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February 22, 2024

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

Re: Public Comment on 2024 Proposed Amendments #2 (Youthful Individuals), #3 (Acquitted Conduct), and #7 (Simplification)

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's proposed 2024 amendments. Enclosed are Defenders' comments on three of the proposed amendments. We will present our comments on additional proposed amendments next week, in the form of witness statements.

Following are our enclosed comments on:

Proposal 2: Youthful Individuals

Proposal 3: Acquitted Conduct

Proposal 7: Simplification

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Jonathan J. Wroblewski, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders Comment on Acquitted Conduct

(Proposal 3)

February 22, 2024

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A jury convicted Dayonta McClinton of robbing a pharmacy and brandishing a firearm during the robbery but acquitted him of robbing and murdering one of his confederates.[1] The sentencing court found that the government proved the murder by a preponderance of the evidence and, based on the acquitted conduct, increased Mr. McClinton's sentencing range from 57 to 71 months, to a staggering 324 months to life in prison; it imposed a 228-month sentence.[2]

Eric Osby was convicted after trial of two counts of possession with intent to distribute drugs, which, alone, would have carried a sentencing guideline range of 24 to 30 months in prison.[3] He was acquitted of five additional counts related to drug distribution and weapon possession.[4] Nevertheless, he was sentenced as if he had been convicted of all seven counts, to 87 months in prison: the bottom of the guideline range that incorporated the acquitted conduct.[5]

Miguel Cabrera-Rangel was in an altercation with a border patrol agent.[6] He was acquitted at trial of assault on a federal officer by physical contact inflicting bodily injury, but was convicted of the lesser-included offense of assault on a federal officer by physical contact.[7] At sentencing, the court applied the aggravated assault guideline despite the acquittal, which raised Mr. Cabrera-Rangel's guideline range from 24 to 30 months, to 77 to 96 months.[8] The court sentenced him to 96 months in prison.[9]

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[1] *See* Petition for Writ of Certiorari at 5–7, *McClinton v. United States*, No. 21-1557 (June 10, 2022)), http://tinyurl.com/4x2bhrur.

[2] *See id.* at 7–9.

[3] *See* Petition for Writ of Certiorari at 4–5, *Osby v. United States*, No. 20-1693 (June 1, 2021), 2021 WL 2337153.

[4] *See id.*

[5] *See id.* at 5–7.

[6] *See* Petition for Writ of Certiorari at 3–4, *Cabrera-Rangel v. United States*, No. 18-650 (U.S. Nov. 19, 2018), 2018 WL 6065310.

[7] *See id.*

[8] See *id.* at 5.

[9] *See id.* at 6.

Increasing a person's sentencing guideline range based on acquitted conduct is deeply problematic.[10] Yet, these are just a handful of the many instances where courts have relied on acquitted conduct to increase a person's sentence under the relevant-conduct rules, USSG §1B1.3.

Acquitted-conduct sentencing has drawn intense scrutiny and opprobrium in recent years.[11] This is nothing new. State and federal jurists from around the country—including Justices of the United States Supreme Court—have, for decades, expressed grave misgivings about the use of acquitted conduct at sentencing.[12] In 2009, Justice (then-Judge) Brett

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[10] Defenders refer to this practice as "acquitted-conduct sentencing."

[11] Numerous commenters wrote to the Commission last year about its acquitted conduct proposal; most strongly favored limiting or eliminating the use of acquitted conduct to enhance the guideline range. USSC, *Public Comments on Proposed Amendment No. 8 – Acquitted Conduct* (Mar. 14, 2023), http://tinyurl.com/3macvp9j; *see also United States v. Medley*, 34 F.4th 326, 336 & n.3 (4th Cir. 2022) (noting the "growing number of critics" of acquitted-conduct sentencing and collecting cases).

[12] *See, e.g.*, *McClinton v. United States*, 143 S. Ct. 2400, 2401–03 (2023) (Sotomayor, J., statement respecting the denial of certiorari) (recognizing several constitutional and policy "concerns" raised by using acquitted conduct to enhance a sentence and stating if the Sentencing Commission "does not act expeditiously or chooses not to act" to resolve these issues, the Supreme Court may need to step in); *United States v. Watts*, 519 U.S. 148, 168 (1997) (Stevens, J., dissenting) ("It is difficult to square [28 U.S.C. § 994(l)'s] explicit statutory command to impose incremental punishment for each of the 'multiple offenses' of which a defendant 'is convicted' with the conclusion that Congress intended incremental punishment for each offense of which the defendant has been acquitted."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Given the Supreme Court's case law, it will likely take some combination of Congress and the Sentencing Commission to *systematically* change federal sentencing to preclude use of acquitted or uncharged conduct."); *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("In my view, the Constitution forbids judges—Guidelines or no Guidelines—from using 'acquitted conduct' to enhance a defendant's sentence because it violates his or her due process right to notice and usurps the jury's Sixth Amendment fact-finding role."); *United States v. White*, 551 F.3d 381, 391–97 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (discussing this matter and concluding by remarking that "the drafters of the Declaration of Independence, the Constitution, and the Sentencing Reform Act of 1984" would agree with the proposition that it is wrong for a judge to sentence an individual based on conduct of which the jury acquitted him); *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

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undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("[S]entence 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) (commenting before *Watts* that the panel "believe[s] that a [person'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."); *United States v. Frias*, 39 F.3d 391, 393–94 (2d Cir. 1994) (Oakes, J., concurring) (explaining that the SRA's text and history support that acquitted-conduct sentencing should not be permitted); *United States v. Hunter*, 19 F.3d 895, 897–98 (4th Cir. 1994) (Hall, J., concurring) (expressing the view that a person "should not be punished" for a acquitted conduct); *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting from denial of rehearing en banc) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."); *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) ("We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."), *abrogated by Watts*, 519 U.S. 148; *United States v. Martinez*, 769 F. App'x 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (unpublished summary order) ("While I concur with the outcome in this case, I believe that the district court's practice of using acquitted conduct to enhance a [person's] sentence—here, to life imprisonment—is fundamentally unfair."); *United States v. Safavian*, 461 F. Supp. 2d 76, 83 (D.D.C. 2006) (Friedman, J.) ("This Court declines to exercise its discretion under the advisory Guidelines to consider [acquitted] conduct, because it has long believed that consideration of acquitted conduct 'trivializes legal guilt or legal innocence,' which is what a jury decides." (quoting *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005))), *rev'd on other grounds*, 528 F.3d 957 (D.C. Cir. 2008); *United States v. Ibanga*, 454 F. Supp. 2d 532, 536–41 (E.D. Va. 2006) (Kelley, J.) (explaining that sentencing a person to time in prison for a crime the jury found he did not commit is a "Kafka-esque result" that "undermines the juror's role as both pupil and participant in civic affairs" and declining to do so under its § 3553(a) authority), *rev'd*, 271 F. App'x 298 (4th Cir. 2008) (per curiam unpublished opinion); *United States v. Coleman*, 370 F. Supp. 2d 661, 669–73 (S.D. Ohio 2005) (Marbley, J.) (explaining that "considering acquitted conduct would disregard completely the jury's role in determining guilt and innocence" and that acquitted-conduct sentencing "skews the criminal justice system's power differential too much in the prosecution's favor"); *State v. Melvin*, 258 A.3d 1075, 1092–94 (N.J. 2021) (holding that "once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable" and that the New Jersey state constitution forbids acquitted-conduct sentencing); *People v. Beck*, 939 N.W.2d 213, 226 (Mich. 2019) (holding that the U.S. Constitution's Fourteenth Amendment bars reliance on acquitted conduct at sentencing); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988) (holding that "due process and fundamental fairness" bar reliance on acquitted conduct at sentencing);

Kavanaugh testified at a Sentencing Commission regional hearing in favor of ending acquitted-conduct sentencing: "Whether they are mandatory or advisory, I think acquitted conduct should be barred from the guidelines calculation. I don't consider myself a particular softy on sentencing issues, but it really bothers me that acquitted conduct is counted in the [g]uidelines calculation."[13] Federal judges have implored the Supreme Court to rule that the use of acquitted conduct at sentencing is unconstitutional.[14] Congress has considered bipartisan legislation outlawing its use.[15] DOJ has at least acknowledged that "concerns [have been] raised by the Commission and litigants regarding the treatment of acquitted conduct and relevant conduct" in the guidelines.[16] And academics have roundly criticized the practice.[17]

State v. Cote, 530 A.2d 775, 785 (N.H. 1987) (holding that it is an abuse of discretion to rely at sentencing on conduct underlying acquitted charges); *cf. Watts*, 519 U.S. at 159 (Breyer, J., concurring) ("Given the role that juries and acquittals play in our system, the Commission could decide to revisit [acquitted-conduct sentencing] in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands.").

[13] Transcript of Public Hearing before the U.S. Sent'g Comm., New York, N.Y., at 42–43 (July 9, 2009) (Judge Kavanaugh), http://tiny.cc/65muwz.

[14] *See* Brief of 17 Former Federal Judges as Amici Curiae in Support of Petitioner at 5–6, *McClinton v. United States*, No. 21-1557 (U.S. Aug. 10, 2022), 2022 WL 3357692; Brief of Former Federal District Court Judges and Law Professors as Amici Curiae in Support of Petitioner at 3, *Osby v. United States*, No. 21-1693 (U.S. July 7, 2021), 2021 WL 2917700.

[15] *See, e.g.*, Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (2023); Jobs and Justice Act of 2018, H.R. 5785, 115th Cong. Div. B § 6006 (2018).

[16] Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm., at 4 (July 31, 2023), http://tinyurl.com/tw7rtat9.

[17] *See generally*, *e.g.*, 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 (2016) ("Johnson, *Puzzling Persistence*"); 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 (2015); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235 (2009); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523 (1993); Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153 (1996) ("Johnson, *If You Don't Succeed*").

It is time for the Commission to heal this "jagged scar on our constitutional complexion."[18] Defenders strongly urge the Commission to take the steps now that it has failed to take in the past, by prohibiting the use of acquitted conduct to determine guideline ranges.[19] That is, by adopting Option 1 of the current proposal, with some suggested modifications to the definition of "acquitted conduct" and to the proposed commentary at §6A1.3 (detailed in Sections II and III, below). To borrow from departed Supreme Court Justice Antonin Scalia: "This has gone on long enough."[20]

In the next sections, we explain why empirical data and strong public policy support Option 1, while Options 2 and 3 have serious shortcomings. We encourage the Commission to define "acquitted conduct" as "conduct underlying an acquittal" that includes state, local, or tribal acquittals. To address concerns about overlapping state and federal conduct, we support language making clear that conduct underlying a state acquittal does not include conduct the person admitted or for which she was convicted in the instant federal case. Finally, we urge the Commission to resist adding an invited departure provision to account for acquitted conduct.

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[18] *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., specially concurring).

[19] As in the past, we also urge the Commission to reconsider the use of uncharged and dismissed conduct, in addition to acquitted conduct, as a basis for enhanced punishment under the relevant-conduct rules. *See*, *e.g.*, Letter from Marjorie Meyers on behalf of Defenders to the U.S. Sent'g Comm., at 24–31 (May 17, 2013), http://tinyurl.com/bp5s4c5w (explaining that relevant-conduct rules create unwarranted disparities, provide prosecutors with too much power, undermine the jury trial right and presumption of innocence, and result in unduly harsh sentences, among other problems). However, there are fundamental differences between uncharged or dismissed conduct and acquitted conduct making it particularly salient for the Commission to act now to end acquitted-conduct sentencing. Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. Crim. L. & Criminology 809, 835 (1998) ("In the American criminal justice system an acquittal carries special weight."); *see also Beck*, 939 N.W.2d at 221–22 ("Acquitted conduct is, of course, different from uncharged conduct—acquitted conduct has been formally charged and specifically adjudicated by a jury.").

[20] *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from the denial of certiorari).

I. Of the three options, Option 1 best advances the goals and purposes of the federal sentencing statutory framework.

As an initial matter, the Commission's first option achieves what its proposal last year did not: a simple, bright-line rule excluding the use of acquitted conduct to calculate the sentencing guideline range, with tailored language addressing overlapping conduct moved to a definition section.[21] Defenders think this construction is clearer and better represents the Commission's goals than the circular limitations language previously proposed.

As we explore below, Option 1 is a better policy choice than Options 2 and 3.

A. There are numerous and significant policy reasons to exclude conduct underlying an acquittal from the guideline range determination (Option 1).

A primary objective of the Sentencing Reform Act of 1984 (SRA) was to develop a new "comprehensive and consistent statement of the federal law of sentencing, setting forth the purposes to be served by the sentencing system."[22] After enumerating those purposes in § 3553(a)(2), "Congress referred to [them] seventeen times in the course of its instructions to the Commission and the courts,"[23] including when instructing the Commission to set sentencing policies to assure the meeting of the purposes of sentencing.[24]

In line with this goal, there are myriad policy reasons to adopt Option 1. Only a prohibition on the use of acquitted conduct to determine the sentencing range—as opposed to a downward departure or change to the

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[21] The 2023 acquitted conduct proposal read: "(1) LIMITATION.—Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline 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; to establish, in whole or in part, the instant offense of conviction." USSC, 2023 Proposed Amendments at 213, http://tinyurl.com/3w8897mj.

[22] S. Rep. No. 98-225, at 39 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3222.

[23] Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1708 (1992).

[24] 28 U.S.C. § 991(b)(1)(A) (cross-referencing 18 U.S.C. § 3553(a)(2)).

burden of proof—honors the jury's verdict and fully advances the purposes of sentencing and the Commission's statutory obligations.

To explain why, it's important to first consider some ways in which acquitted conduct can inflate an individual's guideline range under the relevant-conduct rules. First, courts have applied offense-level enhancements for conduct underlying an acquitted charge.[25] In drug trafficking cases, for example, base offense levels have been determined by large drug quantities despite convictions for conduct involving much smaller amounts and acquittals for the larger amounts.[26] Similarly, in the financial-crimes context, individuals have been sentenced for loss amounts underlying acquitted charges.[27] Second, cross-references peppered throughout the guidelines

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[25] *See, e.g.*, *United States v. Gaspar-Felipe*, 4 F.4th 330, 343–44 & n.10 (5th Cir. 2021) (affirming application of 10-level enhancement at §2L1.1(b)(7)(D), for transportation of an undocumented immigrant resulting in death, despite jury's answer on special interrogatory of verdict form that Mr. Gaspar-Felipe was not responsible for the death); *United States v. White*, 551 F.3d 381, 382, 386 (6th Cir. 2008) (en banc) (affirming application of a 10-level enhancement to Mr. White's armed bank robbery offense level based on conduct for which he was acquitted); *United States v. Isom*, 886 F.2d 736, 737–39 (4th Cir. 1989) (where Mr. Isom was convicted of dealing in counterfeit obligations but acquitted of manufacturing the counterfeit obligations, affirming application of a 6-level enhancement for printing counterfeit bills).

[26] *See, e.g.*, *United States v. Jones*, 744 F.3d 1362, 1366, 1369–70 (D.C. Cir. 2014) (affirming three appellants' sentences ranging from 15 to 19 years where they were convicted of distributing small quantities of crack cocaine, but the guideline ranges (324 to 405, 262 to 327, and 292 to 365 months) were based largely on acquitted drug conspiracy charge); *see also* Brief of Appellants at 11, *United States v. Jones*, No. 08-3033, 10-3108, 11-3031 (D.C. Cir. July 11, 2013), 2013 WL 3484367 (noting that the guideline ranges for just the distribution charges would have been 33 to 41, 27 to 33, and 51 to 71 months); *United States v. Mendez*, 498 F.3d 423, 425–27 & n.1 (6th Cir. 2007) (per curiam) (where jury found that Mr. Mendez participated in a conspiracy to distribute at least 50 but less than 500 grams of methamphetamine, district court did not err in attributing to him 2.95 kg of methamphetamine, which increased the guideline range from 63 to 78 to 151 to 188 months, or in imposing a 151-month sentence); *United States v. Vaughn*, 430 F.3d 518, 521, 526–527 (2d Cir. 2005) (where jury found on special interrogatory that prosecutor had proven appellants' conduct involved at least 50 kg but not more than 100 kg of marijuana, district court did not err in sentencing appellants based on 544 kg of marijuana).

[27] *See, e.g.*, *United States v. Bolton*, 908 F.3d 75, 96 (5th Cir. 2018) ("Additionally, the district court's inclusion of the loss amount from Count 1 was

permit courts to sentence individuals as if they had been convicted of a different, more serious offense—even murder—despite having been acquitted of that more serious offense.[28] Third, certain guidelines contain alternative base offense levels for underlying activity, which can include acquitted conduct.[29] And, it is important to keep in mind that while many cases of acquitted-conduct sentencing involve split verdicts, others involve conduct for which the individual was acquitted outright in another proceeding—sometimes in a different forum.[30]

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proper. Charles's acquittal on Count 1 did not prevent the district court from considering the conduct underlying the acquitted charge as long as it was proven be a preponderance of the evidence, which it was in this case."); *cf. Pimental*, 367 F. Supp. 2d at 145–46 (declining government's invitation to calculate loss amount for mail fraud conviction based on the entire scheme charged in the indictment, including acquitted conduct).

[28] *See supra* nn. 1–2 (*McClinton*); *see also, e.g.*, Petition for Writ of Certiorari at 2–3, *Karr v. United States*, No. 22-5345 (U.S. Aug. 10, 2022), http://tinyurl.com/6pk3sv2p (application of homicide cross-reference in robbery guideline despite jury's special finding that Mr. Karr's conduct did not result in the death of another person, resulting in a 595-month sentence); Petition for Writ of Certiorari at 10–11, *Martinez v. United States*, No. 19-5346 (U.S. July 20, 2019), http://tinyurl.com/mtjb53h2 (application of homicide cross-reference in drug guidelines despite jury's acquittal on all four counts related to murder, resulting in a life sentence); *Concepcion*, 983 F.2d at 385–86, 389 (upholding application of drug conspiracy cross-reference in firearms guideline despite jury's acquittal on the drug counts, increasing the guideline range from 12 to 18 months to 210 to 262 months). The application of the murder cross-reference in these circumstances is particularly odious, generally resulting in a guideline range that calls for "the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections, such as the requirement of proof beyond a reasonable doubt." *United States v. Lombard (Lombard I)*, 72 F.3d 170, 177 (1st Cir. 1995).

[29] *See, e.g.*, *United States v. Bravo*, 26 F.4th 387, 398 (7th Cir. 2022) (explaining that Appellant Luczak's base offense level for racketeering conviction jumped from 33 to 43 for murder despite jury's special finding that the government had not proven the murder); *Ibanga*, 454 F. Supp. 2d at 532, 534–35 (where Mr. Ibanga was convicted of money laundering and acquitted of all drug-trafficking charges, the PSR calculated the money-laundering guideline's base offense level with reference to drug quantity, elevating the guideline range from 51 to 63 months to 151 to 188 months).

[30] *See, e.g.*, *United States v. Stroud*, 673 F.3d 854, 858–59 (8th Cir. 2012) (district court applied murder cross-reference in firearm guideline despite state

1. Honoring the jury's verdict and promoting respect for and confidence in our criminal legal system.

One purpose of sentencing is to promote respect for the law.[31] Inherent in promoting this respect is the need to fortify confidence in our criminal legal and jury trial systems. Such confidence is premised, in part, on the understanding that "once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable."[32] This is because acquittals have "special weight": they are treated as inviolate, even when a judge believes the jury is wrong.[33] Juries have, for centuries, provided a necessary safeguard against governmental overreach and oppression.[34] The Founders considered the right to trial by jury, together with the right to vote, to be "the heart and lungs of liberty."[35]

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court acquittals on murder charges); *Lombard I*, 72 F.3d at 172 (affirming the district court's application of the murder cross-reference in federal firearms guideline to impose a life sentence (under mandatory guidelines), where Mr. Lombard was acquitted of the murder in state court and the district court was "greatly troubled" by the sentence); *United States v. Milton*, 27 F.3d 203, 205, 208–09 (6th Cir. 1994) (affirming application of cross-reference to the second-degree murder guideline from the firearms guideline, despite state-court acquittal, after bench trial, on second-degree murder charge).

[31] *See* 18 U.S.C. § 3553(a)(2)(A).

[32] *Melvin*, 258 A.3d at 1094.

[33] *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *see also McElrath v. Georgia*, No. 22-721, slip. op. at 6 (U.S. Feb. 21, 2024), http://tinyurl.com/avjukb77 ("Once rendered, a jury's verdict of acquittal is inviolate.").

[34] *See McElrath*, slip. op. at 6 (stating a verdict of acquittal is final and cannot be reviewed for error or otherwise "to preserve the jury's 'overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction[]'" (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977))); Brief of the Cato Institute as Amicus Curiae Supporting Petitioner at 3–4, *McClinton v. United States*, No. 21-1557 (U.S. July 14, 2022), 2022 WL 2819575 ("The tradition of independent juries standing as a barrier against unsupported or unjust prosecutions pre-dates the signing of Magna Carta, and likely even the Norman Conquest." (citations omitted)); Ngov at 276–77 ("As early as 1628, it was understood that the judge was charged with the duty to decide the law and the jury with the duty to decide facts.").

[35] *United States v. Haymond*, 588 U.S. ---, 139 S. Ct. 2369, 2375 (2019) (citing Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)); *see also Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) ("[The

In addition to the accused individual's interest in seeing an acquittal respected, "the community itself has a strong interest, complementary to but separate from that of the [accused], in seeing that its verdicts—rendered through a jury process that 'the Constitution regards as the most likely to produce a fair result,'—are given great deference."[36] A jury's verdict of acquittal "represents the community's collective judgment" that the government failed to meet its burden of proving the accused guilty beyond a reasonable doubt, and that he should therefore not be punished.[37] And when jurors render a partial acquittal through a mixed verdict, they wield a well-recognized, longstanding, and important power to "modulate a [person's] punishment."[38]

Acquitted-conduct sentencing turns a jury's "not guilty" verdict into a mere formality, relegated to advisory opinion status: a "liberty-protecting bulwark becomes little more than a speed bump at sentencing."[39] This

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right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Neder v. United States*, 577 U.S. 1, 30 (1999) (Scalia, J., joined by Souter & Ginsburg, JJ., concurring in part and dissenting in part) ("When this Court deals with the content of [the jury trial] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

[36] Brief of the Cato Institute at 6 (quoting *Yeager v. United States*, 557 U.S. 110, 122 (2009)); *cf. McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., statement respecting the denial of certiorari) (explaining that "jurors themselves" also have an interest in seeing their judgments respected, after taking time out of their lives to fulfill their important constitutional role).

[37] *See Yeager*, 557 U.S. at 122.

[38] *Cabrera-Rangel* Petition at 15; *see also* Petition for Writ of Certiorari at 22, *Gaspar-Felipe v. United States*, No. 21-882 (Dec. 10, 2021), 2021 WL 5930606 ("Historically, a jury exercised its power as the conscience of the community not only through acquitting a defendant altogether but also through indirectly checking the potential or inevitable severity of sentences by issuing what today we would call verdicts to lesser included offenses—convicting on some counts and acquitting on others." (internal quotation marks, brackets, and ellipses omitted)).

[39] *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc); *see also United States v. Jones*, 863 F. Supp. 575, 578 (N.D. Ohio 1994) ("The right to a trial by jury means little if a sentencing judge can effectively veto the jury's acquittal on one charge and sentence the defendant as though he had been convicted of that charge.").

diminishes "the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system."[40]

Only an outright ban on using conduct underlying an acquittal to determine the guideline range would respect the jury's historical, institutional role, thereby promoting respect for the law and criminal legal system.

2. Avoiding unwarranted disparities.

The Commission and sentencing courts must also avoid unwarranted disparities in sentencing outcomes.[41] More specifically, Congress's concern about "unwarranted disparities" is about "unwarranted sentence disparities among defendants with similar records who have been *found guilty of* similar conduct."[42] Excluding acquitted conduct from the relevant-conduct rule promotes this important goal.

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[40] *McClinton*, 143 S. Ct. at 2402–03 (Sotomayor, J., Statement respecting the denial of certiorari); *see also Faust*, 456 F.3d at 1353 (Barkett, J., specially concurring) (describing how acquitted-conduct sentencing "'violates those fundamental conceptions of justice which define the community's sense of fair play and decency'" (quoting *Dowling v. United States*, 493 U.S. 342, 353 (1990))); *Lanoue*, 71 F.3d at 984 ("[W]e believe that the Guidelines' apparent requirement that courts sentence for acquitted conduct lacks the appearance of justice."); Transcript of Sentencing at 4–6, *United States v. Nieves*, No. 1:19-cr-354, ECF No. 134 (S.D.N.Y. July 27, 2021) ("[T]here's something unseemly about increasing the guidelines for a crime of which a defendant has been acquitted. . . . [I]s it not bad policy for me to increase the guidelines under these circumstances? . . . [I]t seems to me it sends a very wrong message about our criminal justice system."); Johnson, *If You Don't Succeed* at 185 ("The message that a [person] may permissibly be punished for conduct for which a jury found him not guilty is so counterintuitive to ordinary citizens, that it cannot help but have a negative impact on public confidence in the criminal justice system."); Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1463 (2010) ("[I]f an onlooker sees a [person] sentenced in part for acquitted conduct that the onlooker codes as 'conduct of which the [person] was innocent,' he will assume the criminal justice system is unjust and cease to put faith therein.").

[41] *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(f); 18 U.S.C. § 3553(a)(6).

[42] 18 U.S.C. § 3553(a)(6) (emphasis added); *see also* 28 U.S.C. § 991(b)(1)(B) (charging the Sentencing Commission with establishing sentencing policies and practices that would "avoid[] unwarranted sentencing disparities among defendants with similar records *who have been found guilty of similar criminal conduct*" (emphasis added)).

The Commission has recognized that unwarranted disparities occur not only when there is "different treatment of individual[s] who are similar in relevant ways," but also when there is "similar treatment of individual[s] who differ in characteristics that are relevant to the purposes of sentencing."[43] And perhaps the most important characteristic is one Congress itself highlighted: whether individuals "have been *found guilty of* similar conduct."[44] This language makes clear that Congress expected sentencing ranges and sentences to be tied to convictions, not acquittals. Thus, acquitted-conduct sentencing *necessarily* creates unwarranted disparities: it treats differently-situated people (those acquitted of an offense and those convicted of it) the same. And it treats similarly-situated people (those found guilty of the same offense) differently.

Moreover, when judges attempt to avoid these unwarranted disparities by refusing to engage in acquitted-conduct sentencing, they expose a secondary disparity that is geographical, or even judge-by-judge: between individuals sentenced according to the relevant-conduct rule as written and individuals sentenced by judges who reject—rightfully—ranges enhanced by acquitted conduct as poor sentencing policy.[45] The bottom line is that as long as the relevant-conduct guideline includes acquitted conduct, unwarranted disparities are "inescapable."[46] Thus, excluding conduct underlying an acquittal from the calculated range would significantly reduce unwarranted disparities.[47]

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[43] *See* USSC, Fifteen Years of Guideline Sentencing 113 (2004) (emphasis omitted), http://tinyurl.com/2mab7yzr.

[44] 18 U.S.C. § 3553(a)(6) (emphasis added).

[45] *See, e.g.*, *United States v. Khatallah*, 41 F.4th 608, 645–47 (D.C. Cir. 2022) (noting that the district court varied below Mr. Khatallah's guideline range of life plus ten years to 22 years' imprisonment because the jury concluded that Mr. Khatallah's actions did not result in death); *Ibanga*, 454 F. Supp. 2d at 533; *Pimental*, 367 F. Supp. 2d at 149–53; *cf. Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc) (noting, with approval, a sentencing courts' ability to reject guidelines increased by acquitted conduct); *Vaughn*, 430 F.3d at 527 (same).

[46] *See* Outlaw at 180.

[47] To be sure, courts enjoy broad discretion to fashion sentences under 18 U.S.C. § 3553(a). A rule excluding acquitted conduct from the relevant-conduct guideline

3. Reflecting the severity of the offense.

Sentences and sentencing policy must also reflect offense severity.[48] In implementing the SRA, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[49] In addition to the disparities language of § 3553(a)(6), Congress's command in the Enabling Act, § 994(l), that the Commission must ensure the guidelines reflect "the appropriateness of imposing an incremental penalty for each offense in a case in which a [person] is *convicted of* [certain multiple offenses]," reveals its intent that sentence length be keyed to *convicted conduct*—rather than acquitted conduct—as the appropriate indicator of offense seriousness.[50]

This makes sense. Guidelines enhanced by acquitted conduct are out of all proportion to offense severity, by reflecting the seriousness of an offense the jury decided *was not proven*.[51] Indeed, acquitted-conduct sentencing "driv[es] a wedge between the community's sense of appropriate punishment and the criminal sanction actually inflicted."[52]

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does not police judge's discretion under § 3553(a) and a court could theoretically vary upward to account for acquitted conduct unless the Supreme Court or Congress holds otherwise. But we would not expect this to happen often. And, even if some courts vary upward under § 3553(a) to account for acquitted conduct, their sentences would still be anchored to the guidelines, which are the starting point and "initial benchmark" for every § 3553(a) sentencing decision. *Peugh v. United States*, 569 U.S. 530, 536 (2013) (citation and quotation marks omitted).

[48] *See* 28 U.S.C. § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2)(A).

[49] USSG ch. 1, pt. A, intro. 3 (2023); *see also* 28 U.S.C. § 994(l).

[50] 28 U.S.C. § 994(l) (emphasis added); *see also White*, 551 F.3d at 395–96 (Merritt, J., dissenting).

[51] *See Mercado*, 474 F.3d at 662 (Fletcher, J., dissenting) ("[A sentence enhanced by acquitted conduct] has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the [accused individual's] equals and neighbors."); *see also, e.g.*, *Lombard I*, 72 F.3d at 178 (noting a "qualitative difference" between a life sentence for firearm possession enhanced by alleged conduct underlying an acquitted state court murder charge and a sentence which might have been imposed without the acquitted conduct, "implicat[ing] basic concerns of proportionality" between the offense and sentence).

[52] Johnson, *If You Don't Succeed* at 185.

Acquitted-conduct sentencing is sometimes defended on the ground that a jury's "not guilty" finding is not synonymous with factual innocence, and that trials and sentencings are decided under different burdens of proof.[53] But our Constitution presumes an individual to be innocent unless and until proven guilty beyond a reasonable doubt, and reserves power in the people—not the courts—to make that final determination.[54] A jury may acquit because the government's evidence falls just short of proof beyond a reasonable doubt, but it may also acquit because it determined that the government's evidence was wholly unbelievable.[55] "The prosecutor should not receive the benefit of this ambiguity."[56] Regardless of the reason for acquittal, once that verdict is rendered, "the jury has formally and finally determined that the [accused individual] will not be held criminally culpable for the conduct at issue."[57] In a sense, the presumption of innocence wipes away, and

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[53] *See, e.g.*, *Watts*, 519 U.S. at 155; *Bell*, 808 F.3d at 930 (Millett, J., concurring) (describing this as the "oft-voiced" rationalization for acquitted-conduct sentencing).

[54] *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *Cote*, 530 A.2d at 784 ("[O]ur law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitted jury has left, and sentencing has begun.").

[55] *See McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting denial of certiorari) (observing that a jury's acquittal could reflect its conclusion "that the State's witnesses were lying and that the [accused individual] is innocent of the alleged crime" just as easily as it could reflect that the "evidence of guilt fell just short of the beyond-a-reasonable doubt standard"); *Cote*, 530 A.2d at 784 ("It is true that a jury, in the private sanctity of its own deliberations, may acquit in a given case simply because the evidence falls just short of that required for conviction beyond a reasonable doubt. Nevertheless, we do not invade the inner sanctum of the jury to determine what percentage of probability they may have assigned to the various proofs before [them].").

[56] *Beck*, 939 N.W.2d at 241 (Viviano, J., concurring).

[57] *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting the denial of certiorari); *see also Bell*, 808 F.3d at 930 (Millett, J., concurring) ("The problem with relying on [the distinction in burdens of proof at trial and sentencing] is that the whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting 'to a lack of fundamental fairness,' for an individual to be convicted and then 'imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" (quoting

the individual becomes just "innocent."[58] And "[g]iven . . . that acquittals are the sole manner of 'proving' innocence in our system, we should pause before blurring the innocence-denoting function of acquittals by allowing prior acquitted conduct to be used in sentencing on the theory that acquittal and innocence routinely diverge."[59]

Plainly then, using acquitted conduct at sentencing "puts the guilt and sentencing halves of a criminal case at war with each other."[60] And there is a gulf between sentences ballooned by acquitted conduct and the need for the sentence to reflect the seriousness of the offense. Only Option 1 would appropriately calibrate the sentencing range to the offense the jury found the government proved beyond a reasonable doubt.

4. Providing certainty and fairness in sentencing.

Congress also required the Sentencing Commission to establish policies that "provide certainty and fairness in the meeting of the purposes of sentencing."[61] Acquitted-conduct sentencing is neither certain nor fair. Instead, it has been described as "Kafka-esque," "repugnant," "uniquely malevolent," and "pernicious," among other invectives.[62]

From the sentenced individual's perspective, far from promoting certainty in sentencing, the court's ability to ignore the jury's verdict obfuscates the expected punishment, depriving the individual of adequate notice as to the possible sentence.[63] As one judge remarked, using acquitted

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In re Winship, 397 U.S. 358, 364 (1970))); *cf. McElrath*, slip. op. at 6 (holding that, for double jeopardy purposes, a court may not second-guess a jury's acquittal, even if it likely results from "compassion, compromise, lenity, or misunderstanding of the governing law[]").

[58] *See* Murray at 1464 ("A not guilty judgment is more than a presumption of innocence; it is a finding of innocence." (quoting *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979))).

[59] *Id.*

[60] *Bell*, 808 F.3d at 930 (Millett, J., concurring).

[61] 28 U.S.C. § 991(b)(1)(B).

[62] Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L. Rev. 675, 679–80 and nn. 23–26 (2014).

[63] *See Canania*, 532 F.3d at 776 (Bright, J., concurring); *Beck*, 939 N.W.2d at 222.

conduct to sentence often "result[s] in confusion as to the law, and confusion breeds contempt."[64]

Likewise, "[f]rom the public's perspective, most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted."[65] Undoubtedly, a common factor linking the public's outrage with that of the individual being sentenced based on acquitted conduct is the understanding that acquitted-conduct sentencing is fundamentally unfair.[66]

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[64] *Ibanga*, 454 F. Supp. 2d at 539. Take, for instance, what happened to Tarik Settles. Upon learning that the sentencing judge would consider an acquitted drug trafficking charge to sentence him for being a felon in possession of a firearm, Mr. Settles exclaimed, "I just feel as though, you know, that's not right. That I should get punished for something that the jury and my peers, they found me not guilty." *Settles*, 530 F.3d at 924 (citation and quotation marks omitted); *see also* Brief of the National Ass'n of Fed. Defenders (NAFD) and FAMM (formerly, Families Against Mandatory Minimums) as Amicus Curiae Supporting Petitioner, at 18–20, *McClinton*, No. 21-1557 (U.S. July 14, 2022), 2022 WL 2819573 (explaining how acquitted-conduct sentencing has incited feelings of disbelief, devastation, and lack of trust in clients and their families).

[65] *Ibanga*, 454 F. Supp. 2d at 539; *see also* Freed at 1714 ("Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him."). Look no further than the story of D.C. "Juror No. 6." After serving on a criminal jury for 10 months and acquitting the accused, Antwuan Ball, of the most serious charges against him, he learned the prosecutor was requesting a 40-year sentence to reflect conduct underlying the acquittals. He wrote a letter to the sentencing judge to express his outrage, and that letter has become a battle cry for change. *See* Jim McElhatton, *'Juror No. 6' stirs debate on sentencing*, Wash. Times, May 3, 2009, http://tinyurl.com/yjw7u5bx; *see also, e.g.*, *McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., statement respecting the denial of certiorari) (citing this letter); *White*, 551 F.3d at 396–97 (Merritt, J., dissenting) (same); *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring) (same); *Beck*, 939 N.W.2d at 233–34 (Viviano, J., concurring) (same).

[66] *See, e.g.*, Beutler at 840 ("It belies fairness when, upon acquittal of a crime, a [person] receives the exact same sentence he would have received had he been convicted of that crime."); *Concepcion*, 983 F.2d at 395–96 (Newman, J., dissenting from the denial of rehearing en banc) ("A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.").

5. Discouraging overcharging and preserving the jury-trial right.

One of the Commission's stated intentions in developing a modified real-offense guideline system was to minimize prosecutors' power to "influence sentences by increasing or decreasing the number of counts in an indictment."[67] But the relevant-conduct rules (especially acquitted-conduct sentencing) detract from that goal by enhancing prosecutors' power to manipulate processes (trial and plea) and outcomes (the sentence imposed).[68]

Indeed, much like a metastatic disease, acquitted-conduct sentencing invades and infects *every single stage* of the federal criminal trial system—from the incentivization of prosecutorial overreach in charging, to the diminution of the exercise of the sacred jury-trial right, to the often-dramatic increase in punishment.

At the indictment stage, acquitted-conduct sentencing encourages prosecutors to lodge weakly supported charges. As the National Association of Federal Defenders and FAMM recently explained to the Supreme Court:

> Using acquitted conduct to enhance sentences heightens the temptation of prosecutorial overreach by blunting the downside to the government. If the defendant succumbs to the government's aggressive charges and pleads guilty, the government wins; if he goes to trial and is convicted on those charges, the government still wins; and if he goes to trial and persuades a jury that he is innocent of them, the government *still* wins, so long as it secures conviction on a more easily proved offense and persuades the sentencing judge of his guilt by a preponderance of reliable "information" (not necessarily even "evidence").[69]

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[67] USSG ch. 1, pt. A, intro. (4)(a) (2023).

[68] *See* Brief of Cato Institute at 3; Freed at 1714.

[69] *See* Brief of NAFD and FAMM Supporting Petitioner McClinton at 8 (citing Fed. R. Evid. 1101(d)(3) & USSG §6A1.3 cmt.); *cf. United States v. Scheiblich*, 346 F. Supp. 3d 1076, 1085 (S.D. Ohio 2018) ("The real-world consequence of permitting judge-found fact to increase a potential punishment is that prosecutors are vested

At the plea stage, with acquitted-conduct sentencing lurking in the background, prosecutors hold all the cards.[70] Defenders know that "[t]he forum of sentencing advantages the government—one fact-finder (judge) as opposed to multiple fact-finders who must be unanimous to convict (jury), a lower standard of proof, looser evidentiary rules, and a finding that the [individual being sentenced] is already guilty of something."[71] Against this backdrop, it's not surprising that overcharging and the prospect of the use of acquitted conduct at sentencing has a coercive impact on the accused, "exert[ing] tremendous pressure on [her] to plead guilty to weak allegations" for fear that a partial acquittal will lead to a stiffer sentence than if she'd pled guilty.[72] And it's no wonder that federal trials, which were once a central component and bedrock of this country's criminal justice system, are now exceedingly rare, bordering on extinction.[73]

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with a degree of power that would have shocked the Framers."), *rev'd*, 788 F. App'x 305 (6th Cir. 2019).

[70] As a general matter, prosecutors are widely regarded as the most powerful officials in the criminal justice system. *See, e.g.*, Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 5 (2007); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 741 (1996); Bennet L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 405 (1992).

[71] Outlaw at 179; *see also* Ngov at 241–42 ("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.").

[72] Brief of NAFD and FAMM Supporting Petitioner McClinton at 9–11; *Bell*, 808 F.3d at 932 (Millett, 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."); *McClinton*, 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting denial of certiorari) ("Even [individuals] with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.").

[73] *See* USSC, 2024 Proposed Amendments at 40, http://tinyurl.com/2tttp8ey ("In fiscal year 2022, nearly all sentenced individuals (62,529; 97.5%) were convicted through a guilty plea.").

In a country that "has always ascribed value to processes, not merely outcomes[,]" the disappearance of jury trials is of constitutional importance.[74] It "negatively impacts [accused individuals],"[75] and it negatively impacts the community, which is deprived of the opportunity to act as an independent check on governmental power and abuse.[76] "We have, in effect, traded the transparency, accountability and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders."[77]

There's no clearer example of acquitted-conduct sentencing's chilling effect on the exercise of the jury trial right than the anecdote Defenders shared last year about the impact of Jessie Ailsworth's sentencing on trial practice in the District of Kansas in the ensuing three decades.[78] In 1994, Jessie went to trial on weapons and drug-conspiracy charges.[79] He was acquitted of 28 of the 37 charges and, although he was convicted of participating in a conspiracy to distribute crack cocaine, the jury made a special finding that his involvement was limited to the sale of 33.8 g of crack cocaine in exchange for food stamps.[80] Despite the special finding, the court sentenced Jessie for the entire scope of his charged conspiracy: to 30 years in prison—25 years longer than his co-defendants, who pled guilty and cooperated.[81]

Last year, Jessie's former attorney, Federal Public Defender Melody Brannon, testified:

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[74] Hon. Robert J. Conrad, Jr., and Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99, 161 (2018).

[75] *Id.*

[76] *See* Brief of Cato Institute at 9.

[77] *Id.*

[78] *See* Statement of Melody Brannon on behalf of Defenders to the U.S. Sent'g Comm. on Acquitted Conduct, at 10–13 (Feb. 24, 2023), http://tinyurl.com/4phar58c ("Brannon Statement").

[79] *Id.* at 10.

[80] *Id.* at 11.

[81] *Id.* at 10–11.

> Jessie's case is not simply a tale of injustice for one man. 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 . . . . 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.[82]

In this way, Jessie's is a story about the impact of acquitted-conduct sentencing on both sentencing outcomes and trial and plea processes in the District of Kansas for decades to follow.

6. Reflecting advancement in knowledge through empirical study.

Finally, the Sentencing Commission must develop guidelines that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[83] These advancements are often identified through data collection and review and reflected through evolution of the guidelines over time.[84] And this Commission has repeatedly vowed to "operate in a deliberative, empirically based, and inclusive manner."[85]

The Sentencing Commission has the capacity courts lack to base policy decisions on empirical data and national experience, "guided by a

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[82] *Id.* at 12 (footnotes omitted).

[83] 28 U.S.C. § 991(b)(1)(C).

[84] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988); USSG, ch. 1, pt. A, intro. 3 (2023) ("[T]he guidelines represent an approach that begins with, and builds upon, empirical data.").

[85] USSC, Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sent'g Comm., at 4 (Oct. 28, 2022), http://tinyurl.com/2aatw923.

professional staff with appropriate expertise."[86] The goal is to produce "a set of [g]uidelines that seek to embody the § 3553(a) considerations, both in principle and in practice."[87] And when the Commission fails to rely on empirical data and national experience, it abandons its "characteristic institutional role," and the resulting guidelines are less likely to appropriately reflect § 3553(a) considerations.[88]

Relevant data and national experience support Option 1. The Commission's 2010 survey of district judges revealed that 84 percent of respondent judges believed acquitted conduct *should not be considered relevant conduct* when determining the guideline range.[89]

Question 5. Relevant Conduct

Table 5. What should be considered "relevant conduct" for purposes of sentencing?

	Proportion of Respondents Indicating Agreement Percent	Number
All reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity?	79	639
Conduct that was charged in a count that was later dismissed?	31	639
Uncharged conduct that is presented at trial or admitted by the defendant in court?	77	639
Uncharged conduct referenced only in the presentence report?	32	639
Acquitted conduct?	16	639

Several legal organizations, including the American Law Institute, American Bar Association, American College of Trial Lawyers, and others have taken the same position.[90] Thus, Option 1 aligns with the Commission's

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[86] *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (citation and quotation marks omitted).

[87] *Rita v. United States*, 551 U.S. 338, 350 (2007).

[88] *Kimbrough*, 552 U.S. at 109–10.

[89] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, at tbl.5 (2010).

[90] *See* Model Penal Code: Sentencing § 9.05(2)(b) (Am. Law. Inst., Approved 2017); Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law. Inst., Proposed Official Draft 2017); Am. Bar Ass'n, Crim. Just. Standards Comm., ABA Standards for Criminal Justice, Sentencing § 18-3.6 (3rd ed. 1994) (Offense of conviction as

stated intention and statutory purpose to ground its decisions in empirical analysis.

B. A permitted downward departure to account for acquitted conduct (Option 2) would be toothless.

While Option 1 holds great promise, the same cannot be said for Option 2.[91] A permitted downward departure to account for the impact of acquitted conduct on the guideline range does not go far enough toward eradicating a practice that, for the policy reasons identified above, is deeply flawed. Our concerns with Option 2 are threefold. First, any downward departure that starts from and is tethered to a guideline range that was increased by acquitted conduct will likely be woefully inadequate to counteract the problems created by acquitted-conduct sentencing. Second, departures are increasingly obsolete. Courts disinclined to consider conduct underlying an acquittal at sentencing can already vary below the guidelines under § 3553(a). Third, the disproportionality requirement is unclear.

First, the anchoring effect. The sentencing guideline range serves as the initial starting point and "anchor" for the federal sentencing process.[92] This means, as the range moves up or down, a person's sentence moves with

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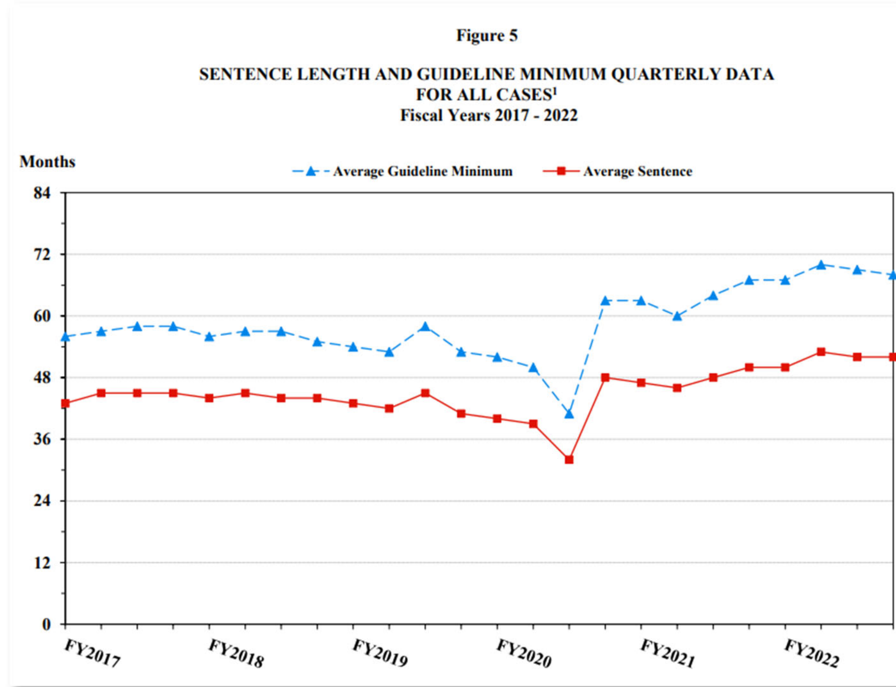
basis for sentence), http://tinyurl.com/2m766wc7; Am. College of Trial Lawyers, *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Amer. Crim. L. Rev. 1463, 1485–87 (2001); *see also* Council on Crim. Just., Task Force on Fed. Priorities, *Independent Task Force Report: Next Steps, An Agenda for Federal Action on Safety and Justice Recommendation*, at 4 (2020) ("CCJ Task Force Report"), http://tinyurl.com/8pamnhzj.

[91] Option 2 amends §1B1.3's commentary to permit a downward departure from the guideline range if acquitted conduct has either an "extremely disproportionate" or a "disproportionate" impact in determining the guideline range relevant to the offense of conviction. *See* 2024 Proposed Amendments at 44.

[92] *Peugh*, 569 U.S. at 549; *see also Settles*, 530 F.3d at 923–24 ("[W]e know that [sentenced individuals] find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence.").

it.[93] Commission data covering fiscal years 2017 to 2022 illustrate this "anchoring effect":[94]



Scholars and judges alike have observed that even when the anchor is inherently defective—as is a range enlarged by acquitted conduct—decisionmakers ascribe to it meaning and significance as a reliable measure on which to base their choices.[95] The "gravitational pull" of a flawed

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[93] *See Peugh*, 569 U.S. at 544.

[94] *See* USSC, *Final Quarterly Data Report FY2022* 28, fig. 5 (2022).

[95] *See, e.g.,* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 511 (2014) (judges are impacted by the anchoring effect even where the anchors are random and unrelated, "like the effect of rolling dice on the length of sentences"); Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 Stan. L. Rev. 1, 45 (2010) ("Research has shown that giving a sentencing official an initial value, even one that is known to be arbitrary, can influence the length of a sentence."); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall, Kimbrough*, and New Understandings of Reasonableness Review*, 58 Cath. U. L. Rev. 115, 123 (2008) ("[E]ven irrelevant anchors have an effect on decisions."); *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring).

acquitted-conduct-enhanced guideline range is compounded by the Supreme Court's suggestion that "a major departure should be supported by a more significant justification than a minor one."[96] And stronger still because some courts of appeals presume that within-guideline sentences are reasonable.[97]

Take, for instance, Dayonta McClinton. A permitted downward departure could not have counteracted the fact that his guideline range for robbery *was equal to that of someone convicted of murder* despite his jury acquittal of murder. Indeed, the court in his case *did* sentence him below his acquitted-conduct-enhanced guideline range of 324 months (27 years) to life—to 228 months (19 years) in prison.[98] But this imposed sentence was still 157 months (over 13 years) above the top of the non-enhanced range of 57 to 71 months (around 5 to 6 years).[99] That is, although Mr. McClinton received a significant downward variance (which, under Option 2, the court might label a "departure"), his sentence was still anchored to a drastically inflated range and was more than three times higher than the top of what his guideline range would have been without acquitted conduct.

Second, the availability of policy-based variances. Mr. McClinton's case illustrates another reason why Option 2 is unsatisfying: post-*Booker*, courts are not often relying on departures to sentence below the guideline range.[100] Courts can, and largely do, base below-guideline sentences on § 3553(a), rather than "departures."[101] The Supreme Court has expressly blessed the use of policy-based deviations from the guidelines, as have some

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[96] *See Gall v. United States*, 552 U.S. 38, 50 (2007).

[97] *See Rita*, 551 U.S. at 391–92 (Souter, J., dissenting) (expressing concern that an appellate presumption of reasonableness for guideline-range sentences would tend to produce within-guideline sentences almost as regularly as the mandatory-guideline regime had done).

[98] *See McClinton* Petition at 8–9.

[99] *See id.* at 8.

[100] *See Booker*, 543 U.S. at 245.

[101] *See* 2024 Proposed Amendments at 124 (recognizing a "growing shift away" from the use of departures in favor of § 3553(a) variances in the wake of *Booker* and subsequent decisions).

circuit court judges in the specific context of acquitted-conduct sentencing.[102] And this Commission's "Simplification" proposal, if adopted, would negate Option 2. Thus, we are uncertain what would be accomplished by adding departure language to account for acquitted conduct.

Third, the opacity of Option 2's language. Finally, the proposed departure would apply only to cases where acquitted conduct has a "disproportionate" or "extremely disproportionate" "impact in determining the guideline range relative to the offense of conviction." The Commission does not define these terms and there would likely be litigation over whether a particular enhancement or cross-reference based on acquitted conduct leads to a "disproportionate" or "extremely disproportionate" sentence. Different judges could reasonably come out differently in similar cases.

In short, we urge the Commission to reject Option 2.

C. The use of "clear and convincing evidence" to establish acquitted conduct at sentencing (Option 3) continues to permit courts to override the jury's verdict and presents practical challenges for defense advocates.

Option 3 is plainly inferior to Option 1, as well.[103] There are two primary reasons: one based in policy and the other in practicability.

First, policy. As discussed above in great detail, there is a fundamental inconsistency between the value this country purports to place on the jury trial right and a sentencing regime that allows a court to override a jury's verdict of acquittal. In this way, Option 3 suffers the same policy problems as the current system. True, this option would place *some* limits on courts' ability to use acquitted conduct to determine the guideline range by

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[102] *See Spears v. United States*, 555 U.S. 261, 265–66 (2009); *Kimbrough*, 552 U.S. at 109–10; *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc); *see also* Murray at 1459–60 (observing, "it is unquestionable that judges have the discretion" to reject acquitted-conduct sentencing and that "[i]n many cases, exercising such restraint would be in accordance with sound public policy[]").

[103] Option 3 raises the burden of proving acquitted conduct at sentencing from "preponderance of the evidence" to "clear and convincing evidence." *See* 2024 Proposed Amendments at 45.

heightening the burden for proving acquitted conduct at sentencing. But it would still permit judges to sidestep jury verdicts.[104]

Second, and relatedly, practicability. Like the current regime, there are workability problems with Option 3 that would "impose[] on defense lawyers vexing strategic dilemmas."[105] Accused individuals would still need to "win over two factfinders, persuading not only the jury to acquit, but also the judge to leave the acquittal undisturbed at sentencing in the event of a split verdict."[106] The government still gets their second bite at the apple at sentencing, forcing defense attorneys to "balance[e] dissimilar audiences and standards" as they develop trial strategy.[107] This creates an "implicit and often hopeless demand that, in order to avoid punishment for charged conduct, [accused individuals] must prove their innocence under two drastically different standards at once."[108]

These conditions severely compromise the defense's ability to "tailor an optimal trial strategy, or indeed formulate any minimally satisfying strategy

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[104] *See* Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 439 (1999) (discussing a 1997 proposed guideline amendment that would have required proof of acquitted conduct by "clear and convincing evidence" and lamenting that the proposal "[did] not address the larger institutional concerns" with using acquitted conduct to determine the sentencing range because it still allowed the court to substitute its judgment for that of the jury's while using a lower standard of proof). The primary problem with Option 3 is its disregard for jury verdicts in a nation founded on the right to trial by jury. But it is also worth noting that requiring proof of guilt beyond a reasonable doubt "is basic in our law and rightly one of the boasts of a free society." *Leland v. State of Or.*, 343 U.S. 790, 803 (1952) (Frankfurter, J., joined by Black, J., dissenting); *see also Bell*, 808 F.3d at 930 (Millett, J., concurring in the denial of rehearing en banc) ("[P]roof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to *depriving an individual of liberty for the alleged conduct.* Constructing a regime in which the judge deprives the defendant of liberty on the basis of the very same factual allegations that the jury specifically found did not meet our constitutional standard for deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.").

[105] *See* Brief of NAFD and FAMM Supporting Petitioner McClinton at 15.

[106] *Id.* at 12.

[107] *Id.*

[108] *Faust*, 456 F.3d at 1353 (Barkett, J., specially concurring).

whatsoever."[109] Ironically, success at trial may actually contribute to punishment for acquitted conduct under a lesser burden of proof.[110] "That is because argument and evidence that resonates with a jury can alienate judges, and vice versa."[111] For instance, someone who "secures a partial acquittal by emphasizing reasonable doubt to a jury may find that his successful theme hamstrings him at sentencing," where the reasonable doubt standard doesn't apply.[112] This puts defenders and their clients "between a proverbial rock and a hard place."[113]

Thus, like Option 2, Option 3 is inadequate.

II. The Commission should define "acquitted conduct" broadly to include conduct "underlying" any acquittal, irrespective of the sovereign or nature of the acquittal.

A. The policy reasons to prohibit using acquitted conduct to determine the guideline range apply to state, local, and tribal acquittals, as well as federal acquittals.

Defenders are encouraged by the promise Option 1 holds for our clients—including those who are tried and partially acquitted and those who would exercise their constitutional right to trial but for the risk that a partial acquittal would land them an even stiffer sentence than a guilty plea as charged. If the Commission does nothing else with acquitted conduct this amendment cycle, we encourage it to adopt Option 1 as presently written as a step in the direction of fairer, more rational sentencing policy.

But we hope the Commission will go a step further. Namely, the Commission should return to the definition of "acquitted conduct" it proposed last year, which included conduct underlying an acquitted charge in federal, *state, local, or tribal court*:

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[109] *Id.*; *see also* Brief of NAFD and FAMM Supporting Petitioner McClinton at 12.

[110] *See Faust*, 456 F.3d at 1353 (Barkett, J., specially concurring); *see also* Brief of NAFD and FAMM Supporting Petitioner McClinton at 15.

[111] *See* Brief of NAFD and FAMM Supporting Petitioner McClinton at 12.

[112] *Id.* at 14.

[113] *Bell*, 808 F.3d at 932 (Millett, J., concurring in denial of rehearing en banc).

> (2) DEFINITION OF ACQUITTED CONDUCT.—For purposes of this guideline, "***acquitted conduct***" means conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

This year, in contrast, the proposed definition is limited to *federal acquittals*.

We understand that the Commission is concerned about conduct underlying a federal conviction that overlaps with conduct underlying a state, local, or tribal acquittal. This came up at the hearing on acquitted conduct last year when Commissioner Claire Murray asked Defender witness Melody Brannon if she had concerns about "parallel state/federal prosecutions," providing the example of the state court acquittal on police-brutality charges of the officers who assaulted Rodney King.[114]

But, this does not pose a real problem. So long as there is a federal conviction, a relevant-conduct rule barring the use of conduct underlying a state acquittal when calculating the guideline range would not prevent the federal court from sentencing an individual for his federal offense. Even if the federal conviction results from the very same facts rejected by a state court jury, the federal court would sentence the individual for his federal law violation—a violation that a jury found proven beyond a reasonable doubt, or the individual admitted—not for the state law violation.

Further, even if a rule barring the use of conduct underlying state, local, or tribal acquittals to enhance the federal guidelines could somehow be viewed as impinging upon the federal court's ability to sentence for the federal conviction in the face of overlapping state, local, or tribal acquitted conduct, the Commission's proposed bracketed (and double-bracketed) language, included in the definition section, clears up any ambiguity:

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[114] Transcript of Public Hearing before the U.S. Sent'g Comm., Washington, D.C., at 118–23 (Feb. 24, 2023) (Melody Brannon).

> [“***Acquitted conduct***” does not include conduct that—
>
> (A) was admitted by the defendant during a guilty plea colloquy; or
>
> (B) was found by the trier of fact beyond a reasonable doubt;
>
> to establish, in whole or in part, the instant offense of conviction**[**, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted**]**.**]**

Defenders have no problem with this language.[115] We believe it solves any potential concern related to overlapping conduct, but without the risk of unintended consequences. And as long as the individual is convicted and sentenced for conduct proven at trial to a federal judge (in the case of a bench trial) or jury (or admitted during the federal plea colloquy)—even if the federally-convicted conduct also underlies an acquittal in another forum—the policy concerns animating our objection to acquitted-conduct sentencing are largely absent.[116]

In contrast, using conduct underlying a state, local, or tribal acquittal *where that conduct was not subsequently proven to a federal judge or jury beyond a reasonable doubt or admitted by the person being sentenced* does quite squarely implicate the same policy concerns as the current regime.[117]

An acquittal is an acquittal. Whether in federal or state court, an acquittal is entitled to special weight and respect. A state jury—no less than a federal jury—has an interest in its collective voice being heard and honored through deference to its verdict. Nor would a person convicted in federal court of only unlawfully possessing a firearm be any less appalled to learn that the court would enhance his sentence for an alleged murder of which he

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[115] Last year we objected to the “limitations” related to overlapping conduct not because we believed courts should be hamstrung in their ability to sentence for state-court acquitted conduct that was subsequently proven in federal court, but because the language’s intent was ambiguous considering its placement. We have no concerns with the language as placed in this proposal.

[116] *See* Section I.A, *supra*, for a discussion of those policy concerns.

[117] Congress appears to share this view. The Prohibiting Punishment of Acquitted Conduct Act of 2023 includes federal, state, tribal, and juvenile acquittals within its definition of “acquitted conduct.” *See* S. 2788.

was previously acquitted in state court, than if the murder acquittal occurred in federal court.

United States v. Lombard (*Lombard I*) provides a stark example of the injustice of relying on conduct underlying a state acquittal to increase the federal sentencing guidelines. Henry Lombard Jr. was acquitted of two murder charges after a state court trial in 1992.[118] One year later, he was tried and convicted in federal court for possessing the firearm allegedly used in the two state-court-acquitted killings and for other charges related to their aftermath.[119] He was not prosecuted for the murders in federal court.[120] Despite the state acquittals, the sentencing court relied on the homicide cross-reference in the firearms guideline to sentence Mr. Lombard to life in prison.[121] Although the sentencing court was "greatly troubled" by the life sentence, at the time the guidelines were mandatory.[122]

The First Circuit ultimately vacated Mr. Lombard's life sentence, saying the sentence "raise[d] questions of whether such a result was strictly intended by the Sentencing Guidelines."[123] It explained that due process imposes "limits" to acquitted-conduct sentencing "in extreme cases."[124] The court was particularly concerned that conduct underlying a state murder acquittal had become the proverbial "tail [that] wagged the dog" of the firearm possession for which Mr. Lombard was ostensibly sentenced, without the procedural protection of proof beyond a reasonable doubt.[125] That is, the court acknowledged the very same fairness, certainty, and proportionality problems with using conduct underlying a state acquittal at sentencing as other courts have recognized in the context of mixed federal verdicts.[126]

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[118] *See Lombard I*, 72 F.3d at 172.

[119] *See id.* at 173.

[120] *See id.*

[121] *See id.* at 174–75.

[122] *See id.* at 172.

[123] *Id.* at 175.

[124] *Id.* at 176.

[125] *Id.* at 177.

[126] *See also Jones*, 863 F. Supp. at 577–78 (reluctantly applying attempted murder cross-reference in federal firearms guideline despite state jury's conclusion

Admittedly, we don't believe that federal guideline ranges are enhanced very frequently by conduct underlying an acquittal in another forum. So, while we have concerns about an uneven rule elevating federal acquittals over others, our objection should not be taken to delay adopting Option 1, even if the Commission is not presently prepared to return to last year's definition. We would, however, encourage the Commission to revisit the question of acquittals in other forums if it doesn't exclude those acquittals from the relevant-conduct guideline this year.

B. The Commission should define acquitted conduct as conduct *underlying* an acquittal.

The proposed amendment further defines "acquitted conduct" as conduct either "underlying a charge of which the defendant has been acquitted" or "constituting an element of a charge of which the defendant has been acquitted." The focus should be on conduct *underlying* an acquittal.

First, "conduct constituting an element" simply does not make sense. A person's "conduct" includes "acts" and/or "omissions" (i.e., factual allegations) about which a prosecutor might present evidence *to prove a statutory element* of the offense. But conduct is not, in and of itself, a statutory "element" of an offense. In contrast, conduct "underlying a charge" makes perfect sense; it is the language courts already generally employ when discussing acquitted-conduct sentencing.[127] Thus, courts would not have difficulty applying an "acquitted conduct" definition framed in this way.

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that Mr. Jones did not intend to kill his wife but noting that doing so "implicates the rights to trial by jury and due process").

[127] *See, e.g.*, *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) ("At the least it ought to be said that to increase a sentence based on *conduct underlying a charge* for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal . . . ." (emphasis added)); *Khatallah*, 41 F.4th at 648 (describing acquitted conduct as facts *"underlying a charge or enhancement"* that the jury necessarily determined were not proven beyond a reasonable doubt (emphasis added)); *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022) ("But despite the long list of dissents and concurrences on the matter, it is still the law in this circuit . . . that a sentencing court may consider *conduct underlying an acquitted charge*, so long as that conduct has been found by a preponderance of the evidence." (emphasis added)); *Canania*, 532 F.3d at 777 (Bright, J., concurring) ("It is not unreasonable for a [sentenced individual] to expect that *conduct underlying a charge*

Further, to the extent that "conduct constituting an element" is read to mean conduct that *must be present* for the government to prove an element (which would seem to be the best reading), in this context, that focus is too narrow. To understand why, consider how the guidelines work: In adopting a modified real-offense sentencing system, the Commission chose to incorporate into the guidelines "a significant number of real offense elements" that "are descriptive of generic conduct" and do not "track purely statutory language."[128] As a result, many (or even most) enhancements, adjustments, and cross-references are based on conduct that need not be present for the government to prove an element of an offense.[129] And thus, the "conduct constituting an element" formulation could undermine a prohibition on acquitted-conduct sentencing or, at a minimum, trigger a great deal of litigation.

Consider this: An individual is convicted of a single direct sale of cocaine but acquitted of participating in a large drug conspiracy, where the government presented evidence that the individual played a leadership role in the conspiracy. At sentencing, the court is considering whether to apply a 4-level "organizer or leader" enhancement to the distribution guideline, under §3B1.1(a). Under the "constituting an element" formulation of an acquitted-conduct prohibition, the court could potentially apply this enhancement even though the leadership conduct underlies the acquitted conspiracy charge that was rejected by the jury. This is because *leadership* need not be present for

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of which he's been acquitted to play no determinative role in his sentencing." (emphasis added)); *see also* CCJ Task Force Report, Recommendation at 4 ("'[A]cquitted conduct sentencing,' occurs when a judge bases a sentence not only on a charge that led to a person's conviction, but also on *behavior underlying charges* for which the individual was acquitted." (emphasis added)). Of note, a Westlaw Boolean search for "conduct /s underlying /s charge /s acquit!" within the database "all federal cases" yields 513 cases. In contrast, a search for "conduct /s constitutes constituting /s element! /s charge /s acquit!" yields only three cases—two of which are inapposite and one that's relevant but does not use "constitute" in the same manner as the proposed definition.

[128] USSG ch. 1, part A, intro. 4(a).

[129] *See* Am. College of Trial Lawyers at 1480 ("Most Chapter Three adjustments and many specific offense characteristics in Chapter Two comfortably fit the description of 'enhancements' because (1) they are not defined in congressional statutes as crimes in and of themselves, (2) in common sense terms, they do reflect the 'manner' in which the offense of conviction was committed, and (3) they are limited in extent.").

the government to prove every element of 21 U.S.C. §§ 846 and 841(a). On the other hand, under the "underlying" formulation, the judge would have to respect that the jury implicitly rejected that the individual played a leadership role by acquitting on the conspiracy charge.

C. There should be no exceptions for "non-substantive" acquittals.

Finally, Defenders again urge the Commission not to exclude from the definition of "acquitted conduct" "acquittals based on reasons unrelated to the substantive evidence." Any attempt to define categories of acquittals "based on reasons unrelated to the substantive evidence," for exemption from the rule, risks over-complicating the rule. For instance, would an acquittal based on an affirmative defense, such as duress or entrapment, count? What if the prosecution claims there was jury nullification? What if, after the verdict was read and the case closed, binding caselaw reveals that the jury instructions were erroneously defense-friendly?

Adding to this complexity, jury deliberations have been described as a "black box."[130] Most juries in criminal cases return a general verdict of "guilty" or "not guilty" that does not indicate the basis for their finding. And Federal Rule of Evidence 606(b) (codifying the common law "no-impeachment rule") greatly restricts a judge's power to admit testimony, affidavits, or other evidence from jurors about their decision-making processes.[131] Even with special jury findings, once there is an acquittal, courts are prohibited from speculating about the reasons for the acquittal since "it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations."[132] So, practically speaking, a judge may not be able to discern whether an acquittal was based on substantive or non-substantive evidence—especially if the defense presents multiple or

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[130] *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) ("Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the innerworkings and deliberation of the jury are deliberately insulated from subsequent review."), *abrogated by Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017).

[131] *See* Fed. R. Evid. 606(b); *Tanner v. United States*, 483 U.S. 107, 121 (1987).

[132] *McElrath*, slip. op. at 9–10 (citation and quotation marks omitted).

inconsistent case theories. The Commission should not adopt a standard that seems likely to trigger years of litigation.

And practicalities aside, an acquittal is an acquittal. Just as a complete acquittal on alleged "non-substantive" grounds could not result in punishment, nor should a partial acquittal on these grounds.[133] The force of the varying policies which support ending acquitted-conduct sentencing is not dependent upon the reason for the acquittal.[134]

III. The Commission should not add commentary to §6A1.3 sanctioning courts' use of acquitted conduct to determine the sentence within the range or to upwardly depart.

If it adopts Option 1, the Commission proposes adding commentary to §6A1.3 inviting courts to consider acquitted conduct in deciding where to sentence within the guideline range or whether to depart:

> The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* §1B1.3(c) (Relevant Conduct). The court is not precluded from considering acquitted conduct 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 Point Within the Guideline Range or Departing from the Guidelines)).

The Commission asks for comment on whether to include this language, or to prohibit (or recommend against) using acquitted conduct to sentence within the range or depart. The Commission further invites comment on the interaction of these various options and 18 U.S.C. § 3661.

We support adding the first sentence of the proposed commentary: "Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* §1B1.3(c) (Relevant Conduct)." Aside from that, the Commission should not add the proposed commentary to

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[133] *Cf. id.* at 7 (emphasizing, "if the 'not guilty' verdict were considered in isolation [on a single count] it would have constituted a valid verdict of acquittal under state law").

[134] *See, e.g.*, Murray at 1460–67 (cataloging policy reasons to disallow acquitted-conduct sentencing even when courts know the prior acquittal does not indicate actual innocence).

§6A1.3 and should not otherwise tell courts how to account for acquitted conduct in their sentences.[135]

First, the proposed commentary would not be useful for the same reason a downward departure related to acquitted conduct (Option 2) would not be useful. The Commission itself recognizes that courts are trending away from departures in favor of the more holistic evaluation outlined in 18 U.S.C. § 3533(a).[136] Indeed, as we express in our comment on the Commission's "Simplification" proposal, Defenders support eliminating departures from the Guidelines Manual entirely, both as a matter of sound policy and to align the guidelines with post-*Booker* sentencing law. And unless and until the Supreme Court or Congress prohibits entirely the use of acquitted conduct at sentencing, courts are free to consider it under 18 U.S.C. §§ 3553(a) and 3661.

Further, § 3661 presents no obstacle to our suggested approach.[137] As we articulated last year, § 3661 must be read in context with the SRA's entire statutory scheme, under which the Commission has a duty to create sentencing guidelines necessarily full of restrictions and which include—and exclude—certain information.[138] Indeed, if § 3661's "no limitation" rule is taken to apply to the Commission in creating and amending guidelines, it would "negate[] the entire [g]uidelines enterprise."[139]

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[135] In other words, the Commission should not invite, prohibit, or recommend against considering acquitted conduct when determining the sentence within the range or whether to depart.

[136] *See* 2024 Proposed Amendments at 123 ("Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.").

[137] This section reads: "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." 18 U.S.C. § 3661.

[138] *See* Brannon Statement at 16–18; *see also* Am. College of Trial Lawyers at 1487 ("[T]he Commission has put a variety of information entirely or partially off limits for any purpose, and Congress has allowed these measures to become law. Prohibiting the use of acquitted conduct in sentencing to promote the strong policy objectives noted above would be consistent with 18 U.S.C. § 3661[.]").

[139] Johnson, *Puzzling Persistence* at 37.

Even if § 3661 is read to restrict the Commission's authority to limit what courts can consider at sentencing, it does not compel the proposed commentary. By declining to incorporate the proposed commentary, the Commission would not place limitations on information courts may consider at sentencing. It would simply stand silent, allowing courts to do what they are uniquely situated to do: "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[140]

IV. Conclusion

This Commission has repeatedly vowed: "When you speak to the Commission, you will be heard."[141] "[W]hether from the halls of Congress or the desk of a prison library, you [will be] heard."[142] Well, for decades, key stakeholders in the criminal justice system—including those impacted by the Commission's policy choices—have spoken out against the *injustice* of using acquitted conduct to increase the scale of an individual's punishment, sometimes by several months, but often by years—even decades.

We trust that this Commission is not only listening; it is also ready to act. We encourage the Commission to: (1) adopt Option 1 of the "Acquitted Conduct" proposed amendment with our suggested modifications to the definition section, and (2) jettison the proposed commentary inviting courts to sentence within the range or depart to account for acquitted conduct.

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[140] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (citation and quotation marks omitted).

[141] Transcript of Public Meeting of the U.S. Sent'g Comm., Washington, D.C., at 7 (Apr. 5, 2023), http://tinyurl.com/yc549zbz (Chair Reeves).

[142] *Id.* at 9.