Before the United States Sentencing Commission Public Hearing on Acquitted Conduct

Statement of Melody Brannon,
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders

February 24, 2023

Statement of Melody Brannon
Federal Public Defender for the District of Kansas
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Acquitted Conduct
February 24, 2023

Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Melody Brannon, and I am the Federal Public Defender for the District of Kansas. I am also a member of the Federal Defender Sentencing Guidelines Committee. I would like to thank the Commission for holding this important hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders on the use of acquitted conduct to enhance sentences ("acquitted conduct sentencing").

Defenders wholeheartedly support eliminating the use of acquitted conduct—whether the acquittal is by a jury or a judge—to enhance sentences. As shown by Jessie Ailsworth's experience, which I discuss below, punishing a person based on allegations rejected by the jury undermines the role of the jury and has a powerful and chilling impact on the decision to go to trial. Mr. Ailsworth's 30-year prison sentence was driven by the court's wholesale reliance on acquitted conduct. But the reach of this pernicious practice extends well beyond the people in Jessie Ailsworth's position. The reverberations of that injustice affected district-wide practices in Kansas for years to follow.

While Defenders are excited by this proposal, we have concerns about the proposed limitations in §1B1.3(c)(1) that are apparently designed to account for so-called "overlapping conduct" or other anomalous scenarios. A simple, bright-line rule that prohibits the use of acquitted conduct when applying the guidelines will best safeguard sacred jury trial and due process rights and will further the purposes of sentencing. The limitations outlined in proposed §1B1.3(c)(1) are unclear, unnecessary, and undermine the policy reasons for prohibiting acquitted conduct sentencing in the first place.

Similarly, because acquitted conduct sentencing frustrates the Commission's obligations to advance the purposes of sentencing, promote certainty and fairness in punishment, and avoid unwarranted disparities, we oppose the suggested revisions to §6A1.3 that invite courts to consider

acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guideline range is warranted.[1]

Finally, the limitation on the use of acquitted conduct at sentencing should not be narrowed to exclude acquittals "unrelated to the substantive evidence" if it is to have the effect of truly protecting acquittals. Such a rule would be too complicated and invites unwarranted disparity. Also, it would invade the province of the jury to parse the basis for the acquittal to search for the jury's reasoning. For example, the defense may present more than one theory of defense, even if those defenses are inconsistent.[2] And a jury may acquit on a completely different basis, without the need to explain or justify its verdict. We explain below.

I. Using acquitted conduct to enhance sentences is unsound sentencing policy.

Acquitted conduct sentencing is bad sentencing policy. The Supreme Court has described the jury as "the central foundation of our justice system and our democracy," "a necessary check on governmental power," "a fundamental safeguard of individual liberty," and "a tangible implementation of the principle that the law comes from the people."[3] The jury system "over

---

[1] While I focus my statement on the acquitted conduct proposal, we also continue to urge the Commission to eliminate from the application of the guidelines the use of uncharged and dismissed conduct, or significantly limit its reach. *See generally* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 208-20 (1991) (identifying "serious due process issues" with the relevant conduct guideline).

[2] *See Mathews v. United States,* 485 U.S. 58, 63 (1988).

[3] *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017); *see also United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (describing the "impressive [historical] pedigree" of the jury trial right, which was "designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" (quoting 2 J. Story, Commentaries on the Laws of England 343, 540-41 (1769))); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); *cf. United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring) ("The genius of the Constitution's protections for criminal defendants was to prevent tyranny [by] ensuring that an individual's liberty could only be stripped away by a jury of his peers upon proof of a crime

the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases."[4]

A prison sentence predicated on the very allegations that a unanimous jury of 12 rejected subverts that jury's esteemed and deep-rooted institutional role.[5] Acquitted conduct sentencing relegates the jury's "not guilty" verdict—which cannot be appealed by the government and carries the constitutional protection against double jeopardy—to advisory opinion status, rather than a fundamental safeguard against oppression and ultimate declaration of a person's guilt or innocence.[6]

Numerous judges and commentators have condemned acquitted conduct sentencing as constitutionally dubious, unsound sentencing policy, or both.[7]

---

beyond a reasonable doubt."); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 241-42 (2009) ("Juries provide several benefits: they serve as a check on the government, the judiciary, and the law, and they reinforce democratic norms. The diversity, group dynamics, and neutrality of juries offer benefits in fact-finding over that of a single judge.").

[4] *Pena-Rodriguez*, 580 U.S. at 210.

[5] *See* Ngov, *supra* note 3, at 242 ("Consideration of acquitted conduct by a judge after a jury has already deliberated sends a message that the work of the jury was unnecessary and, in turn, threatens to undermine the role the jury serves and advantages it provides over judicial fact-finding."); *United States v. Ibanga*, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (Kelley, J.) ("A sentence that repudiates the jury's verdict undermines the juror's role as both a pupil and participant in civic affairs. The juror learns that the law does not value the results of his or her participation in the judicial process and may reject it at will.").

[6] *See* Brief of Professor Douglas Berman as Amicus Curiae Supporting Petitioner at 7, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) ("Acquittals, in these cases, are mere formal matters; acquittals in name only with no meaningful consequence or limit on the state's effort to punish based on the very allegation the jury unanimously rejected.").

[7] *See, e.g.*, See *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millet, J., concurring in the denial of rehearing en banc) (acquitted conduct sentencing reduces the "liberty-protecting bulwark" of the jury system to "little more than a speed bump at sentencing"); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed . . . trivializes [the jury's] principal fact-finding function. But no less significant, this judicial fact-finding deprives a defendant of adequate notice as to his or her possible sentence. This state of affairs is unfair, unjust and I believe plain unconstitutional."); *United States v. White*, 551 F.3d 381,

Indeed, over three decades ago, the Ninth Circuit recognized that enhancing a sentence on a convicted count for allegations rejected by the jury effectively punishes for the acquitted conduct.[8] It lamented that such punishment "pervert[s] our system of justice" and "circumvent[s] . . . statutory directive" prescribing proportional sentencing.[9] Yet, 32 years later, this perverse affront to proportionality persists. D.C. Circuit Judge Patricia Millett recently observed, "Allowing the government to lock people up for a discrete and identifiable term of imprisonment for criminal charges rejected by a jury is a dagger pointed at the heart of the jury system and limited government."[10] Other judges have implored the Sentencing Commission to outlaw this pernicious practice.[11]

(6th Cir. 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe [that] sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) ("Although it makes no difference in this case, we believe that a defendant's Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him. Moreover, we believe the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice."); *see also* 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, 25-27 (2016); Lucius T. Outlaw III, *Giving An Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U. Denv. Crim. L. Rev. 173, 188-91 (2015); Ngov, *supra* note 3, at 263-308; Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523, 551 (1993); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992).

[8] *See United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), *abrogated by United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

[9] *Id. at* 851.

[10] *Brown*, 892 F.3d at 408 (Millett, J., concurring).

[11] *See, e.g,* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, New York, N.Y., at 42-43 (July 9, 2009) (Judge Kavanaugh); *cf. United States v. Watts*, 519 U.S. at 158 (Breyer, J. concurring) ("I join the Court's per curiam opinion

Some district judges already reject the use of acquitted conduct to enhance sentences on policy grounds.[12] Several state high courts have held acquitted conduct sentencing runs afoul of state or federal constitutional provisions, or both.[13] And the American Law Institute's Model Penal Code (MPC) expressly rejects the use of acquitted conduct to formulate sentencing guidelines.[14] While the MPC drafters noted their concern about the lack of constitutional safeguards at sentencing,[15] they recognized that even without constitutional infirmity, acquitted conduct sentencing is "an anomaly with grave impacts upon fairness and process regularity" that is especially malevolent "when the penalty consequences attending a finding of 'guilt' at sentencing are identical to those that would have resulted from a formal conviction at trial."[16]

Congress enacted the Sentencing Reform Act (SRA) in 1984 with an eye toward assuring "that sentences are fair both to the [individual being sentenced] and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all federal cases."[17] It created the Sentencing Commission and set forth one of its primary purposes: to establish sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing" and "avoid[ ] unwarranted

---

while noting that it poses no obstacle to the Sentencing Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.").

[12] *See, e.g.*, *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671, 673 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152-53, 155 (D. Mass. 2005) (Gertner, J.).

[13] *See State v. Melvin*, 258 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213, 216 (Mich. 2019); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987).

[14] *See* Model Penal Code: Sentencing § 9.05(2)(b) (Am. Law. Inst., Approved 2017).

[15] *See* Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law. Inst., Proposed Official Draft 2017).

[16] *Id.*

[17] S. Rep. 98-225, 98th Con., 2d Sess. at 39 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3222.

sentencing disparities."[18] As Defenders explained to the Commission in our September 2022 Annual Letter, acquitted conduct sentencing frustrates this purpose.[19]

Sentencing hearings lack the evidentiary, procedural, and constitutional protections of trials. The rules of evidence (especially the rule against hearsay), the right to confront witnesses, the exclusionary rule, unanimous multiple factfinders, and the proof "beyond a reasonable doubt" standard—none of these protections apply at federal sentencing hearings, which often devolve into brief, informal proceedings by proffer and pronouncement.[20] The use of acquitted conduct to enhance sentences in these circumstances is antithetical to basic notions of certainty and fairness to the sentenced individual and undermines public respect for the sentencing process and the federal judicial system.[21] It also leads to unwarranted disparities because

---

[18] 28 U.S.C. § 991(b)(1)(B). The guidelines the Commission promulgates must similarly give "particular attention" to these requirements. *See* 28 U.S.C. § 994(f).

[19] *See* Defenders' Annual Letter to the Sentencing Commission 6-8 (Sept. 14, 2022).

[20] *See* Outlaw, *supra* note 7, at 179-80; Ngov, *supra* note 3, at 239; Reitz, *supra* note 7, at 548-49.

[21] *See United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) ("[C]alculating a person's sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings."); *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) ("[A]s a matter of public perception and acceptance, [acquitted conduct sentencing] can often invite disrespect for the sentencing process."); *Coleman*, 370 F. Supp. 2d at 671 n. 14 ("[C]onsideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system. A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct for which he has been acquitted.'" (quoting *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring))); *cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law [is] not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 Ga. L. Rev. 895, 945 (2005) ("Because juries are generally perceived to be neutral and because social science research shows that even losing disputants will accept the outcome if they believe the process was fair, juries help guarantee acceptability for the parties, as well as for the community.").

some judges accept, and others reject, acquitted conduct sentencing.[22] For those who accept it, unwarranted disparities manifest in treating individuals convicted of the same offense dissimilarly, and unwarranted similarities manifest in treating individuals acquitted of an offense similarly to those convicted of the same offense.[23]

In addition to providing certain and fair sentencing policies and guarding against unwarranted disparities, the Commission is statutorily required to "independently develop a sentencing range that is consistent with the purposes of sentencing" outlined in 18 U.S.C. § 3553(a).[24] Yet, acquitted conduct sentencing conflicts with this obligation, too.[25] It "risks creating a society that does not respect the law," is an ineffective deterrent because most people are unaware that sentences can be increased for acquitted conduct, and is unlikely to significantly enhance public safety.[26] And while the policy may be facially neutral, in practice it disproportionately impacts racial and ethnic minorities.[27] "[M]ore [B]lack and ethnic minority defendants have acquitted conduct used against them under the broad relevant conduct provisions of the Guidelines than white defendants; as a result, the acquitted conduct may be used as an unintended proxy for racial disparagement."[28] This undermines the Commission's obligation to ensure that the sentencing guidelines and policy statements are racially neutral.[29]

Acquitted conduct sentencing also dangerously elevates prosecutorial power. The specter of acquitted conduct sentencing encourages prosecutors to overcharge, knowing if they can get a conviction on one count, they will be granted a "second-bite at the apple of punishment" at sentencing "under

---

[22] *See* Defenders' Letter *supra* note 19, at 8; *see also* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1462 (2011); Outlaw, *supra* note 7, at 180.

[23] *See* Defenders' Letter, *supra* note 19, at 7-8.

[24] *See* 28 U.S.C. § 994(m).

[25] *See* Ngov, *supra* note 3, at 295-308*;* Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?* 54 Santa Clara L. Rev. 675, 706-09 (2014).

[26] *See* Ngov, *supra* note 3, at 296-304.

[27] *See* Yalincak, *supra* note 25, at 709-10.

[28] *Id.*

[29] *See* 28 U.S.C. § 994(d).

circumstances that substantially disfavor the defendant."[30] Thus, it tips the scales of an already imbalanced legal system even further in favor of the prosecution. It is impossible to quantify the coercive effect of acquitted conduct sentencing on an individual's decision whether to exercise their constitutionally protected right to a jury trial.[31] My personal experience, practicing for 25 years in the district of Kansas after Jessie Ailsworth was sentenced, confirms this reality.

The chorus of criticism against this policy and the Commission's three previous proposals to eliminate acquitted conduct sentencing make clear that this amendment is long overdue.[32] As the lambasting has grown louder over the years, the Commission is obligated under the SRA to set new sentencing policy that reflects this "advancement in knowledge . . . relate[d] to the criminal justice process."[33] Prohibiting acquitted conduct sentencing would carry out that statutory duty, while bringing greater legitimacy,

---

[30] Outlaw, *supra* note 7, at 179; *see also* Reitz, *supra* note 7, at 521 ("[T]he relitigation of acquittal counts at sentencing adds a substantial burden on defendants convicted of some charges and acquitted of others. Acquittal charges must be defended twice, and the defense must be more vigorous the second time around because the available procedures are more spare.").

[31] *See Bell*, 808 F.3d at 929 (Millet, J., concurring in the denial of rehearing en banc) ("[F]actoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury. Defendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges."); *see also* Brief for the National Ass'n of Federal Defenders & Families Against Mandatory Minimums as Amici Curiae Supporting Petitioner at 9, *McClinton v. United States*, No. 21-1557, 2022 WL 2704759 (U.S. July 8, 2022) ("A defendant's typical incentive for rejecting a plea offer is the prospect that she will obtain a more favorable result if she prevails at trial. But punishing acquitted conduct means defendants often cannot reap the benefits of acquittal. In fact, as a practical matter, it threatens *harsher* outcomes for defendants who secure partial acquittals: They are sentenced as if they admitted guilt on every count, but with none of the sentencing breaks that attend a guilty plea." (citation omitted)).

[32] *See* 62 Fed. Reg. 15201 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992).

[33] 28 U.S.C. § 991(b)(1)(C); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

transparency, respect, and fairness to the federal system. Below, we highlight three stories of persons impacted by acquitted conduct sentencing.

II. Using acquitted conduct to enhance sentences leads to unjust results.

The cases of Erick Osby and Christian Nieves highlight the unwarranted and unfair disparities caused by acquitted conduct sentencing. On May 31, 2019, a jury acquitted Erick Osby, a Black man in his mid-twenties, of five of seven drug and weapon counts.[34] At sentencing on the two counts of conviction, the court disregarded the jury's acquittals and used that alleged conduct to calculate the guideline range.[35] The sentencing court felt compelled to "follow the law. . . and allow acquitted conduct to be at least considered."[36] This "consideration" increased Erick's guideline range from 24 to 30 months, based solely on the counts of conviction, to 87 to 108 months based on the whole of the government's allegations at trial.[37] Erick was sentenced to 87 months in prison. Erick has now exhausted the appellate process. His petition for a *writ of certiorari* was denied in October 2021.[38] Erick is 28 years old and remains confined at FCI Beckley.[39] Had the court honored the jury's verdict, Erick would likely be a free man today.

---

[34] Counts one through four of the indictment stemmed from a police search of a hotel room on September 18, 2018, that allegedly uncovered drugs, money, and a firearm. Counts five through seven stemmed from a traffic stop and car search, on September 27, 2018, that allegedly uncovered another gun, more money, and more drugs. *See United States v. Osby*, No. 4:19-cr-9, ECF No. 1. Erick was acquitted of both gun charges (possession of a firearm in furtherance of drug trafficking) and acquitted of the possession with intent to distribute charges related to the hotel search. *See id.,* ECF No. 58 (verdict form). He was convicted only of possession with intent to distribute the drugs found in the car on September 27, 2018. *See id.*

[35] *See United States v. Osby*, No. 4:19-cr-9, ECF No. 84 (transcript of sentencing hearing).

[36] *Id.*, ECF No. 84, at 17.

[37] *See id.*, ECF No. 84, at 59.

[38] *See id.*, ECF No. 96 (text entry).

[39] *See* BOP Inmate Locator Service, available at https://www.bop.gov/inmateloc/ (search by Register No. 93119-083) (last checked February 9, 2023); s*ee also United States v. Basher*, 629 F.3d 1161, 1165 n.2 (9th Cir. 2011) (taking judicial notice of publicly available BOP Inmate Locator data).

Christian Nieves, in contrast, benefited from a sentencing judge who recognized that acquitted conduct sentencing is bad policy.[40] On April 23, 2021, a jury found Christian, a Latino man, not guilty of conspiracy to commit witness tampering (count four), but guilty of witness retaliation (count one).[41] At sentencing, the government asked the court to increase Christian's guideline range based on the witness tampering allegation rejected by the jury at trial.[42] Refusing to substitute its judgement for the jury's, the court denied the government's request, sentencing Christian to 36 months in prison.[43]

Erick and Christian's cases not only exemplify the unwarranted sentencing disparities that result from permitting acquitted conduct sentencing when applying the guidelines,[44] they display the direct and harmful impact of acquitted conduct sentencing on Erick Osby and others who exercise their constitutional right to a jury trial.

Acquitted conduct sentencing also has an indirect, chilling effect on the exercise of the sacred right to be tried by a jury that extends far beyond any one case. Take, for instance, what happened in my district after Jessie Ailsworth was sentenced to 30 years in prison for an expansive crack cocaine conspiracy despite the jury's determination that he played a very minor role.

In 1994, Jessie Ailsworth was charged with a far-ranging conspiracy to distribute crack cocaine spanning 13 months and involving six other people, in violation of 21 U.S.C. § 846. He was also charged with dozens of other drug- and gun-related crimes.[45] Jessie chose to have a jury trial.[46] His jury was thoughtful and deliberate in their verdict. Jury deliberations lasted

---

[40] We reviewed a copy of the sentencing transcript where the judge rejected, as a policy matter, the use of acquitted conduct to enhance Mr. Nieves's guideline range.

[41] *See United States v. Nieves*, No. 1:19-cr-354, ECF No. 107 (verdict form).

[42] *See id.*, ECF No. 134, at 3-6 (transcript of sentencing).

[43] *See id.* at 36. Christian's conviction was recently overturned on appeal for errors during the *voir dire* process. *See United States v. Nieves*, 58 F.4th 623 (2d Cir. 2023).

[44] *Cf.* 28 U.S.C. §§ 991(b)(1)(B); 994(f).

[45] *See United States v. Ailsworth*, No. 5:94-cr-40017, ECF No. 287 (second superseding indictment).

[46] *See id.*, ECF No. 719 (minute sheet of jury trial).

several days during which the jury submitted numerous questions to the court. Finally, the jury returned a partial verdict that exonerated Jessie of 28 of the 37 counts.[47] And although the jury ultimately convicted on the top conspiracy count,[48] they wrote a note on the bottom of the verdict form limiting Jessie's involvement to the sale of 33.81 grams of crack cocaine in exchange for food stamps.[49]

At sentencing on December 12, 1996, the presentence investigation report (PSR) calculated a guideline range that included the acquitted conduct and the government advocated for a life sentence, which was within the enhanced range.[50] In other words, without presenting additional testimony or evidence, the government asked the sentencing court to substitute its fact-finding judgement for that of Jessie's impartial and unanimous jury acquittal.[51] The sentencing court overruled Jessie's objections to the acquitted conduct drug weight and sentenced Jessie to 30 years in prison, assessing a guideline range of 360 months to life in prison based on facts rejected by the jury.[52] This was 25 years longer than any of his co-defendants, who opted to plead guilty, cooperate with the government against Jessie, or both.[53]

---

[47] *See id.,* ECF No. 797 (sentencing transcript on file with author).

[48] Jessie was found guilty of conspiracy to distribute crack cocaine in count 1. That count specifically alleged 1,947.58 grams of crack cocaine. At sentencing, all parties understood that the jury's finding limited the scope of Jessie's participation in the conspiracy to the date November 19, 1993 (the conduct alleged in counts 26 through 28) because the jury wrote on the verdict form, "as related to counts # 26, 27, and 28 on 11/19/93 only." The jury hung on counts three and twelve. The jury convicted him of one other drug count (count 6) and two food stamp counts (counts 7 and 9). At sentencing all parties referred to the conduct alleged in the remaining counts that would have made up the remainder of the 1947.58 grams as acquitted conduct. The verdict form was, in some respects, treated like a special verdict form. The fact that the jury returned a verdict of guilty to count one, limiting the scope of Jessie's participation to approximately 33.81 grams, was not in dispute at the time of sentencing.

[49] *See id.*, ECF No. 985, at 3 (motion to reduce sentence).

[50] I reviewed the PSR and sentencing transcript when preparing these comments.

[51] *See Ailsworth*, *supra* note 45, at ECF No. 797

[52] *See id;* USSG §2D1.1(c)(6) (1994).

[53] *See Ailsworth*, *supra* note 45, at ECF No. 797.

Jessie's case is not simply a tale of injustice for one man.[54] His case is an example of the daunting effect of acquitted conduct sentencing on those who wish to exercise their constitutional right to trial. I knew Jessie's story long before I became the Federal Defender and before our office represented him in First Step Act litigation in 2019. For years, Jessie's success at trial and concomitant loss at sentencing was the lesson that federal court was no place for a jury trial. Jessie's case was the example drilled into my head as a new Assistant Federal Public Defender that trial in federal court was an all-or-nothing game. It was the example we repeatedly, and to my great shame and regret today, used to convince clients to plead guilty rather than risk a trial, regardless of the strength of their defense.[55] I can only conclude that his 30-year sentence, after the jury gutted the prosecution's case, emboldened prosecutors to aggressively and indiscriminately overcharge, knowing they only needed to secure a conviction on one count to request a sentence based on every allegation.

While we are able to talk about the identifiable harm or threat of harm acquitted conduct sentencing posed in these three cases, it is impossible to capture or calculate the damage done to so many clients who should have and could have gone to trial—in our system that was conceived and based on jury

---

[54] Although, indeed, Jessie's case involved multiple layers of personal injustice. In addition to being sentenced for acquitted conduct, Jessie was punished for crack cocaine distribution during the era of the now universally repudiated 100:1 crack to powder cocaine quantity ratio. Beginning in 1995, the Commission urged Congress to abandon the sentencing structure that treated the two forms of cocaine differently and resulted in disproportionately severe sentences for people of color for over two decades. In 1995, the Commission issued a special report to Congress stating it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy, Executive Summary* xii-xv & 192 (1995). The ratio has since been reduced to 18:1. Today, a drug offense involving approximately 34 grams of crack would receive a base offense level (BOL) of 24. In 1996, when Jessie was sentenced, a drug offense involving 34 grams of crack would have received a BOL of 28. *See* USSG §2D1.1 (Nov. 1, 1995). However, because the court used acquitted conduct, Jessie's BOL was 38.

[55] Obviously, this does not apply in single-count indictments. But in federal court, as least in our district, those are mostly felon-in-possession or immigration cases. Our bread-and-butter drug-weapon-conspiracy cases are almost always multiple count indictments. Most white-collar and child pornography cases are also multi-count indictments that carry the same risk of acquitted conduct sentencing.

trials—but did not, because of the risks writ large, exemplified by Jessie Ailsworth's experience, and the experiences of people like him in other districts.

Jessie served 25 years before he was released under the First Step Act.[56] In June 2022, the district court granted Jessie's unopposed motion for early termination of his supervised release term.[57] Today, Jessie has been out of custody for 4 years, and is still adjusting to life since his release. He has his commercial driver's license and drives a truck for a living. He lost his only brother while he was in prison. He missed watching his nephews and other family members grow up. More importantly, during those 25 years when I was building my career as a Federal Defender and raising my own two children, Jessie lost the chance to have children of his own. There is not enough room or time to talk about everything that Jessie lost during those 25 years he served in prison for the very crimes he didn't commit, according to the unanimous jury of 12 who heard and rejected the government's accusation.

III. The Commission should eliminate, rather than limit, the use of acquitted conduct to determine the guideline range.

The Commission should eliminate, rather than limit, the use of acquitted conduct to calculate the sentencing guideline range. Section 1B1.3(c)(1) of the proposal potentially allows acquitted conduct to be used to determine the guideline range under two unusual circumstances. Namely, "acquitted conduct" must not be used to calculate the sentencing range "unless such conduct (A) was admitted by the defendant during a guilty plea colloquy; or (B) was found by the trier of fact beyond a reasonable doubt . . . ."[58] These two limitations are unnecessary, opaque, and may lead to unintended consequences. A clearer rule would state: "Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range." This language and the definition of acquitted conduct at

---

[56] *See Ailsworth*, *supra* note 45, at ECF Nos. 985 and 986.

[57] *See id.* at 994.

[58] *See* 88 Fed. Reg. 7180, 7225 (2023) ("2023 Proposed Amendments").

proposed §1B1.3(c)(2) provide sufficient guidance to courts to apply the guideline.

The Commission raises concerns about the scope of a jury's acquittal where there is "overlapping conduct" among the counts of conviction and acquittal. These scenarios are likely to be so rare as to be anomalous. And policy should not be built on anomalies. For instance, courts and parties attempt to guard against inconsistent verdicts through arguments and instructions to the jury. In most cases, the preclusive effect of the jury's verdict will be clear. If anomalies occur, courts are in the best position to decipher the parameters of the jury's "guilty" and "not guilty" verdict, after hearing arguments from both sides, and to sentence accordingly under § 3553(a). Creating special rules in anticipation of anomalies dilutes and muddles the guideline in the face of strong policy reasons for a general prohibition. Moreover, the Commission can revisit the rule, if necessary, once it has been in place for some time and after receiving feedback from courts and commentators about its workability. This is how the guideline amendment process was intended to work.[59]

IV. The policy reasons to eliminate acquitted conduct from the guideline calculation apply equally to within-guideline and vertical and horizontal departure sentences.

In addition to the changes proposed at USSG §1B1.3 that define and limit acquitted conduct sentencing, the Commission proposes to amend the policy statement at §6A1.3 (Resolution of Disputed Factors). The proposal reads:

> Acquitted conduct, however, generally should not be considered relevant conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). *Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a

[59] *See Rita v. United States*, 551 U.S. 338, 350 (2007) ("The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.").

Point Within the Guideline Range or Departing from the Guidelines)).[60]

The Commission should prohibit the consideration of acquitted conduct when calculating the guidelines—both when determining the initial range, and when determining whether any departures apply. The many policy reasons against using acquitted conduct to increase the offense level apply to *all* sentencing determinations, including *all* applications of the guidelines. There is no reason for the Commission to invite courts to depart upward or sentence at the top of the range to account for acquitted conduct that is excluded from calculating the offense level. The proposed italicized language creates an unnecessary exception to the Commission's laudable new rule and charts a potential end-run around the salutary effect of the relevant conduct amendment.

United States v. Brady, 928 F.2d 844 (9th Cir. 1991) is a prime example of the injustice of using acquitted conduct to vertically depart (along the offense level axis) from the guideline range. Leon Brady was charged with first degree murder and assault with intent to commit murder.[61] At trial, he was acquitted of the greater offenses and convicted of voluntary manslaughter and assault with a dangerous weapon.[62] The sentencing judge departed above the 51 to 63-month guideline range and sentenced Mr. Brady to 180 months, in part because the court believed Mr. Brady was guilty of the greater offenses.[63] The Ninth Circuit reversed. It held, in relevant part, that the *upward departure* to account for acquitted conduct was improper because it effectively overruled the jury's verdict, bringing it outside the bounds of the relevant conduct guideline.[64]

---

[60] *See* 2023 Proposed Amendments, at 7225.

[61] *See Brady*, 928 F.2d at 845.

[62] *See id.* at 845-46.

[63] *See id.* at 846.

[64] *See id.* at 851-52; *see also United States v. Brown,* 892 F.3d at 409 (Millett, J., concurring) ("[U]sing [acquitted] conduct to single a defendant out for distinctively severe punishment—*an above-Guidelines sentence*—renders the jury a sideshow. Without so much as a nod to the niceties of constitutional process, the government plows ahead incarcerating its citizens for lengthy terms of imprisonment without the inconvenience of having to convince jurors of facts beyond a reasonable doubt." (emphasis added)); *Bell*, 808 F.3d at 931 (Millet, J., concurring in the denial of

United States v. Fonner, 920 F.2d 1330 (7th Cir. 1991), provides a compelling example of the injustice of using acquitted conduct to horizontally depart (along the criminal history axis) from the guideline range. Barron Fonner was acquitted of murder in 1972 when the jury concluded unanimously that he acted in self-defense.[65] More than 15 years later, Mr. Fonner was convicted in federal court of mailing threats, under 18 U.S.C. § 876.[66] Although his federal sentencing range for the threats conviction was only 30 to 37 months, the district judge departed to the statutory maximum of 10 years, in part because he believed Mr. Fonner's criminal history score underrepresented his record, under USSG §4A1.3, because the 1972 *acquittal* was not scored as criminal history.[67] The Seventh Circuit remanded for resentencing because the district court did not adequately justify the extent of the departure.[68] But it endorsed the district court's use of Mr. Fonner's jury acquittal to depart above his range based on the different burdens of proof at trial and sentencing, and existing circuit precedent.[69]

18 U.S.C. § 3661 does not compel the Commission to carve departures out of an acquitted conduct prohibition. Section § 3661 provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[70] But the "no limitation" language should not be read

---

rehearing en banc) (explaining that recent Supreme Court decisions "cast substantial doubt on the continuing vitality" of imposing "dramatic *departures* from the Sentencing Guidelines range based on acquitted conduct" (emphasis added)).

[65] *See Fonner*, 920 F.2d at1331.

[66] *See id.*

[67] *See id.* Courts may depart upward "[i]f reliable information indicates that the defendant's criminal history category substantially underrepresents the likelihood that the defendant will commit other crimes." USSG §4A1.3(a). "Prior similar adult criminal conduct not resulting in a criminal conviction" is given as an example of the information that may form the basis of the departure. *Id.* §4A1.3(2)(E).

[68] *See id.* at 1332.

[69] *See id.* at 1333.

[70] 18 U.S.C. § 3661.

expansively. Otherwise, it "negates the entire Guidelines enterprise"[71] and conflicts with other portions of the SRA.[72]

A primary purpose of the SRA was to "cabin the discretion of all [sentencing] judges" to remedy what Congress viewed as "'an unjustifiably wide range of sentences.'"[73] In line with this purpose, the guidelines and SRA limit information judges consider at sentencing related to the convicted person's "background, character, and conduct" in numerous ways.[74] For instance, §5K1.1 and the SRA require a government motion before a court can depart based on substantial assistance to authorities.[75] The guidelines list various "specific offender characteristics"—such as educational/vocational skills, drug/alcohol/gambling addiction, family responsibilities, and lack of guidance as a youth—that courts must generally disregard in deciding whether to *depart*.[76] Prior convictions deemed minor or too remote in time are excluded from the criminal history calculation.[77] Likewise, a prior arrest record, alone, is not grounds for upward departure based on inadequate Criminal History Category.[78] More generally, the guidelines limit the weight courts accord specific factors through its mathematical system of adding and subtracting points and levels. Read literally, § 3661 would even seem to invalidate the well-recognized "preponderance of the evidence" evidentiary burden at sentencing—a limitation on the court's ability to base sentencing

---

[71] Johnson, *supra* note 7, at 37.

[72] Courts have argued that instead of *effectuating* statutory goals and requirements, acquitted conduct sentencing *frustrates* them. *See White*, 551 F.3d at 395 (Merritt, J., dissenting) (the plain language of the Sentencing Reform Act requires a defendant to be "convicted" of the conduct that forms the basis for the sentence); *Ibanga*, 454 F. Supp. 2d at 539 (punishing for acquitted conduct contravenes 18 U.S.C. § 3553(a)(2)(A)'s requirement that the sentence promote respect for the law and results in just punishment for the offense of conviction).

[73] *United States v. Watts*, 519 U.S. at 161 (Stevens, J., dissenting) (quoting S. Rep. No. 98-225, p. 38 (1983)).

[74] 18 U.S.C. § 3661.

[75] *See* USSG §5K1.1; 18 U.S.C. § 3553(e).

[76] *See* USSG ch. 5, pt. H. We note that while the guidelines discourage or prohibit consideration of these factors as grounds to *depart*, courts can (and often do) consider these factors as reasons to *vary* below the guidelines. *See* 18 U.S.C. § 3553(a).

[77] *See* USSG §4A1.2.

[78] *See* USSG §4A1.3(a)(3).

decisions on unreliable evidence. Thus, § 3661 "pose[s] no threat to the Commission's authority to determine the content of the Guidelines, including whether sentencing courts [can] use acquitted conduct." [79]

Finally, an uneven rule that treats guideline calculations and departures/within-guideline determinations differently does not fully rectify the unwarranted disparities problem.[80] While the proposed §1B1.3 amendment mitigates this risk, some judges may still be inclined to consider acquitted conduct when applying the guidelines, even if it is not part of the offense level calculation, either by imposing a sentence at the high end of the range or by way of upward departure.

Although the Supreme Court has yet to invalidate acquitted conduct sentencing altogether, and courts may still consider acquitted conduct when imposing a final sentence under § 3553(a), the Commission should not encourage this practice. Thus, we urge the Commission to delete the proposed statement that "*Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted.*" We further urge the Commission to amend §§1B1.4, 4A1.3 (which the district court applied to Mr. Fonner's case), and 5K2.0 (which the district court applied to Mr. Brady's case) to make clear that acquitted conduct may not be considered at any point when applying the guidelines.

---

[79] Johnson, *supra* note 7, at 41. The House Report on the predecessor version of § 3661 cites the Supreme Court's decision in *Williams v. New York*, 337 U.S. 241 (1949) to explain its enactment. *See United States v. Grayson*, 438 U.S. 41, 50 n. 10 (1978) (citing H.R. Rep. No. 91-1549, at 63 (1970)). Thus, § 3661 can be understood to codify the holding in *Williams* that due process does not mandate application of the rules of evidence and confrontation clause at sentencing. *See Williams*, 337 U.S. at 250-51; *see also Watts*, 519 U.S. at 160 (Stevens, J., dissenting) ("In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U.S.C. § 3661 *to make it clear that otherwise inadmissible evidence could be considered* by judges in the exercise of their sentencing discretion." (Emphasis added)).

[80] *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f) (describing one mission of the Commission as establishing policies that avoid unwarranted disparities in sentencing similarly situated individuals).

V. The limitation on the use of acquitted conduct at sentencing should not be narrowed based on the nature of the acquittal.

Finally, the Commission seeks comment on whether the limitation on the use of acquitted conduct is too narrow or too broad. As an example, the Commission asks whether it should "account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?"[81]

Again, the Commission should not narrow the rule to account for outlier scenarios. "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it."[82] It is "a legal certification [that] an accused person is not guilty of the charged offense."[83] In our justice system, an acquittal is both "final, the last word on a criminal charge"[84] and "unassailable."[85] Creating entire categories of acquittals exempt from the amendment diminishes the force and finality of the verdict, erodes the safeguards of the Fifth and Sixth Amendments, and undermines the ameliorative function of the proposed rule by sanctioning punishment for an acquitted offense in certain circumstances.

Any attempt to define exempt categories of acquittals "otherwise unrelated to the substantive evidence" risks over-complicating the guideline calculation. Courts would need to attempt to ascertain the basis for the jury's

---

[81] *See* 2023 Proposed Amendments, at 7225.

[82] *Yeager v. United States*, 557 U.S. 110, 122 (2009).

[83] Black's Law Dictionary 30 (11th ed. 2019).

[84] *Bravo-Fernandez v. United States*, 580 U.S. 5, 9 (2016) (citation and quotation marks omitted).

[85] *Yeager*, 557 U.S. at 123.

verdict[86] and whether it implicates "substantive evidence".[87] It potentially opens the door to consideration of acquittals based on affirmative defenses, such as duress or entrapment. It would be further complicated if multiple or even inconsistent defenses were presented. Disagreement among judges on these questions, or whether the carve-out was a proper policy choice to begin with,[88] can lead to disparities in sentencing similarly situated individuals. A simple, clear, inclusive prohibition best promotes the policies for the rule, promotes more uniformity, and is easiest to apply.

VI. Conclusion

Defenders commend the Commission for its salient work on this amendment. We encourage the Commission to: (1) eliminate, rather than just limit, the use of acquitted conduct to calculate the guideline range; and (2) prohibit horizontal and vertical departures and within-guideline sentences based on acquitted conduct. We also urge against any narrowing of the limitation on the use of acquitted conduct to account for acquittals "unrelated to the substantive evidence." If the Commission is going to end acquitted conduct-based sentencing, it should do so fully and unequivocally. The pursuit of both the reality and appearance of justice demands no less.

---

[86] This task is not always easy. Jury deliberations have been described as a "black box" where "the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review." *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). With limited exceptions, *see* Fed. R. Evid. 606(b)(2); *Pena-Rodriguez*, 580 U.S. at 225-26, the Rules of Evidence forbid courts from inquiring into juror decision-making once a verdict is rendered. *See* Fed. R. Evid. 606(b)(1).

[87] The "substantive" nature of the acquittal may also be the subject of dispute among judges. *Cf.*, *United States v. Johnson*, 323 U.S. 273, 276 (1944) ("Questions of venue in criminal cases . . . are not merely matters of formal legal procedure."); *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J. concurring in part) (observing that the constitutional venue provisions "were adopted to achieve important substantive ends"), *rev'd on other grounds*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

[88] Judges can vary below the guidelines based on policy disagreements with the Commission. *See Spears v. United States*, 555 U.S. 261, 264 (2009); *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).