2023), at 86-87, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/0224_Transcript.pdf (last accessed Apr. 4, 2023).

The Sentencing Commission cannot resolve the constitutional issues raised by the use of acquitted conduct at sentencing. Only this Court can do that, and the time has come to do so. The widespread practice of using acquitted conduct to enhance criminal sentences “has gone on long enough.” *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of certiorari).

II. Petitioner’s case is a good vehicle for the question presented.

The government also argues that Sanchez’s case is an unsuitable vehicle for the question presented because “the record does not clearly establish that the district court actually relied on acquitted conduct in sentencing” him. B.I.O. at 6, 9. To the contrary, this case squarely raises the constitutionality of the use of acquitted conduct at sentencing.

In the district court, Sanchez objected to the use of acquitted conduct at sentencing as a violation of his rights to due process under the Fifth Amendment and to trial by jury under the Sixth Amendment. Sent. Tr. 4-5.¹ The district court overruled his objection, finding that the court could consider the acquitted conduct in determining his sentence:

¹ The Sentencing Transcript is available at Dist. Ct. Dkt. 158. The Trial Transcript is available at Dist. Ct. Dkt. 161.

The defendant then objects based on constitutional grounds that because he was acquitted, the evidence shouldn't be used against him under his due process rights and rights to a trial by jury. That issue has been addressed, both in the Sentencing Guidelines and by courts of appeal, indicating that the court can consider that evidence as long as it's shown by a preponderance of the evidence. So that objection is also overruled.

Sent. Tr. 6-7.

The district court also considered the acquitted conduct in applying the 5-level enhancement under USSG § 4B1.5(b):

And I find here that there were two instances with [J.S.]. I also believe that the evidence has shown by a preponderance of the evidence that there was sexual -- prohibited sexual conduct with [S.K.M.] and with [G.D.]. So I find that it has been met.

Sent. Tr. 19. Although the district court did find two instances of sexual conduct with J.S., it immediately found that Sanchez also engaged in sexual conduct with S.K.M. and G.D. Only then did it find that the 5-level enhancement applied.

Finally, while the district court expressly rejected some arguments advanced by the parties in explaining its sentence (specifically, Sanchez's susceptibility to COVID-19 in prison), it did not expressly disclaim consideration of the acquitted conduct. *See* Sent. Tr. 54-56. This is significant because the government repeatedly argued that the district court could and should consider the acquitted conduct in sentencing Sanchez. It argued that the acquitted conduct should remain in the Presentence Investigation Report:

There was . . . [S.K.M.]'s testimony for two substantive counts, which were acquitted, but that doesn't mean that the Court can't find those things happened by a preponderance of the evidence. . . . [T]he Court can and should consider it when fashioning its sentence.

Sent. Tr. 5-6. It argued that the acquitted conduct should be used to support a cross-reference: “There was evidence from [S.K.M.] -- and, again, I understand the jury acquitted on the counts relating to her, but the Court can still find by a preponderance that this happened.” Sent. Tr. 11. It argued that the acquitted conduct should be used to support the 5-level enhancement under § 4B1.5(b):

The evidence at trial established by a preponderance of the evidence that the defendant sexually abused three young girls. . . . But I would also say that the Court can find that [S.K.M.]’s testimony on two or three occasions -- that also establishes the pattern.

Sent. Tr. 18. And it argued that the district court should consider the acquitted conduct in selecting a sentence:

Defendant was selective with his victims. . . . [S.K.M.], she was the daughter of his then girlfriend [S.K.M.’s mother] has substance abuse issues then. [S.K.M.] had been abused before by a different relative, and he knew it. So he preys upon her one night when [S.K.M.]’s mom is working, and he sexually abuses her. Because who would believe [S.K.M.]? If she reported another instance of sexual abuse, who would believe her?

Sent. Tr. 50-51. The government repeatedly asked the district court to consider the acquitted conduct in selecting a sentence, and the district court did not expressly disclaim reliance on this conduct.

The government also argues that the jury’s acquittal on the counts involving S.K.M. could have reflected reasonable doubt as to whether the incidents occurred in Indian Country so that “the jury’s not-guilty verdict on the counts involving S.K.M. is not logically inconsistent or incompatible with the district court’s application of the enhancement in reliance on the conduct underlying those counts.”

B.I.O. at 9-10. Sanchez made the same jurisdictional argument in relation to both

the counts involving S.K.M. (from 1996) and the count involving J.S. (from 2006). Trial Tr. 470-71 (oral motion for judgment of acquittal); Trial Tr. 623-26 (closing argument); *see also* Dist. Ct. Dkt. 110, at 3-9. The jury found Sanchez not guilty on the counts involving S.K.M. and guilty on the count involving J.S. Dist. Ct. Dkt. 113. The mostly likely interpretation of the jury's verdict is that it found that Sanchez did not abuse S.K.M., not that it found that the government failed to establish the jurisdictional element with respect to one victim, but established it with respect to the other.

This case squarely presents the constitutional issues raised by the use of acquitted conduct at sentencing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 4th day of April, 2023.

Respectfully submitted,

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