United States Sentencing Commission

2023-2024 Amendment Cycle

Proposed Amendments/Public Comment
88 FR 89142

UNITED STATES SENTENCING COMMISSION

2023-2024 PROPOSED AMENDMENTS
PUBLIC COMMENT
88 FR 89142

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information section of this notice.

DATES: *Written Public Comment*. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than February 22, 2024. Any public comment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts

pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id*. 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A proposed amendment to §2B1.1 (Theft, Property Destruction, and Fraud) that would create Notes to the loss table in §2B1.1(b)(1) and move some of the general rules relating to loss from the commentary to the guideline itself as part of the Notes, as well as make corresponding changes to the Commentary of certain guidelines that refer to the loss rules in §2B1.1, and a related issue for comment.

(2) A two-part proposed amendment relating to the provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) that cover criminal history calculations for offenses committed prior to age eighteen and on §5H1.1 (Age (Policy Statement)), including (A) three options for amending §4A1.2 to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score, and related issues for comment; and (B) an amendment to §5H1.1 to address unique sentencing considerations relating to youthful individuals, and related issues for comment.

(3) A proposed amendment to the *Guidelines Manual* that includes three options to address the use of acquitted conduct for purposes of determining a sentence, and related issues for comment.

(4) A two-part proposed amendment addressing certain circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), including (A) two options for amending §2K2.1(b)(4)(B)(i) to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase for a firearm that "had an altered or obliterated serial number," and a related issue for comment; and (B) amendments to the Commentary to §2K2.4 to address a circuit conflict concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count, and a related issue for comment.

(5) A multi-part proposed amendment in response to recently enacted legislation and miscellaneous guideline issues, including (A) amendments to Appendix A (Statutory Index) and the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) in response to the Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021, Pub. L. 117–258 (2022), and a related issue for comment; (B) amendments to Appendix A and §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) in response to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019,

Pub. L. 115–232 (2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security), and related issues for comment; (C) an amendment to subsection (b)(2)(B) of §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) to reflect the enhanced penalty applicable to offenses under 31 U.S.C. §§ 5322 and 5336; (D) amendments to Appendix A and the Commentary to §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) to replace references to 15 U.S.C. § 3(b) with references to 15 U.S.C. § 3(a); (E) two options for amending §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4); and (F) two options for amending §4C1.1 (Adjustment for Certain Zero-Point Offenders) to address concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b)(2).

(6) A two-part proposed amendment to make technical and other non-substantive changes to the *Guidelines Manual*, including (A) technical and conforming changes relating to §4C1.1 (Adjustment for Certain Zero-Point Offenders); and (B) technical and clerical changes to several guidelines and their corresponding commentaries to add

missing headings to application notes; provide stylistic consistency in how subdivisions are designated; provide consistency in the use of capitalization; correct certain references and typographical errors; and update an example in a Commentary that references 18 U.S.C. § 924(c), which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018).

(7) A two-part proposed amendment to the *Guidelines Manual*, including (A) request for public comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics; and (B) amendments that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The Background Commentary to

§1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov. In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,

Chair.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

We write in response to the Sentencing Commission's request for comment on its Proposed 2024 Amendment to the *Guidelines Manual* for Youthful Individuals. Specifically, we write to express our views on Proposed Amendment #2: Youthful Individuals.

We strongly agree that the Commission should limit consideration of juvenile convictions and sentences in calculating a Sentencing Guidelines range. Given the wide array of literature demonstrating that brain development continues throughout adolescence,[1] we urge the Commission to adopt Part A Option 2—to "amend [U.S. Sentencing Guideline (U.S.S.G.)] § 4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score" and make conforming changes to additional Guidelines provisions and Commentary. Option 2 strikes an appropriate balance between the need to incorporate modern scientific and medical understanding about youth brain development into the federal sentencing scheme, and the importance of capturing the most serious offenses in the criminal history score calculation.

Option 1, which continues to include in the criminal history score calculation certain juvenile sentences, does not account for adolescent brain changes and a corresponding "greater capacity to reform."[2] Furthermore, scoring such sentences under the Sentencing Guidelines doubles down on a system that often disproportionately affects minority youth,[3] not only in terms of justice system contact points, but also in the types and lengths of sentences imposed following adjudications.[4] While Option 3 accounts for these concerns by precluding consideration of all offense conduct committed by a minor regardless of whether the defendant was subject to a juvenile or adult adjudication, Option 3 would excise from the calculus sentences for even the most serious offenses.

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[1] Tsui, Anjeli, *How Brain Science Is Changing How Long Teens Spend in Prison*, PBS Frontline (May 2, 2017), https://www.pbs.org/wgbh/frontline/article/how-brain-science-is-changing-how-long-teens-spend-in-prison/.
[2] *Id.*
[3] *Racial and Ethnic Disparity in Juvenile Justice Processing*, Dep't of Justice Office of Juvenile Justice and Delinquency Prevention (updated Mar. 2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity#4-0.
[4] *See, e.g., id.*; Rovner, Josh, *Black Disparities in Youth Incarceration*, The Sentencing Project (Dec. 2023), https://www.sentencingproject.org/app/uploads/2023/12/Black-Disparities-in-Youth-Incarceration.pdf.

In contrast, Option 2 appropriately balances these competing concerns. By removing juvenile sentences from consideration, Option 2 incorporates the growing body of scientific literature and legal scholarship recognizing the significance of youthful functioning and malleability,[5] while continuing to capture the most serious offenses, since individuals charged with such offenses are almost always charged in or transferred to adult court.

For substantially the same reasons, we urge the Commission to decline the bracketed proposed language of Option 2, which permits consideration of juvenile sentences under U.S.S.G. § 4A1.3's departure analysis. Such a provision would provide an alternative means for sentencing courts to consider the same problematic information that Option 2 properly excises from the sentencing calculus.

Finally, we support Part B of the proposed amendment, which aligns with the important policy goals underlying Part A Option 2 by strengthening the existing downward departure on the basis of youth at the time of the offense in U.S.S.G. § 5H1.1 and suggesting that alternatives to incarceration may be appropriate in some cases.

Brain immaturity spurs impulsive, risk-taking behavior that tends to subside as adolescents and young adults mature.[6] Incarceration not only slows this developmental maturation, but often does not enhance public safety.[7] Part B's proposal appropriately balances the importance of youth in sentence calculations with the sentencing court's discretion to depart. Thus, we applaud the proposed revisions to § 5H1.1 and urge the Commission to implement Part B.

Thank you for considering our views.

Sincerely,

Richard J. Durbin
United States Senator

Sheldon Whitehouse
United States Senator

Peter Welch
United States Senator

Alex Padilla
United States Senator

[5] *See, e.g., Miller v. Alabama*, 567 U.S. 460, 471–72 (2012).
[6] Mendel, Richard, *Why Youth Incarceration Fails: An Updated Review of the Evidence* (Mar. 1, 2023), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/.
[7] *Id.*

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February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
Attention: Public Affairs

Dear Chair Reeves:

We write in response to the Sentencing Commission's request for comment on its Proposed 2024 Amendment to the *Guidelines Manual* for Acquitted Conduct. Specifically, we write to express our views on Proposed Amendment #3 – Acquitted Conduct.

We applaud the Commission for again proposing amendments to the Sentencing Guidelines to limit consideration of acquitted conduct for purposes of federal sentencing proceedings. During the 2022–2023 amendment cycle, the Commission identified this issue as a priority.

Since that time, cases challenging the problematic use of acquitted conduct for sentencing purposes have continued to percolate through the courts, and widespread criticism of the practice still exists. However, the Supreme Court has declined to hear these cases, with several justices signaling support for the Commission to address the issue before the Court does.[1] Accordingly, we write in support of the Commission amending U.S.S.G. § 1B1.3 to preclude consideration of acquitted conduct when determining the Sentencing Guidelines range.

We urge the Commission to implement Option 1, which if enacted would "add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range." Options 2 and 3, which continue to permit consideration of acquitted conduct in the guideline range calculation, would not adequately ensure that important procedural safeguards—such as due process and the right to jury trial—are preserved throughout the sentencing stage of criminal proceedings.

Fifth Amendment Right to Due Process and Sixth Amendment Right to a Jury Trial

[1] *McClinton v. United States*, 143 S. Ct. 2400, 2401-03 (2023) (Sotomayor, J., respecting the denial of certiorari); *id.* at 2403 (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari).

When the government fails to discharge its burden of proof—whether reflected in a jury verdict or meritorious motion for acquittal—subsequent use of such acquitted conduct offends the principles underlying the Fifth and Sixth Amendments to the Constitution.

The presumption that an accused is innocent until proven guilty beyond a reasonable doubt is a fundamental precept of due process—a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law."[2] Relatedly, the right to trial by jury serves as "an inestimable safeguard against" arbitrary governmental power that might otherwise undermine a fair and just process of criminal adjudication.[3] Together, these protections ensure the fair and reliable administration of justice.

When a prosecution ends in acquittal, the result indicates that the government failed to prove each element of the charge beyond a reasonable doubt.[4] The finality of this result "is unassailable."[5] Yet, at sentencing for separate charges, a judge may consider relevant conduct by a mere preponderance of the evidence. When relevant conduct encompasses acquitted conduct, the judge effectively reevaluates the jury's verdict—under a significantly lower standard of proof and without the same procedural safeguards. Stated differently, to nevertheless use the underlying conduct for which an accused was acquitted to enhance a sentence for which he was not would allow a judge to penalize a defendant as if the acquittal had not occurred, thereby stripping an accused of the right to due process and a jury trial.[6]

Use of acquitted conduct to increase the severity of sentences seriously damages the appearance of fairness and accuracy in our criminal justice system. Numerous Supreme Court justices, both former and current, have questioned the perceived legitimacy of such a practice in a system affording acquittals "special weight."[7] For example, in a 2005 dissent from denial of certiorari, then-Justice Scalia, joined by then-Justice Ginsburg and Justice Thomas, wrote, "not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense."[8] Scalia decried the practice, writing, "this has gone on long enough."[9] By excluding acquitted conduct from the definition of relevant conduct under § 1B1.3, Option 1 best adheres to the animating principles of our criminal justice system.

Purposes of Sentencing

The statutory mission of the Sentencing Guidelines is to, through a rationalized process, further goals such as deterrence, incapacitation, just punishment, and rehabilitation through use of an effective and fair sentencing system.

Using acquitted conduct to increase a defendant's sentencing range largely frustrates these goals. For example, many people are unaware that conduct for which they have been found not guilty might nevertheless be used to increase a separate sentence. Without such knowledge, the practice has no meaningful deterrent effect. And permitting the use of acquitted conduct affirmatively cuts against both fairness and justice, as the punishment is tailored (at least in part) to an offense for which the defendant is

[2] *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted).

[3] *Duncan v. State of La.*, 391 U.S. 145, 155–56 (1968).

[4] Whether the result of a trial of one's peers or a motion for acquittal, acquitted conduct should be treated similarly for sentencing purposes.

[5] *Yeager v. United States*, 557 U.S. 110, 123 (2009).

[6] We note that acquitted conduct stands apart from uncharged conduct, which has not been affirmatively passed upon by a judge or jury. While the appropriateness of including uncharged conduct in determining the Sentencing Guidelines range may be important to consider in the future, the Commission need not grapple with this question for purposes of Proposed Amendment #3.

[7] *McClinton*, 143 S. Ct. at 2401-02 (Sotomayor, J., respecting the denial of certiorari); *United States v. Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

[8] *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from the denial of certiorari).

[9] *Id.*

legally not criminally liable. Indeed, defendants are often factually innocent of the conduct for which they have been acquitted, eliminating any rehabilitative, penal, or deterrent value from the punishment.

Punishing a defendant for acquitted conduct is a fundamentally unfair practice, which fails to uphold the goals of sentencing and promote respect for the law.

Scope of Acquitted Conduct

We urge the Commission, in defining "acquitted conduct," to adopt the bracketed language "underlying" (as opposed to the bracketed language "constituting an element of") when determining the scope of excluded conduct and to expand the provision to cover state, local, and tribal jurisdictions. An acquittal obtained in any jurisdiction should carry the same weight and finality as an acquittal in federal proceedings.

Moreover, the Commission should refrain from promulgating any exceptions to the "acquitted conduct" definition. Explicit exceptions are unnecessary because the extent to which § 1B1.3 limits "acquitted conduct" is clear based on the Commission's new definition of the term. To the extent the Commission proposes language that would permit consideration of conduct admitted by the defendant at a subsequent plea colloquy, we urge the Commission to decline this exception in particular. Defendants may plead guilty for reasons sometimes unrelated to actual guilt, and thus an acquittal by a trier of fact should supersede statements made during such plea colloquies.

Finally, the Commission should decline the proposed bracketed language exempting acquitted conduct which underlies the instant offense "regardless of whether such conduct also underlies a charge of which the defendant has been acquitted." To consider such conduct when determining the sentencing range implicates the same constitutional and policy concerns discussed above. At most, the Commission should consider limiting such an exception to apply only when the overlapping conduct is essential to establish an element of the crime of conviction—such as if the defendant has been convicted of a lesser-included offense, but acquitted of the greater offense.

Thank you for considering our views.

Sincerely,

Richard J. Durbin
United States Senator

Cory A. Booker
United States Senator

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United States Senate
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February 22, 2024

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

Dear Judge Reeves,

I write to express my views regarding the U.S. Sentencing Commission's Proposed Amendments to the Sentencing Guidelines (Preliminary), which were published on December 14, 2023. In particular, I would strongly encourage the Commission to reconsider the proposed amendment to §4A1.2(d)—Offenses Committed Prior to Age Eighteen—which would reduce or eliminate criminal history points for juvenile convictions, including violent offenses.

The amendment proposes three different options to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score, which is a core component of calculating a defendant's guideline range. While I recommend that the Commission reject all three options, Option 1 is the least harmful of the three because it at least preserves the possibility of a single criminal history point for juvenile sentences imposed within five years of the defendant's commencement of the instant offense. By contrast, Options 2 and 3 go much further by essentially eliminating from a violent offender's criminal history score any criminal history points for sentences resulting from juvenile offenses, or, in the case of the most extreme Option 3, even adult offenses sentences committed prior to age eighteen.

Now is not the time to lower criminal consequences for juvenile crimes. In fact, I would recommend moving in the opposite direction with respect to those using juveniles as tools of violence. Given the prevalence of gangs' and other organized crime groups' use of minors to commit crimes, and in order to facilitate greater deterrence of this heinous practice, I encourage the Commission to increase by at least two levels the penalty for violating §3B1.4—Using a Minor to Commit a Crime.

I also recommend that the Commission look into increasing the base offense level for carjacking, currently only a level 22, pursuant to §2B3.1(a)(5). Carjacking is at epidemic levels from coast-to-coast, and it is not being adequately deterred. The Commission should also increase the base offense level for carjacking in order to better facilitate just punishment for this violent conduct.

On August 14, 2023, 17-year-old Jesus Ayala and 16-year-old Jzamir Keys were on video driving down retired policy chief Andreas Probst while he was on his bike. Mr. Probst was killed.[1] This was only one of a series of Grand Theft Auto-like activities engaged by Ayala and Keys that day. One of the teens tells the other to 'pit maneuver' a Toyota Corolla in traffic,

[1] Jaewon Jung, *Trial date set for teens accused of killing retired police chief Andreas Probst*, ABC13 KTNV (October 24, 2023), https://www.ktnv.com/news/crime/watch-live-teens-accused-of-killing-cyclist-appear-in-court.

which the driver does.[2] They struck another bicyclist as well, a 72-year old, while one of the teens was saying "bump him, bump him" with both laughing.[3] The interaction between the boys and the arresting officer was recorded. Ayala "repeatedly asks how long he will be detained and is jovial about the situation. He even asks the officer to get him something to eat saying he is hungry."[4] The officer explains that the situation is much more serious than Ayala seems to think:

> The officer tells Ayala he will probably be sentenced to 20 to 30 years in prison.
>
> "I'm not lying or being dramatic," said the officer. "I don't understand why you choose this life. I mean you're like 17. You have your whole life ahead of you. You already got some face tattoos. You're already committing some crimes. Like, why?"
>
> Ayala seemingly expects easier treatment as a juvenile. He was 17 on the day of the crimes.
>
> "You think this juvenile sh** is going to do something? I'll be out in 30 days. I bet you," said Ayala.
>
> "You might be out of juvenile, but you'll be moved over to adult jail because of how bad it is," said the officer.
>
> "Just a fu***** hit and run. Slap on the wrist," said Ayala. "Why you got to lie and say it's something serious? It's not that serious."[5]

In January, FBI Director Christopher Wray met with law enforcement officers in Dallas, Texas. He stated that juvenile crime is increasingly a major concern throughout the United States:

> "We are noticing a troubling increase in juvenile offenders, and that increase matches trends we are seeing on a national level," Wray said. "Whether it is carjackings, armed robberies or even worse, violence. Juveniles are committing serious, violent crimes, and that's a challenge that everyone in law enforcement faces these days."
>
> He says part of the problem is juveniles are used by adults to commit violent acts.
>
> "On the traditional violent crime side you see for example where you see gangs who will task juvies to be the shooter because of the perception that consequences will be less if it's a juvenile instead of an adult," said Wray.

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[2] Jaewon Jung, *'It's not that serious.' Video shows teen joking with Metro officer after hit-and-run that killed retired cop*, ABC13 KTNV (October 23, 2023), https://www.ktnv.com/news/its-not-that-serious-video-shows-teen-joking-with-metro-officer-after-hit-and-run-that-killed-retired-cop.
[3] *Id.*
[4] *Id.*
[5] *Id.*

> And he says it's not just juveniles involved in gangs and gun violence but teenagers plotting terrorist attacks.
>
> "In fact, in the last three years, the Dallas area has seen an increase in juveniles inspired by foreign terrorists' organizations like Isis."
>
> He says the FBI working with local law enforcement has recently disrupted violent attacks. Wray says one of the biggest problems is social media.
>
> "Where you have kids essentially online or social medium platforms that are egging each other on to commit violence," Wray said.[6]

Countless similar episodes are occurring across the country, including in my state of Tennessee. Several months ago in Nashville, three juveniles aged 12, 15, and 16 escaped a treatment facility and carjacked a woman at knifepoint.[7] Two months prior, in November 2023, multiple juveniles carjacked a vehicle in Red Bank, TN and led law enforcement on a high-speed pursuit until they crashed in Chattanooga, TN.[8] In Memphis, police "reported the majority of criminals breaking into vehicles and stealing vehicles are teens."[9]

These incidents are unfortunately emblematic of a larger nationwide trend. In Montgomery County, Maryland, State's Attorney John McCarthy stated that "70% of the kids arrested for carjackings in Montgomery County are juveniles."[10] In Hennepin County, Minnesota, "[j]uveniles charged with homicide have more than doubled since 2021 compared with the three years prior."[11] In late 2023, "[Washington] D.C. police data reveal[ed] that 66% of [carjacking] arrests involve juveniles."[12] In Jackson, Mississippi, the City Council approved a curfew for juveniles in January "as part of an effort to curb the surge in youth violence."[13]

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[6] Rebecca Lopez, *Juvenile violent crime is up, according to the Director of the FBI*, WFAA 8 ABC (January 25, 2024), https://www.wfaa.com/article/news/crime/juvenile-violent-crime-up-according-to-director-fbi/287-3f8135f1-17e8-4965-a65a-18f544b5993b.

[7] Alicia Patton, *3 minors in custody after carjacking woman at knifepoint in West Nashville parking garage* (December 20, 2023), https://www.wkrn.com/news/local-news/nashville/3-juveniles-in-custody-after-carjacking-woman-at-knifepoint-in-west-nashville-parking-garage/

[8] Amelia Greer, *Juveniles charged with carjacking and evading arrest* (November 12, 2023), https://www.wdef.com/juveniles-charged-with-carjacking-and-evading-arrest/

[9] Myracle Evans, *Memphis leaders to address juvenile crime in meeting*, ACTION NEWS 5 (February 20, 2024), https://www.actionnews5.com/2024/02/20/memphis-leaders-address-juvenile-crime-meeting/.

[10] Cheyenne Corin, *Maryland plan to curb juvenile crime stirs debate*, WTOP NEWS (February 9, 2024), https://wtop.com/maryland/2024/02/governor-moores-juvenile-justice-plan-stirring-debate-in-annapolis/.

[11] Christopher Magan, *With juveniles committing more serious crimes, these Hennepin County and state leaders are seeking new solutions*, STAR TRIBUNE (December 3, 2023), https://www.startribune.com/how-to-prevent-juveniles-offenders-from-committing-new-crimes-hennepin-county-state-legislature/600324076/.

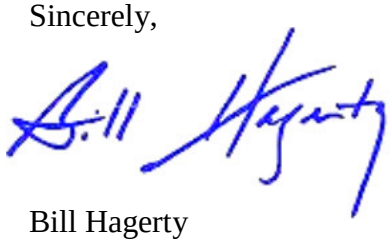
[12] Sierra Fox, *Rise in DC carjackings linked to repeat juvenile offenders, police data shows*, FOX 5 DC (November 16, 2023), https://www.fox5dc.com/news/rise-in-dc-carjackings-linked-to-repeat-juvenile-offenders-police-data-shows.

[13] Charlie Drape & Thao Nguyen, *Mississippi city enacts curfew in an effort to curb youth violence. Critics say measures are ineffective.*, USA TODAY (January 4, 2024), https://www.msn.com/en-us/news/us/mississippi-city-enacts-curfew-in-an-effort-to-curb-youth-violence-critics-say-measures-are-ineffective/ar-AA1mryH3.

It is important to emphasize Director Wray's comment—which is well known across the law enforcement community—that juveniles are recruited by gangs to engage in the worst criminal activities *precisely because the criminal consequences of juvenile actions are minimal* compared to adults. Not only does this disparity thus encourage further juvenile criminal behavior, but it places those juveniles at risk of death or disability. Vernard Toney Jr. was fatally shot in Anacostia by his intended carjacking victim last October.[14] Also last October, four teens died when they crashed a stolen car into a tree in Bowie, Maryland.[15] These sorts of stories are sadly becoming more and more common. There can be no rehabilitation where a juvenile offender's life has been snuffed out in the course of committing a crime. This is why the §3B1.4 increase is so critical.

I understand that the Commission's role in this crisis is minimal—it is primarily driven by insufficient law enforcement attention paid to juvenile criminal activity and other factors that are outside the Commission's control. However, the Commission should not contribute further to the perception—or sometimes reality—that there is no legal consequence to criminal behavior by juveniles. It is not a question of juvenile brain development or culpability—these guidelines apply to subsequent federal criminal offenses. It is a question of real-world outcomes that result from effectively decriminalizing and ignoring the criminal conduct of juvenile offenders.

Sincerely,



Bill Hagerty
United States Senator

[14] Emily Davies, Peter Hermann and Keith L. Alexander, *Alleged teen carjacker fatally shot as D.C. grapples with youth crime*, THE WASHINGTON POST (October 30, 2023), https://www.washingtonpost.com/dc-md-va/2023/10/30/carjacking-youth-dc-fatal-shootiing/.

[15] Brad Bell, *Md. juvenile justice system under scrutiny after 4 teens die in crash involving stolen car*, ABC7 NEWS (October 2, 2023), https://wjla.com/news/local/car-crash-bowie-woodmore-road-four-teenagers-dead-stolen-armed-carjacking-juvenile-justice-system-chase-expired-tags-greenbelt-killed-fire-flames-prince-georges-county-single-vehicle-accident-ems-rescue-smoke.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
333 Constitution Avenue, N.W., Room 4317
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Honorable Roy K. Altman
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February 22, 2024

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer comment on the proposed Guideline amendments for the 2023-2024 amendment cycle.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of criminal law. The Committee provides comments about the amendments proposed by the Sentencing Commission (Commission) for the 2023-2024 amendment cycle as part of its oversight role regarding sentencing guidelines and its monitoring role regarding the workload and operation of probation offices. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the Guidelines."[1] Moreover, the Judicial Conference has resolved that "the federal judiciary

[1] JCUS-SEP 90, p. 69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such

is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] In the past, the Committee has presented testimony and submitted comments expressing support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments focus on four of the proposed amendments, specifically, those that seek to:

1. Amend §2B1.1 regarding the Commentary at Application Note 3(A);
2. Eliminate or limit most consideration of acquitted conduct at sentencing;
3. Reconsider the impact of prior offenses committed before the age of 18 (Part A), and the departure provision regarding age at sentencing (Part B); and
4. Simplify the current "three-step process" courts use to sentence under the Guidelines Manual.

Discussion

I. Proposed Loss Amendment at §2B1.1

This proposed amendment is part of the Commission's multiyear study to address case law concerning the validity and enforceability of Guideline commentary in the Guidelines Manual. Specifically, this particular amendment would address the Third Circuit's decision in *United States v. Banks*—which held that the Commentary to §2B1.1 in Application Note 3(A) impermissibly instructs courts to consider intended loss—and ensure that all circuits can similarly consider and apply the language in question.[3]

The proposed amendment is intended to ensure consistent loss calculations across circuits and address the Third Circuit decision by adding a "Notes" section to the loss table in §2B1.1(b)(1) and by moving the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the Guideline itself, to be included as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm," from the commentary to the Notes.

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communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] *See United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (holding that Application Note 3(A) to §2B1.1, which defines "loss" as the greater of actual loss or intended loss, is inconsistent with the ordinary meaning of loss, which is limited to actual loss). As a result, the loss calculations for defendants in the Third Circuit are now calculated differently than in circuits that continue to apply Application Note 3(A).

The Committee supports this amendment and the Commission's efforts to amend the Guidelines in this manner to avoid disparity and to clarify application of the loss rules. Without endorsing any particular methodology for calculating loss, the Committee favors amending the Guideline to ensure more consistent application of the Guideline language and to clarify its validity and enforceability.

II. Proposed Acquitted Conduct Amendment

This proposed amendment is a result of the Commission's reconsideration of how acquitted conduct is considered in applying the Guidelines.[4] The proposed amendment would eliminate or limit the consideration of acquitted conduct at sentencing pursuant to one of three options, all of which would add the following definition of "acquitted conduct."

> "Acquitted Conduct" means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 1 would prohibit a court from considering acquitted conduct when calculating a defendant's Guideline range. Option 2 would allow for consideration of acquitted conduct but provide a new downward departure if it has either a "disproportionate" or "extremely disproportionate" impact (depending on which bracketed language is ultimately adopted) in determining the Guideline range relative to the offense of conviction. Option 3 would change the standard of proof for consideration of acquitted conduct from a "preponderance of the evidence" standard, used for other relevant conduct, to a "clear and convincing evidence" standard.

For the reasons discussed below, the Committee does not support eliminating or limiting consideration of acquitted conduct or other relevant conduct at sentencing because: (1) the proposed definition of acquitted conduct lacks clarity; (2) the proposed amendment would be unduly difficult to administer; and (3) excluding or limiting acquitted conduct would arguably prevent courts from making fully informed decisions on the statutory goals of sentencing. Instead, the Committee believes that the concerns that appear to underlie this proposed amendment are best addressed through the already-existing discretion of judges to mitigate a sentence when the offense level is based in some part on acquitted conduct. Relying on this existing, well-understood mechanism would avoid the problems associated with having to craft a workable, universal definition of acquitted conduct. Nonetheless, if the Commission chooses to adopt one of the three proposed options, then Option 2 would be the least difficult to administer.

[4] *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023) (cited in the Synopsis to the Proposed Amendment).

A. Any Definition of Acquitted Conduct Should Exclude Conduct Established by a Trial

The Commission seeks comment on whether it should include bracketed language in Option 1 that would exclude from the definition of "acquitted conduct" conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. At the outset, if the amendment were adopted without some version of the language in brackets that would exclude any facts that were found or admitted to "establish, in whole or in part, the instant offense of conviction," then it is likely that Option 1 would frequently render unworkable any attempt to calculate the offense level for the counts of conviction. Given the rules on joinder, Fed. R. Crim. P. 8(a), there often is overlap in alleged conduct from count to count. Absent the exclusion for trial-proven facts from the acquitted conduct definition, it is not clear how a court would calculate an offense level in the many cases with factual overlap. For example, consider a drug distribution case with a conspiracy-to-distribute count and a substantive distribution count. If there is an acquittal on either charge and a conviction on the other, then there arguably would be *no* conduct on which to calculate the offense level absent the bracketed exclusion from the definition of acquitted conduct. Putting this fundamental problem to the side, the following comments assume that the bracketed exclusion language would be incorporated into Option 1.

B. Proposed Definition of Acquitted Conduct Lacks Clarity

The proposed definition of acquitted conduct —as well as the alternative definitions mentioned in the Issues for Comment—lack clarity and will likely result in protracted litigation, particularly in cases where the sentencing judge is unable to readily discern between underlying conduct that was accepted or rejected by the jury. The Committee is concerned about the impact this would have on the fair and timely administration of justice.

The Committee suggests that, if the Commission adopts Option 1, any proposed definition of acquitted conduct must be revised to ensure that it is clear, especially in application. Currently, the proposal defines "acquitted conduct" to mean "conduct (i.e., any acts or omission)" either "underlying" or "constituting an element of" "a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal." The proposed definition thus directs courts to decide what is the conduct "underlying" a charge or (as an alternative) "constituting an element" of a charge, but the definition does not further elaborate on those terms. Regarding the term "underlying," it does not appear that the term arises from an analogous doctrine in criminal law, that is, a doctrine that examines what conduct "underlies" a charge. One view might be that any conduct that was *relevant* to the charge would be considered acquitted conduct, but perhaps the term "underlie" is not coextensive with relevancy. Regarding the phrase "constituting an element," many federal offenses are comprised of elements that do not correspond directly and narrowly to specific conduct. For example, federal fraud statutes require proof of a scheme to defraud (e.g., 18 U.S.C. § 1343), and the breadth of that element could make it difficult to discern what conduct "constitutes" that element.

C. Proposed Amendment Would be Difficult to Administer

Excluding acquitted conduct from relevant conduct could create overly difficult or anomalous situations for sentencing judges when trying to determine the appropriate offense level. Option 1 would prohibit courts from considering acquitted conduct and Option 2 would make it less likely to be considered but still permit consideration of *uncharged* or *dismissed* conduct as part of relevant conduct. This would likely yield anomalous results in sentencing, insofar as the options would allow courts to consider reliable information about uncharged or dismissed conduct while prohibiting or limiting their consideration of equally reliable—or perhaps even more reliable—information about conduct that was charged but then the subject of an acquittal.

The proposed amendment's Synopsis states that in Fiscal Year 2022, there were 286 sentenced individuals with at least one count acquitted at trial. To assist in evaluating the proposed amendment, it would be helpful to apply the proposed amendment options and definition of acquitted conduct to a sample of these cases to illustrate how courts would apply the amendment. Presumably some of those sentenced individuals appealed their convictions and a trial transcript is available, along with the charging instrument and the jury instructions. That would be the same record on which courts would apply the acquitted-conduct definition.

To help demonstrate the anticipated application issues discussed above, the Committee offers two scenarios.

Scenario One

The defendant was charged with one count of criminal sexual abuse of a thirteen-year-old female, Minor A, and one count of criminal sexual abuse of her sister, fifteen-year-old Minor B (both violations of 18 U.S.C. § 2243). The offense conduct describes an evening when the minors' aunt babysat them overnight, and her boyfriend (the defendant) came over. On two separate occasions during the evening, he sexually abused each minor. The defendant proceeded to trial and was convicted of the sexual abuse of Minor A but acquitted of the charge against Minor B, after conceding that the abuse happened but successfully arguing the affirmative defense that he believed Minor B was sixteen years old.[5] Under current application of the Guidelines, a five-level enhancement pursuant to §4B1.5(b) (Repeat and Dangerous Sex Offender Against Minors) would apply based on how the enhancement defines a minor.[6] Under Option 1, would this five-level enhancement not apply because he was acquitted of the count as to Minor B? Or, instead, would the enhancement still apply because the acquitted-conduct definition refers to "conduct," which he conceded at trial? Relatedly, if the same defendant pled guilty to only the count involving Minor A, the §4B1.5 enhancement would apply based on the dismissed conduct (but proven at sentencing) involving Minor B. In this example, the defendant will receive a higher Guideline range if he accepts responsibility and pleads guilty than he would if he proceeded to trial.

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[5] Pursuant to 18 U.S.C. § 2243(d), "In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years."

[6] This enhancement defines "minor" as any individual under the age of eighteen. USSG §4B1.5, App. Note 1(A).

Scenario Two

Two codefendants were indicted on 13 counts of distribution of cocaine base, distributing 28 grams each time. Defendant A pled guilty to one count of distribution and was held accountable at sentencing for the other 12 distributions with Defendant B, pursuant to §1B1.3 (Relevant Conduct), totaling 364 grams of crack. Defendant B exercised his right to a jury trial, and the jury acquitted him of 10 of the 13 counts. The three counts of which Defendant B was found guilty totaled 84 grams of crack; however, at the sentencing hearing, the sentencing judge concluded that, based on a preponderance of the evidence, Defendant B participated in all 13 distributions. Both defendants were in Criminal History Category I. Under the current Guidelines, after acceptance of responsibility, Defendant A would have a Guideline range of 70 to 87 months' imprisonment. Defendant B's range would be 97 to 121 months' imprisonment. Under Option 1, where the conduct underlying Defendant B's acquitted charges could not be considered, Defendant B's range would be 51 to 63 months' imprisonment. This would result in a significant difference between similarly situated codefendants driven by the different treatment of dismissed versus acquitted conduct. To address the disparity, should the court vary upward in the imposition of Defendant B's sentence or vary downward in Defendant A's sentence—or not take the disparity into account either way?

D. Excluding Acquitted Conduct Removes Information Relevant to Statutory Goals

Section 3661 of Title 18 states: "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." This statute allows sentencing courts to consider all reliable and relevant information in determining an appropriate sentence. Prohibiting, or even limiting, a sentencing court's consideration of reliable information about a defendant's acquitted conduct may undermine the statutory purpose.

In addition, prohibiting the use of acquitted conduct in calculating the Guideline range could produce a significant gap between application of the Guidelines and application of 18 U.S.C. § 3553(a). If proven by a preponderance at sentencing, courts may consider acquitted conduct in deciding whether a sentence adequately provides for specific deterrence, § 3553(a)(2)(B), or protects the public from further crimes, § 3553(a)(2)(C). Also, eliminating consideration of acquitted conduct in determining the Guideline range could undermine the Guidelines' relevant-conduct concept altogether, leading to an even larger gap. The overarching purpose of relevant conduct is to emphasize real-offense sentencing instead of charge-offense sentencing, and the omission of acquitted conduct—when otherwise proven at sentencing—would undermine that purpose.[7]

III. Proposed Amendment on Youthful Offenders and Offenses

The proposed amendment addressed in this section contains two parts related to "youthful individuals." Part A would change the computation of criminal history points at §4A1.2(d) for

[7] *See* "Real Offense vs. Charge Offense Sentencing" at USSG Ch.1, Pt.(4)(a).

offenses committed prior to age eighteen. Part B would amend the departure provision at §5H1.1 related to age, including youth. Consistent with the statutory requirements set out in 18 U.S.C. § 3553(a)(2), the Committee supports the court's consideration at sentencing of each individual's history and characteristics, including youthful age, as part of its broad consideration of the statutory sentencing factors. Because criminal history points should reflect (at least in part) the risk of recidivism, however, the computation of criminal history points should not be altered to categorically exclude or further limit offenses committed prior to the age of eighteen. For that reason and others, the Committee does not support Part A of the amendment to the extent that it would exclude criminal history from consideration. At the same time, the Committee supports the intent of Part B, allowing for consideration of youthful age as a ground for departure, with a caveat about some of the language proposed in it. Our reasons are discussed in more detail below.

A. Proposed Amendment Part A (§4A1.2): Computing Criminal History for Offenses Committed Prior to Age Eighteen

Part A provides three options to either limit or eliminate the court's consideration of offenses committed prior to age eighteen in the calculation of a defendant's criminal history score. For several reasons, the Committee does not support any of these options. As explained below, Part A of the proposed amendment is arguably inconsistent with the statutory and Guideline mandates, and it is in tension with empirical research on recidivism. The Commission's recidivism research, consistent with other recidivism literature, shows that young adult defendants are arrested at a higher rate than older defendants.[8] Also, focusing specifically on juvenile adjudications, the Commission's recently published supplemental data shows that 66.9% of those defendants with at least one criminal history point for a juvenile adjudication were rearrested within three years, compared with 43.4% of defendants with at least one criminal history point but none based on a juvenile adjudication.[9] Even when compared to the subset of under-26-year-old defendants, defendants with a prior juvenile adjudication were nearly 12%

[8] According to the 2021 recidivism study cited in the Synopsis, 72.5% of defendants younger than age twenty-one were rearrested during the eight-year study period compared to an overall rearrest rate of 49.3% for federal defendants of all ages. *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* at 24 (2021). *See also* Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects Of Aging on Recidivism Among Federal Offenders* (2017); Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)* at 6 (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

[9] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 10. In addition, the median months to rearrest was ten months for those with at least one criminal history point for a prior juvenile adjudication, compared with twelve months for those with at least one criminal history point without a juvenile adjudication. *Id.*

more likely to garner a new arrest than defendants under the age of 26 without a juvenile adjudication.[10]

In addition, the current criminal history scoring rules at §4A1.2(d) already place reasonable, empirically appropriate limits on which offenses committed before the age of eighteen can be considered by courts. Moreover, when considering an individual defendant's prior juvenile record in light of the section 3553(a) factors, judges already may consider (at appropriate places in the sentencing process) the factors raised in the amendment's Synopsis, including brain development science and culpability.

1. Part A is in Tension with Statutory Mandates and the Purposes of the Criminal History Guidelines

In determining what sentence to impose on a particular individual, section 3553(a) requires courts to consider a broad range of factors, including the criminal history of the defendant.[11] In addition, as noted earlier, section 3661 instructs that "[n]o limitation shall be placed on the information concerning the background" of a defendant. Limiting a court's consideration of a defendant's prior criminal history, as Part A proposes in calculating criminal history, would be in tension with these statutory mandates, especially given that the majority of the impacted prior offenses are recent in time to the federal offense, due to the five-year limitations in §4A1.2(d)(1) and (2).

Section 3553(a) also requires courts, in determining a particular sentence, to consider the need for the sentence imposed to serve the purposes of sentencing.[12] Specifically, courts must consider the need for the sentence imposed to:

- reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;
- afford adequate deterrence to criminal conduct;
- protect the public from further crimes of the defendant; and
- provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[13]

By restricting a court from considering a portion of the defendant's criminal history (which might also be recent) as part of the Guideline calculation, the proposed amendment

[10] *Id.* at Slide 12 (66.9% of defendants in the study group with at least one criminal history point for a prior juvenile adjudication were rearrested compared to 60.0% of those who were under 26 at the time of sentencing with no prior juvenile adjudications).

[11] Specifically, section 3553(a)(1) states that a sentencing court "*shall consider* the nature and circumstances of the offense *and the history* and characteristics of the defendant." *See* 18 U.S.C. § 3553(a)(1) (emphasis added).

[12] *See* 18 U.S.C. § 3553(a)(2)(A)-(D).

[13] *See* 18 U.S.C. § 3553(a)(2).

would arguably not reflect some of the statutory purposes of sentencing, especially: promoting respect for the law (as evidenced by the number and recency of prior offenses); specific deterrence (including the defendant's likelihood to recidivate); and protection of the public (as reflected by the type, recency, and frequency of the defendant's criminal history).

The proposed amendment is also contrary to the intent of the criminal history rules themselves. The Introductory Commentary to the Criminal History chapter of the Guidelines Manual states:

> The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.[14]

Turning to the three options, Option 1 would amend §4A1.2(d)(2)(A) to exclude any juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences of imprisonment of at least sixty days. All juvenile sentences, regardless of violence or other severity, would be treated equally, despite the Commission's own research on violence, dangerousness, and recidivism. The Commission's recently released data provides empirical support for maintaining the current distinction, based on recency and sentence length, between one-point juvenile adjudications and two-point juvenile adjudications.[15] Compared to defendants who had only one-point juvenile adjudications, the data shows that defendants with a prior two-point juvenile adjudication had a history of more violent juvenile offenses, were more often convicted of an instant firearms offense, and were in higher criminal history categories (with 87% in Criminal History Category III, IV, V, and VI).[16] According to the Commission's

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[14] *See* Guidelines Manual, Chapter Four, Part A. The Introductory Commentary goes on to emphasize "the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior," and concludes by saying that "the Commission will review additional data insofar as they become available in the future."

[15] *See* U.S. Sent'g Comm'n, *2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* (Jan. 2024).

[16] S*ee id.* at Slides 9, 11, 12. Based on the Commission's data from Fiscal Year 2022, there were 363 prior two-point juvenile offenses that would be reduced to one-point offenses. *Id.* at Slide 7. According to this data, more than half of the juvenile offenses that received two points were violent offenses (robbery, assault, and other violent offenses) compared to approximately one-third of the one-point offenses, and an additional 23% of the two-point juvenile offenses were weapons offenses. *Id.* at Slide 9. In addition, the most common instant federal offense for defendants with a prior two-point juvenile adjudication was a firearms offense (38.3% of two-point offenders), while those with one-point juvenile priors had more instant drug trafficking and immigration offenses. *Id.* at Slide 11.

recent recidivism study, defendants with a prior two-point juvenile adjudication also had a significantly higher three-year rearrest percentage (more than 72% were rearrested) than those with a prior one-point juvenile adjudication, and they were rearrested sooner than defendants with only one-point juvenile adjudications.[17] Option 1, which would move most defendants with prior two-point offenses down one or more criminal history categories, is not supported by the Commission's recidivism research.[18]

In addition, under Option 1, a repeat juvenile defendant who avoided transfer to adult court could incur a substantial number of prior sentences while only receiving a total of four criminal history points due to the limit in §4A1.1(c). This presents a significant risk of anomalous outcomes. For example, a person with several prior juvenile shoplifting offenses could easily end up with a higher criminal history score than someone who committed a murder or two armed robberies but was not charged as an adult. One of the reasons for this amendment, according to the Synopsis, is that state laws also vary widely as to when (by age, or offense type, or both) a minor can be charged and sentenced as an adult. But Option 1 could widen these geographical disparities, because individuals who commit similar crimes and who receive similar sentences—save for the adult/juvenile distinction—would be treated differently. Consider an example: two fifteen-year-olds committed identical violent crimes; one received an eight-month adult sentence while the other (in a state where a person must be sixteen or older to be charged in adult court) received an eight-month juvenile sentence. Because of this state-law difference, the first defendant would receive two points while the second defendant would receive one point. Additionally, the difference in how the five-year period is calculated between two-point and one-point offenses means that the first defendant's sentence will receive points for a longer period of time than the second defendant's sentence.

Option 2 would amend §4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score. As a result, although offenses committed prior to age eighteen would be counted if the defendant had been convicted and sentenced as an adult, this option would prohibit courts from scoring criminal history points based on juvenile convictions that were not sentenced as adult convictions even if they involved violent crimes and weapons.[19] In addition, Option 2 would prohibit consideration, in calculating

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[17] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 17. According to the Commission's recent recidivism study, defendants with only one-point juvenile adjudications had a three-year rearrest rate of 63.5%, and those with at least one criminal history point that did not include a prior juvenile adjudication had a three-year rearrest rate of 44.4%. *Id.* at Slides 7, 17. In addition, the median months to rearrest was eight months for those with at least one two-point prior juvenile adjudication, compared with ten months to rearrest for those with prior one-point juvenile adjudications. *Id.* at 7.

[18] Under Option 1, a majority of those defendants with prior two-point offenses would move down one or more criminal history categories, despite the fact that courts currently appear to be departing upwards more frequently in cases with a prior two-point juvenile adjudication. *See* U.S. Sent'g Comm'n*, 2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* (Jan. 2024) at Slides 13, 14.

[19] Under Option 2, 940 defendants would no longer receive criminal history points for their prior juvenile convictions, even though nearly half of those prior convictions were for violent offenses (robbery, assault and other

criminal history points, of a defendant's juvenile record no matter how lengthy, serious, similar, or recent it was to the instant offense, and no matter how predictive it might be of the defendant's likelihood of recidivating. The Commission's recently published supplemental data shows that 66.9% of those defendants with at least one criminal history point for a juvenile adjudication were rearrested within three years, compared with 43.4% of defendants with at least one criminal history point but none based on a juvenile adjudication.[20] Even when compared to the subset of under-26-year-old defendants, defendants with a prior juvenile adjudication were nearly 12% more likely to garner a new arrest than defendants under the age of 26 without a juvenile adjudication.[21]

As for violent offenses, approximately 27%-28% of defendants with a prior juvenile adjudication, a prior juvenile adjudication resulting in a confinement sentence, or an offense committed prior to the age of 18 were rearrested for violent offenses; in comparison, the violent rearrest rates for defendants without any offenses committed before the age of 18 was 20%. Although the supplemental data show that the percentage of rearrests for violent offenses is similar for the defendants with juvenile adjudications and those without among defendants in matched age groups, there remain relatively more rearrests for serious crimes: 20.7% more rearrests for homicide; 12.2% more arrests for drug trafficking; and 35.1% more arrests for weapons offenses.[22] Option 2 would prevent sentencing courts from considering, as part of the Guideline calculation, the section 3553(a)(2) statutory purposes of sentencing—promoting respect for the law, affording adequate deterrence, providing effective correctional treatment—and hamper their ability to meaningfully assess whether the defendant poses a risk to public safety.

Further, by allowing consideration of only adult sentences, Option 2 would not address the variation in laws related to trying juveniles as adults, which the proposal cites as a reason for the amendment. As the Synopsis to the amendment emphasizes, states vary with respect to the minimum age at which an individual can be transferred to adult status (ranging from age ten to

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violent offenses) and an additional 18% were prior convictions for weapons offenses. *See* U.S. Sent'g Comm'n, *2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* at Slides 17, 18. When looking at the instant crime type, a higher proportion of defendants with points that included a prior juvenile adjudication were sentenced for firearms crimes while a higher proportion of defendants with no prior juvenile adjudications were sentenced for an instant federal immigration offense. *Id*. at Slide 20. Nearly 70% of defendants with a prior juvenile adjudication were in Criminal History Category III, IV, V and VI. *Id*. at 21. Under Option 2, nearly 62% of individuals would move down one or more criminal history categories, and more than 25% of these defendants would receive zero criminal history points. *Id*. at Slide 23.

[20] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 10.

[21] *Id.* at Slide 12 (66.9% of defendants in the study group with at least one criminal history point for a prior juvenile adjudication were rearrested compared to 60.0% of those who were under 26 at the time of sentencing with no points for juvenile adjudications).

[22] *Id.* at Slide 13 (3.5% versus 2.9% for homicides; 9.2% versus 8.2% for drug trafficking; and 5.0% versus 3.7% for weapons offenses).

sixteen), and state and local rules vary with respect to the adult status determination; some jurisdictions base the determination on the type of offense and others base the determination on a finding that the defendant would not benefit from juvenile court. As a result, Option 2 would only widen that disparity.

Option 3 would amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. In other words, this option would not count these offenses even if the defendant had been sentenced as an adult, which is an indication in many jurisdictions that the prior offense was particularly serious. Option 3 would prohibit consideration of offenses committed prior to age eighteen even if they involved crimes of violence or firearms. [23] In addition, Option 3 would prohibit consideration of a defendant's juvenile record no matter how lengthy, serious, similar, or recent his past offenses were to the instant offense, and no matter how predictive it might be of the defendant's risk of recidivism. This option would again prevent sentencing courts from considering, as part of the Guideline calculation, the statutory purposes of sentencing—that is, promoting respect for the law and affording adequate deterrence—and hamper their ability to meaningfully assess whether the defendant poses a risk to public safety.

Options 2 and 3 include optional bracketed language providing that juvenile sentences may be considered for purposes of an upward departure under §4A1.3. If the Commission were to limit the criminal history points or eliminate consideration of juvenile offenses, as proposed in the amendment, providing for an upward departure would not resolve one of the primary purposes of the amendment, that is, to address the difficulties and disparities in obtaining juvenile records. Given the departure provision, officers would still have the sometimes-difficult task of gathering those records. Further, although adding an upward departure may ameliorate some concerns about excluding criminal history from a sentencing courts' consideration, generally speaking upward departures are rarely imposed. Moreover, given the recidivism-prediction goal of criminal history points, it would be more appropriate for the scoring to be reflective of recidivism data in the first instance rather than leave that to a departure.

In an Issue for Comment, the Commission asks whether it should limit any of the proposed options based on the type of crimes involved in the offenses committed before age eighteen. The Committee is hesitant to support such a limitation because it might very well

[23] Option 3 would impact nearly 8% of all defendants (3,112) who received criminal history points in Fiscal Year 2022, with all 3,112 defendants who received points for offense committed prior to age 18, whether adult or juvenile, getting zero points. *Id.* at Slide 26. For these 3,112 defendants whose prior record before age 18 would be excluded under Option 3, more than 50% of those prior convictions were for violent offenses, including homicides (3.7%), and an additional 15% were for weapons offenses. *Id.* at Slide 27. Looking at the instant federal offense of conviction, a much higher proportion of defendants who received points for a prior offense committed before the age of 18 was convicted of a federal firearms offense, and criminal history categories were higher for those with prior offenses committed before the age of eighteen compared to those without. *Id.* at Slides 29, 30. Ultimately, if Option 3 were adopted, more than 68% of the 3,112 defendants sentenced in Fiscal Year 2022 would move down one or more criminal history categories, and over 16% of those defendants would receive zero criminal history points. *Id.* at Slide 32.

require courts to engage in difficult line drawing. It is even possible that the problematic "categorical approach" would be deployed for the limitation.

2. Part A is Contrary to Empirical Recidivism Research

To the extent that criminal history is used to measure the risk of recidivism, there does not appear to be an empirical basis for excluding or limiting courts' consideration of offenses committed prior to age eighteen, some of which may be close in time to the federal offense. In fact, the recidivism research, including the Commission's recent study, shows that a criminal record before the age of eighteen *is* predictive of recidivism as a young adult.[24] The Introduction to the Guidelines Manual states that the Guidelines "represent an approach that begins with, and builds upon, empirical data."[25]

Empirical research on the impact of a defendant's juvenile record on the individual's risk of recidivism as an adult has consistently demonstrated that defendants with a prior record of offenses committed before the age of eighteen – irrespective of whether they were charged as a juvenile or adult - have a higher rate of adult recidivism than those without prior convictions before the age of eighteen.[26] The Commission recently released data studying the three-year rearrest rate for over 23,381 defendants who had received at least one criminal history point at sentencing. It showed that those defendants with at least one criminal history point for a juvenile offense were rearrested at substantially higher rates, and sooner after release, than those whose criminal history points did not include a juvenile offense.[27] Defendants with a prior adjudication before the age of eighteen were substantially more likely to recidivate than the other defendants

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[24] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*). See also* Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

[25] Chapter I, Part A(3).

[26] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*). See also* Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

In addition, we note that nearly every state-guidelines jurisdiction includes prior juvenile adjudications in their criminal history scores. *See* Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* at 47 (2015), https://robinainstitute.umn.edu/criminal-history-enhancements.

[27] *See* U.S. Sent'g Comm'n, 2024 *Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*)* at Slide 15. For this reason, before making any of the changes to the criminal history calculations proposed here, the Commission should consider whether those changes would alter the predictive strength of the criminal history categories on recidivism for defendants with a prior offenses committed prior to the age of eighteen. For example, if Part A had been in effect in past study periods, would the predictive strength of criminal history categories on recidivism be reduced, improved, or stay the same? Further investigation into this issue should be conducted.

in the study group.[28] Specifically, the percentage of defendants rearrested for any offense within the three-year timeframe was 72% for defendants with a two-point prior juvenile adjudication and 63.5% for those with a one-point prior adjudication; the three-year recidivism rate was 44% for the other defendants in the study group.[29] Particularly notable, the rearrest rate for violent offenses was higher for defendants with at least one criminal history point for a juvenile offense than for defendants in the study group who did not have a prior juvenile offense.[30] In addition, defendants in the study group with a prior juvenile adjudication were rearrested sooner than those without a prior juvenile adjudication. The median time to rearrest was twelve months for defendants in the study who did not have a prior juvenile adjudication, eight months for defendants with a prior two-point juvenile adjudication, and ten months for defendants with at least one prior one-point juvenile adjudication.[31]

The two research reports cited in the proposal's Synopsis, both of which were published by the Commission, showed a correlation between age and rearrest rates, with younger individuals being rearrested at higher rates, and sooner after release, than older individuals.[32] As reported by the Commission's 2021 recidivism study, 72.5% of defendants younger than age 21 were rearrested during the eight-year study period (as compared to a rearrest rate of 49.3% for defendants of all ages), and the median time to rearrest was twelve months (as compared to fourteen months for defendants of all ages).[33] In addition, a record of repeated criminal behavior increases the risk of recidivism.[34]

A defendant's record of past criminal conduct, including recent offenses committed before the age of eighteen, is directly relevant to the four purposes of sentencing set out in the Guidelines and the Comprehensive Crime Control Act.[35] Without information about a defendant's repeated criminal behavior, courts would not be able to accurately assess the section

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[28] *Id.* at Slide 17.

[29] *Id.* at Slide 7, 17.

[30] *Id*. at Slide 11. Specifically, approximately 27-28% of defendants with a prior adjudication before the age of eighteen were rearrested for a violent offense while the violent rearrest rate for defendants without a prior juvenile adjudication before the age of eighteen was approximately 20%. *Id*. at Slides 11, 16.

[31] *Id*. at Slides 7, 10.

[32] *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* (2021); *See also* Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects Of Aging on Recidivism Among Federal Offenders* (2017).

[33] *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* at 4 (2021).

[34] *See id.* at 25-26 (finding that defendants with more extensive criminal histories, as demonstrated by their criminal history category and criminal history score, had higher rearrest rates). *See also*, Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) at 6 (2021).

[35] *See* 18 U.S.C. § 3553(a)(2).

3553(a)(2) factors, including the likelihood that the defendant will commit further crimes and may present a greater danger to the community. For young adult defendants (from around ages eighteen to twenty-five), this may be the only criminal history they have and, without it, they could be zero-point offenders, even if they have a recent and lengthy record of serious crimes.

3. Current Criminal History Rules Already Include Reasonable Limits for Scoring Offenses Committed Before Age Eighteen

The current criminal history scoring rules at §4A1.2(d) already place reasonable limitations on offenses committed before the age of eighteen. The existing rules, which distinguish between an "adult sentence," where the offender was convicted as an adult, and a "juvenile sentence," resulting from a juvenile adjudication, provides shorter "lookback" limits for juvenile convictions than for adult convictions. Under §4A1.2(d), only those convictions that resulted in an adult sentence exceeding one year and a month are subject to the typical fifteen-year lookback period applicable to other adult convictions. Shorter adult sentences, and all juvenile sentences, only receive criminal history points during a much shorter five-year period, running from the date of release for two-point sentences or the date sentence was imposed for one-point sentences. As a result, most juvenile offenses do not receive criminal history points by the time defendants reach their mid-twenties. The current criminal history Guideline already excludes juvenile offenses sentenced (for one-point offenses) or released (for two-point offenses) more than five years before the instant offense, no matter the seriousness of the offense or the length of sentence. After five years, only those offenses deemed serious enough to warrant an adult sentence exceeding a year and a month receive criminal history points under the current Guideline. The current rules are consistent with the recidivism research on which offenses committed before the age of eighteen are predictive of future criminal behavior.

4. Judges Already Weigh the Factors at Issue When Considering Prior Juvenile Convictions

The proposal's Synopsis explains that the proposed amendment seeks to balance various considerations as they relate to the sentencing of youthful individuals. These considerations include evolving brain science research on culpability, studies showing high rates of recidivism for younger individuals, possible racial and ethnic disparities, the challenges of obtaining juvenile records, and protection of the public. These are all issues that courts can and do address when they consider an individual defendant's juvenile criminal history in weighing sentencing goals and factors under 18 U.S.C. § 3553(a). Courts are accustomed to weighing information about past records and are able to distinguish between youthful errors in judgment that should not weigh as heavily on the federal sentence and the kind of concerning conduct that indicates a greater need for deterrence and protection of the public. Rather than amend criminal-history calculations, the most appropriate place for considering youth is under 18 U.S.C. § 3553(a).

B. Proposed Amendment Part B: Departure Provisions §5H1.1

The Committee supports Part B of the proposed amendment with one exception. We support the amendment's proposed change to the first sentence of §5H1.1 as well as the proposed

addition of language specifically providing for a downward departure based on the defendant's "youthfulness" at the time of the offense. However, the Committee does not support the proposed language mandating that courts consider the two categories of listed research when determining whether a departure based on youth is warranted.[36] Not only does the proposed amendment require consideration of a very specific set of brain development and rearrest studies whose outcomes may evolve and be subject to scientific debate, the amendment seems to limit courts to only those two categories of studies in deciding whether to depart.

IV. Proposed Simplification Amendment

This proposed amendment is intended to simplify both (1) the current three-step process used in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the Guidelines Manual regarding a court's consideration of the individual circumstances of the defendant and certain offense characteristics. It would remove the second step in the §1B1.1(b) three-step process, which requires the court to consider the departure provisions, by moving the departure provisions currently set forth in Part H (Specific Offender Characteristics) and Part K (Departures) of Chapter Five to lists of factors outlined in Chapter Six. Departure provisions currently contained in the commentary to various Guidelines would be maintained in new sections of commentary titled "Additional Considerations" or into commentary to Chapter Two provisions as "Additional Offense Specific Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a). The proposed amendment also creates a new Chapter Six, titled "Determining the Sentence" which attempts to facilitate the court consideration of 18 U.S.C. §3553(a).

The Committee generally supports the Commission's commitment to simplify the Guidelines and acknowledges that the three-step process currently outlined in the Guidelines Manual may no longer reflect the practices of many courts, either due to case law or preference. This approach has the advantage of simplifying the sentencing process by avoiding consideration and litigation over departures that ultimately would be overridden by section 3553(a) goals and factors. At the same time, it is worth noting that some judges may find that the departure step promotes transparency and uniformity in their sentencings. Specifically, the advance-notice requirement of Criminal Rule 32(h) ensures that defendants know the grounds for potential departures. And the very fact that departures set forth requisite elements can provide structure to

[36] The proposed amendment states that

> the court should consider the following:
>
> > (1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decisionmaking, and resistance to peer pressure, is generally not developed until the mid-20s.
> >
> > (2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals.

the sentencing judge across cases. At the same time, the Committee overall supports simplification to reflect how a growing number of courts approach sentencing.

The Committee has concerns, however, with several aspects of this proposed amendment, including whether the Commission's authority extends to creating Guidelines for the statutory factors in section 3553(a) and whether the many changes to the text will engender litigation. As a result, the Committee believes the proposed amendment needs additional consideration before implementation.

A. Reclassified Text May Result in Excessive Litigation

It is difficult to determine, based on the Synopsis and the hundreds of marked-up pages that reflect the proposed revisions, if the text added in the redlines introduces new language or if it is identical to language that already exists in the Manual. Although the Synopsis of the proposed amendment states that the new "Additional Considerations" section is "intended to retain, to the extent possible, the guidance and considerations provided by the deleted provisions and to be neutral as to the scope and content of the conduct covered," there is no indication in the amendment text where relocated language has been changed or where new text has been introduced. The Committee is concerned that the introduction of new language throughout Chapter Two and Chapter Six will lead to litigation.

To demonstrate these problems, the Committee has identified several examples of new or changed language. The proposed redlined simplification amendment adds to §2B1.1 as a new mitigating factor that: "The defendant had little or no gain as related to the loss."[37] This does not appear to be a departure provision in the current Guidelines Manual, but it is a consideration in the application of §3B1.2 (Mitigating Role).[38] Another change to §2B1.1 includes voluntary reporting or cessation as a mitigating factor relating to the offense.[39] This does not appear to be a departure provision in the current Guidelines Manual, though these factors are considerations for an adjustment for acceptance of responsibility under §3E1.1.[40] Although the current departure at

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[37] Proposed §2B1.1(2)(B).

[38] Application Note 3(A) to §3B1.2 states, in relevant part:

> Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

[39] Proposed §2B1.1 Additional Offense Specific Consideration 2(D) includes as a mitigating factor: "The defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense."

[40] Application Note 1(B) to §3E1.1 includes "voluntary termination or withdrawal from criminal conduct or associations" as an appropriate consideration in determining whether a defendant qualifies under §3E1.1(a).

§5K2.16 lists voluntary reporting of an offense, there is a significant distinction between stopping an offense (i.e., voluntary cessation) and taking the affirmative step of reporting one's own crime.[41]

These examples suggest that, although the proposed additions are intended to retain the guidance provided by the deleted provisions, there are at least some instances of new language resulting in substantive changes. Without identification of new language, it is difficult for the Committee to comment on the whether the changes will result in increased litigation or difficulties in implementation.

The Committee is also concerned about whether the courts will be *obligated* to consider the factors outlined in the proposed commentary to specific Chapter Two provisions, particularly in light of the Commission's proposal to move certain guidance in §2B1.1 from commentary to the Guideline itself, and the possibility of future revisions that enhance the enforceability of the commentary.

B. New Chapter Six Would Be Difficult to Administer

In the proposal's Synopsis, Issue for Comment No. 2 raises an important and unanswered inquiry regarding the statutory authority vested in the Commission to issue "guidance" on §3553(a) in the form of Commission Policy Statement. Though the Committee is not currently commenting on the authority or lack thereof, it nonetheless agrees that the question merits additional consideration and may, if the proposed amendment is adopted, result in substantial litigation absent a clear source of authority.

The proposal to add Chapter Six may present other significant administrability challenges and difficult litigation. The Committee understands the underlying goal of stating personal (§6A1.2) and offense (§6A1.3) factors neutrally and concisely; however, the enumeration of those factors itself invites litigation over the inclusion and meaning of each category. The judiciary has accumulated eighteen years of experience in the post-*Booker* era applying 18 U.S.C. §3553(a). Introducing an entirely new process rather than relying on this existing experience will likely only complicate, rather than simplify, the sentencing process.

Finally, although the Committee acknowledges that the introduction of Chapter Six may result in some potential benefits in terms of data collection, if the departure step is removed, then

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[41] The Policy Statement at §5K2.16 states:

> If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

those data-collection benefits should still be achievable through continued use of the Judgment and Statement of Reasons forms.

C. Proposed Approach Runs Counter to Rule 32 and the Need for Notice

Rule 32 requires that a presentence report "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32. Absent a change to the criminal rule, the proposed amendment to eliminate the second step may result in presentence reports that do not comply with Rule 32 as currently written.

The rule also requires the court to give "reasonable notice" that the court is considering a departure from the Guideline range if the grounds for the particular departure is not outlined in the presentence report or a party's prehearing submission.[42] The Commission's Synopsis of the proposed amendment acknowledges this, noting that the proposed amendment would "better align the requirements placed on the court." Though the Committee agrees that the outcome would be more consistent, it has concerns that removing the notice requirement may negatively impact the adversarial process or lead to increased litigation.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on its ambitious list of proposed amendments for the 2023-24 amendment cycle. The Committee members look forward to working with the Commission to pursue initiatives that will improve the overall effectiveness of the sentencing guidelines and the fair administration of criminal justice. We remain available to assist in any way we can.

Sincerely,

Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

[42] At least one reference to departures is also made in the statute at 18 U.S.C. §3553(b)(2)(A)(ii)(I).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
2388 UNITED STATES COURTHOUSE
75 TED TURNER DRIVE, S.W.
ATLANTA, GA 30303-3309

Chambers of
Amy Totenberg
United States District Judge

404-215-1438

February 21, 2024

Dear Judge Reeves and Members of the Sentencing Commission,

Once again, thank you for your thoughtful work on revisions to the Sentencing Guidelines. We have reviewed the most recent alternate Proposed Amendments relating to Acquitted Conduct, pursuant to USSG § 1B1.3 and §1B1.4 and in that connection related provisions under Chapters 2, 3, and 4 and share these comments:

We view Option 1 as the most viable and beneficial option proposed. Option 1 provides a concrete and clear proposal for both handling the difficulties of addressing acquitted conduct and protecting the credibility and integrity of the jury and judicial system. Generally speaking, it is very hard for jurors or affected defendants and their families to understand how the jury's rendering of a not-guilty verdict on some charges could result in additional sentencing and punishment as to such charges. Therefore, as a whole, we strongly favor Option 1. We view Options 2 and 3 as creating a potential judicial decision-making morass with the need for difficult and lengthy additional hearings and the likelihood of totally inconsistent judicial approaches and sentencing decisions.

Our one major concern arising in connection with Option 1 concerns that Option's discussion of what conduct "Acquitted conduct" *does not* include as described murkily by the concluding phrase "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]." The manner in which this is written as an explanation of what "Acquitted conduct" *does not include* is frankly confusing, especially in light of the language contained in the first two paragraphs of Section C, sub paragraphs (1) and (2). We are still ourselves trying to untangle how the language in this last paragraph dealing with what "Acquitted conduct does not include" should be read and reconciled with the apparent overall intent of Section C. In its current form, the end paragraph's language likely will create a volume of sentencing disputes, confusion, litigation, and appeals. *We therefore recommend that the currently proposed provision regarding what "Acquitted does not include" be replaced with the language below so as to* clarify and

simplify the Option 1 proposal: “Acquitted conduct generally does not constitute relevant conduct under 1B1.3, but as always a judge may consider the totality of the defendant’s conduct as part of the 3553(a) analysis, as appropriate.”

Finally, we are additionally interested in learning whether the Sentencing Commission will be reviewing the parallel problem posed by acquittals on identical state criminal charges that are then pursued in federal court as federal charges. This too can pose difficult sentencing quandaries.

Thank you for consideration of our comments and the important work that the Commission is undertaking.

Sincerely,

Hon. Amy Totenberg
Sr. U.S. District Judge, N.D. Ga.

Hon. Steven Grimberg
U.S. District Judge, N.D. Ga.

Hon. Victoria Calvert
U.S. District Judge, N.D. Ga.

Hon. Sarah Geraghty
U.S. District Judge, N.D. Ga.

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Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

District Judge Jack Mcconnell, Rhode Island

Topics:

Youthful Individuals

Acquitted Conduct

Comments:

1. Youthful Individuals - Part A - Option THREE seems the most appropriate to me. We have learned so much about the culpability (or lack thereof) of youthful offenders. Their conduct is often as a result of childhood trauma, poor parenting, lack of community support, racism, etc. Considering a youth's conduct in any way in sentencing them for adult offenses - only perpetuates the society evils that caused it in the first place. It compounds the problem unjustly.

2. Acquitted Conduct - we need to live what we preach. A person is considered innocent before they are convicted and after an acquittal. This is fundamental to our justice system. To allow acquitted conduct to be considered in sentencing is an affront to this basic precipe of our justice system.

Thank you for considering my comments,

Jack McConnell
Chief Judge, District of Rhode Island

Submitted on: December 28, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

District Judge Stephen Bough, Missouri, Western

Topics:

Youthful Individuals

Acquitted Conduct

Comments:

Thank you for receiving comments on the proposed rule changes.

On Youthful Offenders, federal courts face the difficult position of looking at 50 states variations on due process. As the USSC has recognized, youth are not given all the constitutional protections. Different states have different rules on even who can be tried. I would encourage Option 3 - exclude all sentences resulting from offenses committed prior to age eighteen. One of the reasons the Supreme Court does not afford minors all constitutional protections is states are to treat these youthful offenders lacking full brain development is that they are kids and society should be providing parental-type love and support. To later add points in a PSR for something that occurred while an individual is under 18 seems to make a mockery of the Supreme Court's logic.

Next, on Acquitted Conduct, I would encourage the USSC to adopt Option 1, "acquitted conduct is not relevant." Our criminal justice system is premised upon the notion that you are innocent until proven guilty. To get an acquittal means you are not guilty. To then later prove someone is "guilty" on an acquitted crime through a lesser standard of proof turns on constitutional protections on its head.

I'm proud that the USSC is back in business. Thank you for your hard work.

Submitted on: December 14, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Charles W Lander, retired Local Criminal Court Steuben County

Topics:

Acquitted Conduct

Comments:

February 20, 2024
Sentencing Commission Re. Acquitted Conduct Sentencing
I've been of the opinion, for quite some time now, that the Federal Judiciary, and likely most of the state's judiciary have gone awry. I'm obviously not alone. If you were to ask any middle class person today what they consider to be the condition of the United States Judicial System they would likely answer using one or more of the following adjectives. Broken, unfair, non-uniform, self-serving, corrupt, influenced by hidden agendas, political, unequally yoked rich vs. poor, racist, and on and on. Contrary to this, most legal professionals do not feel this way. Why is that? Perhaps because lawyers, judges, and law professors are often required to operate within many constraints and in doing so they have buried that simpler, more grounded form of fairness possessed by the laity. Maybe they just get lost in the quicksand of legalese or their overzealous use of the English language. This is a plausible analogy when one looks at the effort employed by courts during voir dire. Be that as it may, I've laid the foundation for my following comments. Please indulge me my layperson's understanding as I present my point.

Regarding the topic of "Acquitted Conduct Sentencing" it's important that we first boil this down, as my late Mother would say, and then run it through the filters of common sense. I ask you to do this now by asking yourself this question. Is it fair? Is it doing to someone what you would not want done to you… or someone you love? Does it feel dishonest? Does it seem bent or even a little crooked? What would Jesus do? This question definitely deserves some soul searching before answering. As you may have guessed, my opinion is that it is NOT fair and for a myriad of ethical reasons. Furthermore, most anyone on the street would agree with me. Maybe they couldn't eloquently articulate their reasoning but deep down inside their soul they would feel fervently that it IS unfair; unfair to draw up an agreement only to renege as soon as signatures are obtained; it's unfair for judges to overrule a jury's conclusion; it's unfair when DAs corroborate with defense attorneys in order to steer the outcome for the purpose of saving time or seeking advancement, OR filing quotas for the 158 privately owned prisons in this country.

In conclusion let me also touch on this. Courts are held to the highest of standards. Everyone

sort of knows this but the standard is even higher than you think! When you sit as a judge, know that you have been put there by God and no one else! You answer to Him and it doesn't matter if you believe in it or not; the buck stops with you! Congress, of all people, should not be producing Sentencing Guidelines or anything meant to influence or "help" the judiciary. Who in the hell do they think they are? There have been a plethora of negative occurrences that have happened to this country since 1969. The people for whom this country exists have been echoing, "Just do the right thing"! You know Acquitted Conduct Sentencing should not be allowed. Sitting judges who allow it should be admonished and then the second time removed. Thank you for this opportunity. May God still bless this country.

Hon Justice Charles W. Lander retired

Submitted on: February 20, 2024

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 22, 2024

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

Dear Judge Reeves:

This letter responds to the United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.[1] We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come to improve public safety and further the cause of justice for all.

I. Calculating Criminal Histories for Crimes Before the Age of Eighteen

The Department is focused on working to reduce violent crime and is concerned about any amendment to the Guidelines that would prevent sentencing courts from holding accountable violent offenders who have recidivated within a short period of time. Each of the three options in Part A of the proposed amendment would do just that by categorically excluding juvenile

[1] U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at Federal Register : Sentencing Guidelines for United States Courts.

sentences, even for violent crimes, from consideration in the Guidelines' criminal history calculus without respect to the nature of those sentences.

In part for this reason, we are concerned that the proposed amendment offers too simple an answer to a complex question. As the Commission notes, research generally shows that brain development continues well into one's twenties, affecting reasoning and decision making. Behaviors generally change as young people mature. No one approach fits all experiences.

The Department believes that we must be able to identify adults who are most at risk of continuing to commit violent offenses – *e.g.*, homicides, non-fatal shootings, and carjackings.[2] The research on youthful offending recognizes the substantial heterogeneity in youth who commit crime,[3] in part as a result of the heterogeneity of cognitive development among youth generally.[4] Most young people do not commit crime at all. Some young people commit minor offenses; some commit serious and violent offenses;[5] and some are chronic offenders[6] who commit serious and violent crimes over and over again.[7] Rather than supporting a bright-line provision like the Commission's current proposals, the research supports a more nuanced approach – as a result, the Department opposes Part A of the proposed amendment.[8]

II. Acquitted Conduct

a. *Summary*

As it did during the last amendment year, the Commission has proposed amendments limiting the use of acquitted conduct in determining the guidelines range. Consistent with federal statutes, the proposals would continue to allow district courts to consider acquitted conduct when determining where within the applicable guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 ("[N]o limitation shall be

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[2] Given the recent spike in incidents of carjacking, including by juvenile offenders, the Department looks forward to working with the Commission in the next amendment cycle to evaluate current sentencing policy for such offenses, with consideration given to increasing penalties on those who recruit juveniles to engage in carjacking. Such penalty increases would complement law enforcement and community engagement steps the Department is taking to reduce such crime.

[3] National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (2013), ch. 1, 23, available at https://nap.nationalacademies.org/catalog/14685/reforming-juvenile-justice-a-developmental-approach.

[4] *See e.g.* Rachel M Brouwer, et al., The Speed of Development of Adolescent Brain Age Depends on Sex and Is Genetically Determined, 31 Cerebral Cortex 2, (2021), available at: https://academic.oup.com/cercor/article/31/2/1296/5929823; Stephanie K. Scott & Kelli A. Saginak, *Adolescence: Emotional and Social Development*, in D. Capuzzi & M. Stauffer (eds), *Human Growth and Development Across the Lifespan: Applications for Counselors*, ch. 12 (2016); Albert Dustin et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 Current Directions in Psychological Science 2, 114-20 (Apr. 2013).

[5] *Reforming Juvenile Justice: A Developmental Approach*, *supra* note 3.

[6] We use the term "offender" as the Commission did in the amendment and the issue for comment.

[7] *Reforming Juvenile Justice: A Developmental Approach*, supra note 3, citing to Kimberly Kempf-Leonard et al., *Serious, Violent, and Chronic Juvenile Offenders: The Relationship of Delinquency Career Types to Adult Criminality*,18 Justice Quarterly *3*, 449-78 (2001); Rolf Loeber & David P. Farrington, *Serious and Violent Juvenile Offenders. Risk Factors and Successful Interventions* (1999).

[8] Because we do not view the proposal contained in Part B as altering a sentencing court's discretion to depart, either downward or upward, based on a defendant's individual circumstances, we take no position on Part B of the proposed amendment.

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.").

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with an amendment, the Department believes the definition of acquitted conduct should be amended. Of the Commission's proposed options, we believe that Option Two, with the Department's revised definition, would present fewer administrability concerns, litigation risks, and uncertainty.

b. *Background*

The Supreme Court has long recognized a judge's broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., Watts*, 519 U.S. at 157 ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as the conduct has been proven by a preponderance"); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"). The Court in *Watts* reiterated its holding in *Williams v. New York*, that "[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 151-52 (quoting *Williams,* 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of conduct underlying acquitted counts at sentencing would be a significant departure from this longstanding sentencing principle. *Watts*, 519 U.S. at 152 (noting that even "[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted").

Section 3553(a) requires the sentencing judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. Section 3661 codifies the longstanding principle that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a sentencing judge may receive and consider.

c. *Option One Would Be Difficult for Courts to Administer*

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Likewise, §6A1.3(a) specifies that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility

under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Citing 18 U.S.C. § 3661 and the Court's decision in *Watts*, the commentary to that provision explains that "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."

Option One would make four changes to the Guidelines and commentary. It would –

- add a new subsection (c)(1) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3;

- add a new subsection (c)(2) to §1B1.3, in the Guidelines text, defining "acquitted conduct" as "conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure." A consistent definition would also apply under Options Two and Three;

- propose, if the new subsection (c)(2) to §1B1.3 is adopted, excluding from the definition, conduct that was either "admitted by the defendant during a guilty plea colloquy" or "found by the trier of fact beyond a reasonable doubt" and "establish[es] 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]"; and

- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that "[a]cquitted conduct, however, is not relevant conduct for purposes of determining the guideline range;" remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine "the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4."

We appreciate the Commission's changes to the definition of acquitted conduct that was published for comment last year in response to commentators' concerns: combining the exceptions with the definition; adding *"constituting an element of a charge"*[9]; limiting the definition to federal acquittals to address concerns regarding parallel state and federal prosecutions; and adding clarification for overlapping verdicts ("*regardless of whether such conduct also underlies a charge of which the defendant has been acquitted*").

We continue to believe, however, that the Commission cannot practicably prohibit the consideration of acquitted conduct in determining the guidelines range. Though well intentioned, Option One will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a

[9] We appreciate the Commission's inclusion of "*a charge"* to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase "*underlying a charge"* adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct, and for the reasons we stated last year, *"underlying a charge"* would not provide sufficient guidance.

defendant's conduct.[10] As the Supreme Court recognized in *Watts*, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define "acquitted conduct," the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

If adopted, Option One (and the corresponding definitions in Options Two and Three) would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as "*underlying a charge of which the defendant has been acquitted*" will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.[11] The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission's proposal fails to account for an acquittal unrelated to the defendant's innocence as to the conduct at issue – for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence was established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the guidelines range.

Option One and the corresponding definitions in Options Two and Three also fail to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of

[10] Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would "be unsound as a practical matter." *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022). "It will frequently be "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *McClinton v. United States*, 143 S. Ct. 2400, 2405 (2023) (Alito, J., concurrence respecting denial of *certiorari*) (*quoting Watts*, 519 U.S. at 155).

[11] Like last year, we appreciate the Commission's inclusion of "*a charge*" to recognize that triers of fact decide charges, not conduct. Juries generally do not acquit defendants of conduct, they acquit on charges. We also recognize that the phrase "*underlying a charge*" adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion from the definition conduct either "admitted by the defendant during a guilty plea colloquy" or that was "found by the trier of fact beyond a reasonable doubt" and "establish[es], in whole or in part, the instant offense of conviction" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in to both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

d. *A More Workable Definition for (c)(2), Applicable to All Three Options*

Many commentators from last year's consideration of this issue shared our concerns with the Commission's proposed definition.[12] If the Commission proceeds with some amendment nonetheless,[13] defining "acquitted conduct" as clearly as possible is essential. While only Option One of the published proposals contains a definition with exceptions, we believe all three of the Commission's options necessitate a definition that is as clear, calibrated, and workable as it can be. We recommend a narrower definition of "acquitted conduct" for each option that would: (1) include specific exceptions; (2) clarify the definition to reduce administrability concerns; and (3) focus on the conduct that the evidence proves rather than what the trier of fact found. This narrower definition will not fully resolve our concerns. But it would better account for overlapping, split, or inconsistent verdicts, and verdicts unrelated to factual innocence. It would also better protect victims' rights. Should the Commission proceed with any of the three options, we recommend incorporating our definition below.

Our recommended changes are <u>underlined</u> and explained below.

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[12] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf.

[13] Beyond the citation to *Watts* already in §6A1.3.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(2) DEFINITION OF ACQUITTED CONDUCT. For the purposes of this guideline, "***acquitted conduct"*** means conduct (*i.e.*, any acts or omissions) constituting an element of a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

"Acquitted conduct" does not include any conduct (*i.e.*, any acts or omissions) that—

A) was admitted by the defendant under oath ~~during a guilty plea colloquy;~~ or

B) was determined by the court to have been established at trial beyond a reasonable doubt ~~was found by the trier of fact~~;[14]

~~to establish~~, and relates, in whole or in part, to the instant offense of conviction, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted.

"Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771.

The Department recommends these changes for the following reasons:

First, separating the definition of acquitted conduct from any rule governing its use would help reduce confusion. Conduct which the evidence at trial established beyond a reasonable doubt and relates to the instant offense of conviction is not acquitted conduct, even if the same conduct also underlies a count of acquittal. Reframing the exclusion as to what the evidence shows, *i.e.,* whether the trial evidence established the conduct beyond a reasonable doubt accomplishes the Commission's goals of affording due respect to the jury's verdict while allowing the judge to properly sentence the defendant for conduct found proven. These changes will help clarify that the Commission's proposal is not intended to prevent a sentencing judge from considering conduct underlying the elements of a charge for which the defendant was convicted and thus which a jury necessarily found beyond a reasonable doubt. Because a defendant may also properly admit to conduct during testimony under oath, we recommend deleting the limitation regarding an admission made "*during a guilty plea colloquy*."

Second, our reframing of subsection B so that it would exclude from the definition of acquitted conduct, conduct that *was determined by the court to have been established at trial*

[14] We share the concerns expressed by Justice Alito in his denial of certiorari in *McClinton v. United States* that "while the *[United States v.] Watts* regime has been shown to be eminently workable, significant practical concerns pervade the alternatives," identifying, among other issues, that "it will frequently be 'impossible to know exactly why a jury found a defendant not guilty on a certain charge,'" which will lead to a proliferation of special-verdict forms, "despite the fact that they are generally disfavored in criminal cases and thought to disadvantage defendants." *McClinton v. United States*, 143 S. Ct. 2400, 2405-06 (2023) (Alito, J., concurring).

beyond a reasonable doubt, would, in addition to accounting for overlapping, split or inconsistent verdicts, also account for an acquittal unrelated to the defendant's conduct.

Finally, we recommend adding language to ensure that limiting a sentencing judge's ability to consider acquitted conduct does not unintentionally limit the ability of a victim to be "reasonably heard" under 18 U.S.C. § 3771(a)(4) or unduly limit the judge's discretion to consider any information concerning the conduct of a defendant.

e. ***A More Workable Construction for (c)(1)***

If the Commission decides to proceed with Option One, we recommend two changes. First, we recommend incorporating our revised definition discussed above. Second, because of the evolving case law questioning the validity of certain guideline commentary, we also recommend moving from the commentary in §6A1.3 the permitted use of acquitted conduct to the text of §1B1.3. While these changes will not fully resolve the Department's administrability concerns, splitting the prohibited use in the guideline from the permitted use in the commentary would add unnecessary complexity, invite additional litigation over the authoritativeness of guideline commentary, and be inconsistent with actions to preserve the validity of the commentary. The Department's recommended changes are underlined below.

> (C) ACQUITTED CONDUCT. (1) EXCLUSION. Acquitted Conduct is not relevant conduct for the purposes of determining the guideline range. The court is not precluded from considering acquitted conduct in determining the sentence to impose within the Guidelines range, or whether a departure or a variance 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 also solicited comments on whether it should completely ban consideration of acquitted conduct for all purposes when imposing a sentence – including for § 3553(a) considerations – and whether it has the legal authority to do so. We think that the answer to both is: no. Congress created the Commission and charged it with promulgating the Guidelines.[15] In addition to directing the Commission to meet general goals for federal sentencing, *see Neal v. United States*, 516 U.S. 284, 290–91 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply, 28 U.S.C. § 994(a) - (y). Among those requirements is the provision stating that the Commission "shall promulgate" the Guidelines "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). As the Supreme Court has noted, Congress did not grant the Commission "unbounded discretion" and "broad as that discretion may be, however, it must bow to the specific directives of Congress."[16] A blanket prohibition against consideration of acquitted conduct would be inconsistent with federal statutes, including §§ 3661 and 3553(a), and outside the bounds of Congress's specific grant of authority. *See Concepcion v. United States*, 597 U.S. 481, 494 (2022) ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution."); *see generally United States v. Booker*, 543 U.S. 220, 250 (2005) ("Congress'

[15] 28 U.S.C. § 991; *Mistretta v. United States*, 488 U.S. 361, 366 (1989).
[16] *United States v. LaBonte*, 520 U.S. 751, 753, 757 (1997).

basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.").

f. *Option Two's More Workable Alternative*

If the Commission proceeds with an amendment now, we recommend Option Two with our revised definition. Option Two would allow courts to consider a downward departure if the use of acquitted conduct results in a disproportionate guidelines range relative to the offense of conviction. This option would preserve judicial discretion to determine how much – if any – weight to accord conduct underlying an acquitted count, address unfairness concerns about acquitted conduct driving sentences, and present fewer operational challenges. As opposed to a bright-line rule, it would also raise fewer legal concerns regarding the interplay with federal statutes such as 18 U.S.C. §§ 3661, 3771, and 3553(a). Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Two would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. For consistency and to avoid unintended consequences,[17] we recommend modeling the downward departure provision on the language currently in Application Note 2 to §4C1.1. If the Commission eliminates departures under its simplification proposal, we recommend restyling the departure provision as an "additional consideration." The Department's recommended changes are underlined below:

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range).

10. Downward Departure Consideration for Acquitted Conduct.—If the use of acquitted conduct (*i.e.*, conduct ~~[underlying] [~~constituting an element of~~]~~ a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure) results in a guideline range that overrepresents the seriousness of the defendant's conduct ~~has [an extremely] [a] disproportionate impact in determining the guideline range~~ relative to the offense of conviction, a downward departure may be warranted.

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[We recommend incorporating our full revised definition discussed in part d, above].

[17] We note that the "disproportionate impact" language comes from *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (holding that facts supporting guidelines enhancements that have a "disproportionate impact" on the sentence require proof by clear and convincing evidence). *Staten* was not about acquitted conduct, decided before *Apprendi* and *Alleyne*, and other circuits have declined to follow this rule post-*Booker*. *See, e.g., United States v. Reuter*, 463 F.3d 797, 793 (7th Cir. 2006); *United States v. Mohammed*, 2023 WL 8853035 (D.C. Cir. 2023). Because we do not understand the Commission to be adopting any rule as what constitutes a "disproportionate impact," we recommend that the Commission avoid any potential unintended consequences from introducing this language into the guidelines and instead use the "overrepresents" (and "underrepresents") language used in existing departure provisions. *See, e.g.,* app. n. 6(i) §2G2.3; app. n. 3(B) §4A1.2; §4A1.3(a)(1); app. n. 2 §4C1.1; app. n. 4. §4B1.1.

g. *Option Three's Elevated Standard of Proof and Administrability Challenges*

Compared to Option Two, Option Three presents far greater administrability challenges. Many of these concerns are similar to those for Option One. Option Three would require acquitted conduct to be proven by clear and convincing evidence before the court could consider that conduct for Guidelines purposes. Raising the standard of proof to clear and convincing evidence would distinguish acquitted conduct from other relevant conduct, which may address some concerns, but also lead to more litigation. Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Three would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. On balance, it would retain judicial discretion to consider acquitted conduct sufficiently proven and shift the focus from what the trier of fact found to what the evidence shows, making it a more viable option than Option One. But because it still requires judges to siphon off acquitted conduct from relevant conduct, it will result in many of the same administrability concerns outlined above.

III. Simplification of the Three-Step Process

a. *Summary*

The Department supports simplification of the Guidelines, but we think it must be done through a meticulous, deliberative, and fully researched process to ensure both its legality and effectiveness. We are concerned with the speed at which this proposal is moving and that it is happening without adequate consideration of the numerous legal and policy issues it raises. We are especially concerned that portions of the Commission's amendment conflict with express congressional directives and will cause confusion over a judge's authority to fashion an appropriate sentence pursuant to all the factors listed in 18 U.S.C. § 3553(a). Given the scope of this amendment and its legal vulnerabilities, we encourage the Commission to defer consideration of the proposal until it can carefully and fully review its effects and the implicated legal issues.

Before the Supreme Court's decision in *United States v. Booker*,[18] judges were required to impose sentences within the sentencing ranges prescribed by the Guidelines, except under narrow and specifically defined circumstances.[19] In the pre-*Booker* sentencing regime, departures were vital to the integrated structure of the Guidelines.[20] A sentencing judge granted a "departure" when it invoked the discretion under the mandatory guidelines regime to sentence outside the applicable guideline range under specified circumstances.[21]

Booker invalidated the mandatory features of the Guidelines, allowing judges to exercise discretion to impose a sentence outside the applicable guidelines range regardless of the presence or absence of departure authority. Departures and variances are distinct, though very similar,

[18] 543 U.S. 220 (2005).
[19] 18 U.S.C. § 3553(b)(1) (excised by *Booker*, 543 U.S. at 259).
[20] *United States v. Rivera*, 994 F.2d 942, 948-50 (1st Cir. 1993).
[21] *See*, *e.g.*, USSG §4A1.3 (authorizing departures when a defendant's criminal history score inadequately reflects the defendant's prior criminal conduct); USSG §5K2.0 (permitting departures based on relevant circumstances that the Guidelines have overlooked entirely or have accounted for insufficiently).

concepts in the post-*Booker* sentencing scheme. Although they may lead to the same result – a sentence outside the applicable guidelines range – a variance and departure reach that result in different ways. A variance is a sentence imposed outside the guidelines range when the judge determines, for a reason independent of the guidelines or Guidelines Manual, that a sentence within that range will not adequately further the purposes reflected in 18 U.S.C. § 3553(a).[22] A departure, by contrast, is a sentence imposed outside the applicable guideline range[23] for a reason described in the Guidelines Manual, including the departure provisions.[24]

We agree with the Commission that, as a general matter, judges use departures less frequently than variances.[25] Nonetheless, it is still critical for the Commission to carefully analyze the legal and practical implications of the proposal before enacting it. The proposed amendment is comprehensive – removing even the mention of departures in commentary – essentially requiring republication of the entire Guidelines Manual as part of the amendment.[26] Given the proposal's scope and structure, there are serious legal and policy questions raised by it and many potential unintended consequences. Until those questions and consequences are more fully explored, we think the Commission should not move forward.

b. *Conflicts with Congressional Directives, Federal Statutes, and the Federal Rules of Criminal Procedure*

One of our primary concerns with the proposal is that portions of it conflict or appear to conflict with express congressional directives and other legislative enactments. For example, Section 401(b) of the PROTECT Act,[27] which amended the Guidelines addressing departures and below-guideline sentences for crimes against children and sexual offenses, is not mentioned or analyzed.[28] That provision directly inserted a new subsection (b) into §5K2.0 to clarify the limits of downward departures in these cases.[29] It also created a new policy statement in the Guidelines (§5K2.22) delineating the circumstances in which a judge could use a defendant's age and serious physical impairment as a ground for a downward departure. It required that "[d]rug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines" in such cases.[30] The Act directly amended §5K2.20 (aberrant behavior) to limit departures on those grounds in these cases.[31] And it included language in §5H1.6 barring a downward departure in such cases based on family ties and responsibilities and community ties.[32] Finally, it amended §5K2.13 to state that a judge could not depart downward on the

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[22] *See Gall*, 552 U.S. at 49–50.
[23] App. n. 1(F) USSG §1B1.1.
[24] *Irizarry v. United States*, 553 U.S. 708, 714 (2008).
[25] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 123 (noting that "courts have been using departures provided under step two of the three-step process with less frequency in favor of variances").
[26] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 121-621.
[27] Pub. L. No. 108-21, § 401(b) (2003).
[28] Most of the limitations expressly apply to a defendant convicted of an "offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code." *Id*. §§ 401(b)(2), (3), (4), (5).
[29] *Id*. § 401(b)(1).
[30] *Id*. § 401(b)(2).
[31] *Id*. § 401(b)(3).
[32] *Id*. § 401(b)(4).

grounds of diminished capacity in these types of cases.[33] Taken together, these amendments sought – by creating one policy statement and making specific amendments to several other policy statements – to set the limits on the use of downward departures in certain cases on certain grounds (age; serious physical impairment; drug, alcohol, or gambling dependence; aberrant behavior; family ties and responsibilities and community ties; and diminished capacity). There are Commission policies on non-guideline sentences that are acceptable and some that are not. But the changes from the PROTECT Act reflect deliberate policy choices made by Congress, and the current Guidelines include these congressionally mandated amendments.

The Commission's proposed amendment disregards Congress's directives in the PROTECT Act. It eliminates §§5K2.0, 5K2.22, 5K2.20, 5H1.6, and 5K2.13 entirely, including the language that Congress specifically directed be part of the Guidelines Manual as policies of the Commission. It does so without acknowledging the PROTECT Act or explaining how the amendment is consistent with it. Of course, judges, as part of their § 3553(a) analysis, may disagree with these aspects of the PROTECT Act, as they may disagree with Commission's policy statements generally.[34] And Congress may subsequently amend one or more of these portions of the Act. Currently, however, Congress, through federal law, has specifically and directly authored portions of the Guidelines Manual. Judges must consider all of the § 3553(a) factors in imposing sentences, and those factors include the Guidelines' policy statements. The proposed amendment does not explain how the Commission may set aside those congressional directives consistent with the legal requirements of the PROTECT Act and § 3553(a).

There are other legal questions raised by the proposed amendment, questions related to the interplay of the Guidelines with federal statutes and rules of procedure that specifically reference departures.[35] Before moving forward, we think the Commission must rigorously research all these legal issues.

c. *Parts of the Proposed Amendment Conflict with the Mandate of § 3553(a)*

We also are concerned that the Commission's proposed amendment will create confusion and intrude on sentencing judges' authority – and requirement – to fashion an appropriate sentence under § 3553(a), and that it in part conflicts with § 3553(a). Since *Booker*, judges have enjoyed broad discretion in evaluating and accounting for the factors under 18 U.S.C. § 3553(a).[36] This is based on the statute's requirement that the sentencing judge consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Moreover, in § 3661, Congress clearly provided that "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

[33] *Id*. § 401(b)(5).
[34] *See, e.g., United States v. Herrera-Zuniga*, 571 F.3d 568, 585-86 (6th Cir. 2009) (collecting cases).
[35] *See, e.g.,* 18 U.S.C. § 3742; Fed. R. Crim. P. 11, 32.
[36] *See, e.g., Beckles v. United States*, 580 U.S. 256, 263 (2017) ("Yet in the long history of discretionary sentencing, this Court has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'" (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005))); *see also United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) ("The decision about how much weight to assign a particular sentencing factor is 'committed to the sound discretion of the district court.'" (quoting *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) (quotation marks omitted))).

an appropriate sentence."[37] Similarly, the Supreme Court has "long recognized that sentencing judges exercise a wide discretion in the types of evidence they may consider when imposing sentence and that [h]ighly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[38]

The Commission's proposed amendment to §1B1.1, however, appears to add requirements to § 3553(a). It appears, for instance, to shape a judge's sentencing discretion by *requiring* the judge to "consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) *and the guidance provided in Chapter Six* to determine the sentence that is sufficient, but not greater than necessary" (emphasis added). Similarly, the proposed commentary to §1B1.1 "*instructs* courts to consider guidance provided by the Commission in Chapter Six."[39] The new Chapter Six mandates and limits the factors a judge may consider as part of the § 3553(a) analysis. Such a policy statement is not content-neutral compared to the current Guidelines (as the Commission says it is aiming for with the amendment), and also seeks to impose new obligations on the sentencing judge which may exceed the Commission's authority and will sow confusion.[40]

The proposed Chapter Six amendments similarly seek to limit or shape the judge's sentencing discretion. For example, the policy statement in proposed § 6A1.3 states that, in "considering the nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1), the following factors, *if not accounted for in the applicable Chapter Two guideline*, may be relevant" (emphasis added).[41] Proposed §9C5.1 (addressing the nature and circumstances of an organization's offense in determining an organization's guideline fine range) contains similar language. This language implies that certain factors are not relevant as part of the § 3553 analysis if they were already accounted for in the Guidelines. These and other policy statements sprinkled through the hundreds of pages of the proposed amendment limit judges' discretion at the § 3553 stage of the sentencing process. They are at odds with the statutory mandate in § 3553(a)(1) that the judge consider "the history and characteristics of the defendant" and with the statutory mandate in § 3661 that "[n]o 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."

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[37] 18 U.S.C. § 3661.
[38] *Williams*, 337 U.S. at 246-47.
[39] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines, at 151 (proposed §1B1.1 Application Background (emphasis added)).
[40] *See, e.g.*, *LaBonte*, 520 U.S. at 753 ("the Commission, however, was not granted unbounded discretion.").
[41] Section 3553(a)(5) requires the sentencing court to consider "any pertinent policy statement . . . issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 28)." Even assuming that the policy statements in Chapter Six fall under § 3553(a)(5), the Commission's proposed policy statements create confusion about how they interact with the full range of § 3553(a) factors. They also, as described here, are not content-neutral.

The calculation of the advisory guideline range and the judge's § 3553(a) analysis are two separate steps in the sentencing process.[42] A judge considers the application of departures in the process of calculating the applicable sentencing guideline range – something consistent with the Commission's traditional authority. That focus on the Guidelines also respects a judge's authority to weigh the § 3553(a) factors and the broad range of evidence that it may consider when fashioning a sentence. At that point, practitioners may argue, and judges are free to determine, how much weight to give any facts under § 3553(a), even if the Guidelines include those facts as an "additional offense specific consideration." Listing factors that a judge may consider as part of the § 3553(a) analysis intrudes on the authority of the sentencing judge to determine a sentence pursuant to § 3553(a) and directly conflicts with the statute, in many places. These are serious legal questions that go to the Commission's authority and the constitutional balance the Supreme Court reached in *Booker*. They demand careful legal analysis by the Commission before effectuating the proposal.

It is also unclear why the proposed amendment highlights certain factors for § 3553(a) consideration but not others. The proposed new Chapter Six includes detailed lists of factors for a judge to evaluate when considering a defendant's individual circumstances and the nature and circumstances of the offense.[43] Aside from a general reference to the factors under § 3553(a)(2),[44] however, the proposed new chapter does not meaningfully address promoting respect for the law; providing just punishment; affording adequate deterrence to criminal conduct; and protecting the public from further crimes of the defendant.[45] For example, the Commission has not provided guidance about how a judge should consider a significant increase in shootings or fentanyl overdose deaths when considering defendants whose offenses are driving those outcomes. By contrast, it lists many factors relating to employment or skills. Including some factors but omitting others may cause confusion among litigants and judges about how to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of § 3553(a).

Similarly, the proposed revisions are not content neutral when compared with the current Guidelines Manual. For example, the proposals removed, or at least deemphasized, the specifics of a defendant's prior convictions. Those specifics – which are separate from the criminal history calculation – suggest that whether a defendant has committed similar offenses repeatedly or tends to use violence when committing those offenses is relevant in imposing a sentence. Such details often are critical to understanding a defendant's "history and characteristics" pursuant to § 3553(a)(1). The proposed Chapter Six does not appear to mention these considerations. Moreover, the criminal history commentary in Chapter Four, where it was once discussed, has been edited to no longer refer to such circumstances explicitly. Indeed, these sentences seem to

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[42] *See, e.g.*, *United States v. Adorno-Molina*, 774 F.3d 116, 126 (1st Cir. 2014) (describing variances as "non-Guidelines sentences that result from the sentencing judge's consideration of factors under 18 U.S.C. § 3553"); *United States v. David*, 682 F.3d 1074, 1077 (8th Cir. 2012) ("factors that have already been taken into account in calculating the advisory Guidelines range can nevertheless form the basis of a variance"). *See also, e.g., United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008) (explaining that courts are "allowed to contextually evaluate each § 3553(a) factor, including those factors the relevant guideline(s) already purport to take into account").

[43] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 652 (proposed §§6A1.2, 6A1.3).

[44] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 651-52 (proposed §6A1.1(a)(2)).

[45] 18 U.S.C. § 3553(a)(2).

have been deleted: "For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious."

The amendment also makes many changes to portions of Chapter Two that describe when departures may be appropriate despite the Commission's intent not to "expand or contract the scope and content of those provisions." For example, Application Note 1 of §2A1.2 states, "[i]f the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted." Similar departure language appears in the commentary to §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2, 2K1.4, and others. The proposed amendment replaces those changes with the more neutrally-phrased, "[i]n determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a), evidence that the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim may be relevant."[46] Again, similar language appears throughout the proposed amendment.[47] In moving from the current language to the proposed language, the Commission removes the notion that the judge should consider an above-guideline sentence. And although some portions of the proposed amendment use bolded headers such as "Aggravating Factors Relating to the Offense"[48] before including this language, not all such proposed text has it.[49] Additionally, the proposal removes examples throughout the commentary.

These proposed changes and the resulting questions will impose a serious cost on litigants and courts. They also will create confusion at the pretrial, plea negotiation, sentencing, and appellate stages. As the parties work through those questions (including, among others, how proposed Chapter Six interacts with the courts' discretion under § 3553), that litigation will impose additional burdens. Judges and practitioners understand the concept of departures and how they fit into the sentencing process. Caselaw has developed for decades to ensure that departures are handled uniformly. Although the Guidelines can be tailored and adjusted to address changes in the law and other needs, such a wholesale restyling – particularly in such a short period of time – should not proceed without far more extensive legal and operational consideration.

IV. Rules for Calculating Loss (§2B1.1)

The Department supports the Commission's proposal to move the definition of "loss" from the commentary to the substantive text of §2B1.1. Doing so will resolve a circuit conflict over whether the commentary's inclusion of intended loss is authoritative and will ensure consistency when determining the culpability of fraud offenders, both across federal courts and within the Guidelines themselves. The Department also does not oppose the Commission's proposal to "conduct[ ] a comprehensive examination of §2B1.1 during an upcoming amendment

[46] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 184 (proposed Note 1 of §2A1.2).
[47] *See, e.g.*, U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 187 - 256 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2).
[48] *See, e.g.*, *id.* at p.185, 217, 242, 279, 393 (proposed §§2A1.4, 2B1.1, 2B1.5, 2D1.1, 2K2.1).
[49] *See, e.g.*, *id.* at 187, 191, 197, 211, 213, 254, 389 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B3.2, 2K1.4).

cycle."[50] The Commission should ensure, however, that §2B1.1 operates consistently and uniformly while any such examination is pending.

a. *Background*

Recent appellate decisions have called into question the validity of guideline commentary.[51] Several circuits have held that, under the Supreme Court's decision in *Kisor v. Wilkie*,[52] guideline commentary is entitled to deference only if, "[a]fter applying our traditional tools of statutory interpretation," the guideline is ambiguous and the commentary resolves that ambiguity.[53] Other circuits have rejected that approach and have relied on pre-*Kisor* precedent to hold that "the guidelines commentary is 'authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'"[54] The Commission has proposed legislation that would resolve that conflict by putting guidelines, policy statements, and commentary on the same authoritative footing. The Department supports the basic outlines of that legislative proposal.[55]

Meanwhile, the circuits' underlying disagreement over whether and in what circumstances guideline commentary is entitled to deference has spawned related circuit conflicts over the validity and application of particular commentary provisions. One recent example involves the definition of "loss" in §2B1.1. That section provides an escalating series of offense-level enhancements for fraud and theft offenses based on the amount of loss attributable to the offense.[56] The commentary to §2B1.1 defines "loss" as "the greater of actual loss or intended loss."[57] The commentary further defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," and defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict, . . . includ[ing] intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)."[58]

In *United States v. Banks*,[59] the Third Circuit held that the commentary's definition of "loss" in §2B1.1 is not entitled to deference because it includes intended loss, whereas the guideline itself is limited to actual loss.[60] The court acknowledged that §2B1.1 refers only to "loss" and that, "in context, 'loss' could mean pecuniary or non-pecuniary loss and could mean actual or intended loss."[61] The court determined, however, that "in the context of a sentence

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[50] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 12.
[51] *See id.* at 3.
[52] 139 S. Ct. 2400 (2019).
[53] *United States v. Dupree*, 57 F.4th 1269, 1277-78 (11th Cir. 2023) (en banc) (citing cases).
[54] *United States v. Vargas*, 74 F.4th 673, 677 (5th Cir. 2023) (en banc) (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)); *see id.* at 678 & n.3 (citing cases).
[55] *See* Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEPT. OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. SENT'G COMM'N (Mar. 21, 2023).
[56] USSG §2B1.1(b)(1).
[57] *Id.* §2B1.1 comment. (n.3(A)).
[58] *Id.* §2B1.1 comment. (n.3(A)(i), (ii)).
[59] 55 F.4th 246 (3d Cir. 2022).
[60] *Id.* at 257-58.
[61] *Id.* at 258.

enhancement for basic economic offenses, the ordinary meaning of the word 'loss' is the loss the victim actually suffered."[62] Accordingly, the court held that the loss-related enhancements in §2B1.1 apply only where defendants' schemes resulted in actual loss.

Every other court of appeals to have considered the question after *Banks* – including courts that otherwise agree with the Third Circuit's restrictive approach to determining whether guideline commentary is entitled to deference – has determined that intended loss remains a valid form of "loss" under §2B1.1.[63] As those courts have explained, the reasoning in *Banks* suffers from two flaws. First, it fails to take account of the fact that §2B1.1 uses the term "loss" as a proxy for the defendant's culpability, not the harm suffered by the victim.[64] "Literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, legal language."[65] Because the ability of fraudsters and thieves to inflict actual harm on their victims may be thwarted by factors beyond their control – a sting operation, a change in the location or value of assets, the fortuitous intervention of a vigilant police officer, or a victim who unexpectedly fights back – "intended loss is frequently a better measure of culpability than actual loss."[66]

Second, defining "loss" in §2B1.1 to mean only actual loss would create unnecessary tension with other Guidelines provisions. In determining the Guidelines offense level, courts must apply the relevant conduct guideline (§1B1.3) in addition to the guideline applicable to the substantive offense.[67] The relevant conduct guideline directs courts to consider, among other things, "all harm that resulted from the acts and omissions [of the defendant], *and all harm that*

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[62] *Id.* at 257-58 (citing dictionary definitions of "loss" that refer to actual destruction, diminishment, or failure).
[63] *See United States v. Smith*, 79 F.4th 790, 797-98 (6th Cir. 2023) (holding that "loss" in § 2B1.1 is ambiguous and that commentary appropriately defines that term to include intended loss); *United States v. You*, 74 F.4th 378, 397-98 (6th Cir. 2023) (same); *see also, e.g.*, *United States v. Gadson*, 77 F.4th 16, 19-22 (1st Cir. 2023) (same on review for plain error); *United States v. Verdeza*, 69 F.4th 780, 793-94 (11th Cir. 2023) (same); *United States v. Limbaugh*, No. 21-4449, 2023 WL 119577, at *3-4 (4th Cir. Jan. 6, 2023) (unpublished) (same); *cf. United States v. Ekene*, No. 22-20570, 2023 WL 4932110, at *1 (5th Cir. Aug. 2, 2023) (unpublished) (rejecting challenge to loss commentary in light of circuit precedent applying *Stinson* deference to commentary generally).
[64] *See, e.g.*, *Gadson*, 77 F.4th at 21; *You*, 74 F.4th at 397-98; *see also* USSG § 2B1.1, comment. (background) (explaining that Guidelines use loss to assess "the seriousness of the offense and the defendant's relative culpability"); *id.* App. C Supp., at 104-05 (Amend. 793) (noting "the Commission's belief that intended loss is an important factor in economic fraud offenses" because it focuses "specifically on the defendant's culpability"); *id.* App. C, Vol. II, at 177 (Amend. 617) (same).
[65] *You*, 74 F.4th at 397 (brackets and quotation marks omitted).
[66] *Gadson*, 77 F.4th at 21 (quotation marks omitted). Indeed, in *Banks* itself, the defendant's scheme almost succeeded: he managed to execute several fraudulent wire transfers into bank accounts he controlled, which were clawed back at the last moment when his intended victim realized what was happening. Other cases similarly involve circumstances where actual losses were avoided due solely to fortuitous intervention by others. *See, e.g.*, *United States v. Walker*, 89 F.4th 173, 178 (1st Cir. 2023) (police intervened at last moment to prevent a robbery); *United States v. Tellez*, 86 F.4th 1148, 1150, 1154 (6th Cir. 2023) (police unexpectedly discovered fraudulent gift cards during traffic stop); *United States v. Kennert*, No. 22-1998, 2023 WL 4977456, at *1-3 (6th Cir. Aug. 3, 2023) (unpublished) (police investigating defendant's sale of counterfeit sports trading cards discovered "a fake 1916 Babe Ruth card" during a search of his home); *United States v. Corker*, No. 22-10192, 2023 WL 1777195, at *1, *4 (11th Cir. Feb. 6, 2023) (defendant received loan check as part of scheme to defraud bank, but alert bank employee canceled loan before defendant could cash the check).
[67] *See* USSG §1B1.2(b) ("After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).").

was the object of such acts and omissions," in determining the appropriate offense level.[68] As the Sixth Circuit has explained, "[i]f the fraud guideline does not include intended loss, then the court cannot meaningfully apply the relevant-conduct guideline, which is applicable to all sentencings and contemplates intended harm as conduct for which a defendant should be held accountable."[69] Interpreting §2B1.1 to exclude intended loss also creates tension with other guidelines applicable to fraud offenses. A defendant convicted of attempt or conspiracy to commit fraud, for example, is subject to "the base offense level from the guideline for the substantive offense, *plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty*."[70] And in the context of tax crimes – for which the offense level is similarly tied to the amount of "loss" – the relevant guideline provides that loss "is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)."[71] The possibility of "vastly different sentences for similarly culpable defendants" provides a further reason not to interpret the loss table in §2B1.1 as applying only to actual loss, as defendants who engaged in conduct of equal complexity and/or severity are otherwise subject to different guideline ranges based only on the fortuity of whether their misconduct was detected in time.[72]

b. *We Support Resolving the Circuit Conflict by Moving the Commentary's Existing Definition into the Guideline Text*

The Department supports the Commission's proposal to resolve the circuit conflict over the meaning of "loss" in §2B1.1 by moving the commentary's existing loss definition into the text of the guideline, thus resolving any uncertainty over whether that definition is binding. As the Commission notes in its proposed amendment, "approximately one-fifth of individuals sentenced under §2B1.1 in fiscal year 2022 were sentenced using intended loss," representing about 750 defendants.[73] Consistent application of such a commonly used guideline is critically important. The Commission's proposed amendment will ensure uniform application of §2B1.1 throughout the country; it will resolve the internal inconsistencies within the Guidelines that the Third Circuit's interpretation of that provision creates; and it will ensure that the fraud guideline continues to function as the Commission has intended, including by maintaining consistency in the treatment of similarly culpable defendants and avoiding unwarranted sentencing windfalls for fraudsters and thieves who fully intended to cause significant losses to their victims but were thwarted by circumstances outside their control. The Commission's proposal also appropriately resolves this particular conflict while deferring to Congress on broader questions related to the deference due to guidelines commentary generally.

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[68] *Id.* §1B1.3(a)(3) (emphasis added).
[69] *Smith*, 79 F.4th at 798.
[70] USSG §2X1.1(a) (emphasis added); *see Walker*, 89 F.4th at 181 ("[U]nlike the intended loss language in [§2B1.1], the textual hook for intended conduct in [§2X1.1] is contained in the Guideline itself."); *Smith*, 79 F.4th at 798 (same).
[71] USSG §2T1.1(c)(1); *see United States v. Upshur*, 67 F.4th 178, 181-82 (3d Cir. 2023) (distinguishing *Banks* on the ground that §2T1.1 "uses a definition of 'loss' that unambiguously includes both actual and intended losses").
[72] *You*, 74 F.4th at 398.
[73] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 3.

c. *The Importance of Resolving this Narrow Issue Now*

The Commission has additionally sought comment on "whether it should defer making changes to §2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of §2B1.1."[74] Although the Department does not oppose a future reexamination of §2B1.1, the Commission should not perpetuate the existing circuit conflict over the meaning of "loss" in the meantime. For one thing, the timing of any comprehensive examination is uncertain: as the Commission's proposal notes, no decision has yet been made about whether to undertake such a project in the first place, or to do so in any particular future cycle. Meanwhile, for the reasons we have already stated, consistent application of the loss table in §2B1.1 will be critically important. Thousands of defendants receive offense-level enhancements under that provision each year, hundreds of which are based on intended loss. Resolving the narrow circuit conflict on that issue now will ensure consistency across the circuits, among similarly culpable offenders, and within the Guidelines themselves while any potential future reexamination of §2B1.1 is pending. The Commission's action would therefore ensure that §2B1.1 continues to function uniformly and in the manner the Commission has historically intended, just like any other guideline the Commission might one day choose to reexamine. Under those circumstances – and in light of Congress's expectation that the Commission will resolve circuit conflicts over the meaning and application of the Guidelines without the need for Supreme Court intervention[75] – the Department urges the Commission to resolve the existing circuit conflict over the meaning of "loss" in §2B1.1 by moving that section's commentary into the guideline text. The Commission could then consider whether to conduct a broader reexamination of that guideline in a future amendment cycle.[76]

V. Circuit Conflicts

a. *Definition of "Altered or Obliterated Serial Number"*

The Department supports Option Two, which would retain the Commission's existing four-level enhancement for an offense involving a firearm that "had an altered or obliterated serial number" under §2K2.1(b)(4)(B). These offenses are often intended to evade accountability and thwart law enforcement. But we recognize the view that a four-level enhancement may be inappropriate where law enforcement can still determine the serial number with an unaided eye regardless of alterations. If the Commission adopts Option One's definition, we also recommend that it consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits, but would not meet the new definition because the altered serial number is still legible.

When the Commission increased this enhancement from two to four levels in 2006, it considered the full range of activity that this enhancement was expected to cover and elected to

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[74] *Id.* at 14.

[75] *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 347-39 (1991); *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

[76] Indeed, if the legislation proposed by the Commission to address the validity of commentary is not soon advanced, the Department would further support a comprehensive effort by the Commission to incorporate current commentary into text throughout the Guidelines manual, in order to restore in all Circuits without endless litigation the validity of all of the Commission's carefully considered commentary.

include instances where a serial number was altered in such a manner that did not prevent traceability. It did so because an altered serial number is evidence of an intent to evade detection.

Neither the Guidelines nor the criminal statute on which this particular guideline is based, 18 U.S.C. § 922(k), define "altered or obliterated."[77] Circuits are split regarding whether a defendant must make a serial number "illegible" or "less accessible" in order to receive the four-level enhancement under §2K2.1(b)(4)(B). The Second and Sixth Circuits have held that a serial number is not "altered or obliterated" unless it is no longer visible to the "naked eye" and thus illegible.[78] In contrast, the Fourth, Fifth, and Eleventh Circuits have held that a serial number is "altered or obliterated" if it has been "changed," "modif[ied]," "defaced," or "scratched" so as to make the serial number "less accessible," even if it is still legible.[79]

The Commission has proposed two options to amend §2K2.1(b)(4)(B) to define what constitutes an "altered or obliterated serial number." Option One would adopt the Second and Sixth Circuit's view.[80] Doing so would reduce the current applicability of the enhancement. Option Two would adopt the Fourth, Fifth, and Eleventh Circuit's view.[81]

Recognizing the effects of altered firearm serial numbers on public safety, the Commission has twice voted to increase that enhancement. In 1989, the Commission increased the enhancement from one level to two levels to "better reflect the seriousness of this conduct."[82] And, in 2006,[83] the Commission determined – notwithstanding concerns that §2K2.1(b)(4)(B) applies *even where a serial number can still be identified*[84] – that an increase to a four-level

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[77] *United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009) (noting that the "legislative history of §2K2.1(b)(4) suggest[s] that 'altered or obliterated' likely is derived from what is today found in 18 U.S.C. § 922(k)", but "'no progenitur of § 922(k) at any point define[d] these words.'") (*quoting United States v. Carter*, 421 F.3d 909, 910 (9th Cir. 2005)).

[78] *United States v. St. Hilaire*, 960 F.3d 61,66 (2d Cir. 2020); *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[79] *United States v. Harris*, 720 F.3d 499, 503-504 (4th Cir. 2013); *see also Perez*, 585 F.3d at 885 (5th Cir. 2009); *United States v. Millender*, 791 F. App'x 782, 783 (11th Cir. 2019) (unpublished).

[80] *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[81] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 54.

[82] USSC §2K2.1(b)(4) (Nov. 1989) (Amendment 189).

[83] The Department submitted public comments, at the time, recommending that the Commission consider increasing "§2K2.1 (b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers," explaining that "these offenses are often committed in furtherance of firearm trafficking" and noting that, "[b]y increasing sentences for firearms-trafficking offenses to reflect the serious harm these offenses may cause, the guidelines would provide a stronger deterrent and better reflect the harm of these offenses." *See* Letter from U.S. Dep't of Just. to the U.S. Sent'g Comm. (Aug. 15, 2005).

[84] The Assistant Public Defender for the District of Montana argued, during the Commission's March 15, 2006, Public Hearing, that:

> A defaced serial number is not an obliterated serial number. Crime labs will tell you that they can frequently recover serial numbers that are not visible to the naked eye. Only where the number is grounded down to below the imprint, below the stamp, is the recovery of the serial number impossible, and even in those occasions, many times manufacturers are placing a second hidden serial number on the gun.
>
> So unless the Commission recrafts the obliterated serial number enhancement to apply only where the firearm is untraceable--in other words the serial number cannot be recovered or there's not a second hidden

enhancement was appropriate because of the "difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."[85] In light of the firearms violence facing our country, we see no reason to retreat from the Commission's prior actions, and we recommend Option Two.

Option Two's definition of "altered or obliterated serial number" is consistent with the ordinary meaning of the phrase "altered or obliterated," as used in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k).[86] The "ordinary meaning of 'altered' is straightforward."[87] The term "altered" means "'to cause to become different in some particular characteristic . . . without changing into something else' or '[t]o change or make different; modify.'"[88]

The Fourth, Fifth, and Eleventh Circuits have applied this "straightforward" definition and held that a serial number that is "less legible is made different," "frustrate[s] the purpose of the serial numbers," and is therefore "altered" for purposes of §2K2.1(b)(4).[89] The term "obliterated" already embraces situations, as the Second Circuit identified, where the serial number is illegible. If the Commission interprets both "altered or obliterated" to mean the same thing – that the serial number must be illegible – then one of the two terms (either "altered" or "obliterated") in the Guideline text would have no meaning.[90] The courts in *Harris* and *Millender* defined the term "altered or obliterated" in a manner that would not render the term "obliterated" superfluous.[91]

In addition, retaining the scope of the four-level enhancement is consistent with the seriousness of the offense. Congress, in enacting the Gun Control Act of 1968 ("GCA"), created

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> serial number--enhancement is and will continue to be applied where the serial number is identified. In other words, sentences are being enhanced where the harm warranting the enhancement isn't even present. And this all happens without a mens rea requirement.

Testimony of John Rhodes, Assistant Fed. Pub. Def. for the District of Montana, Transcript of Public Hearing (Marh 15, 2006).

[85] USSC §2K2.1(b)(4) (Nov. 2006) (Amendment 691).

[86] *Perrin v. United States*, 444 U.S. 37, 42 (1979) (a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *see also Harris*, 720 F.3d at 503 (looking at the plain meaning of the terms "altered" or obliterated" since they were not defined in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k)); *see also Millender*, 791 F. App'x at 783 (same).

[87] Br. for Appellee at 17, *United States v. Sands*, Case No. 17-2420 (6th Cir. July 23, 2018) (*citing United States v. Carter*, 421 F.3d 909, 912 (9th Cir. 2005).

[88] *See id*. (*citing United States v. Carter*, 421 F.3d at 912) (quoting Webster's and the American Heritage dictionaries); *see also Harris*, 720 F.3d at 503 (holding that "[t]o 'alter' is 'to cause to become different in some particular characteristic . . . without changing into something else.'") (*quoting* Webster's Third New International Dictionary 63 (1993)); *Millender*, 791 F. App'x at 783 ("In 1986, 'alter' meant 'to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else;'" 'to become different in some respect;' or to 'undergo change usually without resulting difference in essential nature.'") (*citing* Webster's Third New International Dictionary, Unabridged 63 (1986)).

[89] *See Harris*, 720 F.3d at 503; *Millender*, 791 F. App'x at 783.

[90] *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) ("one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation and internal quotation marks omitted).

[91] *See Harris*, 720 F.3d at 503 (further explaining that the "interpretation that a serial number rendered less legible by gouges and scratches is 'altered' prevents the word 'obliterated' from becoming superfluous."); *Millender*, 791 F. App'x at 783 (holding that the "district court properly declined to adopt an interpretation of 'altered' that would require illegibility because that interpretation would render 'obliterated' superfluous.").

a comprehensive scheme designed to assist Federal, State, and local law enforcement in targeting serious crimes involving firearms. Specifically, the GCA required manufacturers and importers to identify firearms by "a serial number engraved or cast on the receiver or frame of the weapon"; it mandated that Federal firearms licensees maintain records of their firearm transactions, including complete and accurate descriptions of the firearms; and it made it "unlawful for any person knowingly to transport, ship, receive . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered."[92] These requirements enabled "authorities both to enforce the law's verification measures and to trace firearms used in crimes."[93] This information, in turn, "helps to fight serious crime."[94]

ATF, through its National Tracing Center, can use serial numbers and other data points, in response to requests for "crime gun traces by Federal, State, and local law enforcement agencies," to trace the history of a specific firearm from the date it was manufactured or imported into the United States to the first retail purchase of the firearm, thus enabling ATF, and the law enforcement agencies it supports, to "identify suspects involved in criminal violations, determine if the firearm is stolen, and provide other information relevant to an investigation."[95]

As the Fourth Circuit noted in *Harris*, "the regulations reflect the government's interest in having serial numbers placed on firearms that have a minimum level of legibility."[96] A "less legible" serial number "frustrated the purpose of serial numbers" and tracing.[97] This is not new ground. In 2006, the Commission assessed if four levels was appropriate regardless of whether the alteration rendered the serial number untraceable. The Commission received comment explicitly addressing this point, noting that "an altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable."[98] The Commission further considered whether to narrow its enhancement only to firearms that were rendered untraceable.[99] The Commission declined the invitation to exempt incomplete or ineffective alteration and obliteration from application of its four-level enhancement.

Incorporating the definition set forth in Option Two would be consistent with the long-standing recognition from the Commission about the importance of serial numbers, even where tracing is still possible, and the significant efforts the Commission has taken to date to dissuade those who attempt to thwart the firearm-tracing process.[100] The Department commends the

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[92] Gun Control Act of 1968, § 102, 82 Stat. 1213.
[93] *Abramski v. United States*, 573 U.S. 169, 173 (2014) (*citing* H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)).
[94] *Id*. at 182; *see also* Identification Markings Placed on Firearms, 66 Fed. Reg. 40597 (Aug. 3, 2001) ("Firearms tracing is an integral part of any investigation involving the criminal use of firearms."); *Blaustein & Reich, Inc. v. Buckles*, 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).
[95] *Id*.
[96] *Harris*, 720 F.3d at 503.
[97] *Id.*
[98] *See* Letter from Jon M. Sands, Fed. Pub. Def. for the District of Arizona (Mar. 9, 2006).
[99] *See* Testimony of John Rhodes, Assistant Federal Public Defender for the District of Montana, Transcript of Public Hearing (Mar. 15, 2006) (suggesting that the Commission could narrow the enhancement to only apply to untraceable firearms).
[100] The Commission first addressed the issue in its September 1986 Preliminary Guidelines, where it proposed adding "6 to the base offense level" and noted, in general, that "appropriate penalties [were] added" where "specific offense characteristics address conduct that by law constitutes a particular danger to public safety." Preliminary

efforts the Commission has taken to date. If the Commission adopts Option One's definition, we also recommend that the Commission consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits but where law enforcement can still determine the serial number with an unaided eye.

b. *Grouping*

The Department does not oppose the Commission's proposal to amend §2K2.4, which applies to certain firearms offenses with mandatory-minimum terms of imprisonment, including 18 U.S.C. § 924(c). Section 3D1.2 permits grouping of closely-related counts of conviction, including "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."[101] This provision generally results in the grouping of firearms counts under 18 U.S.C. § 922(g), to which §2K2.1 applies, and drug counts under 21 U.S.C. § 841, to which §2D1.1 applies.[102] The courts of appeals disagree, however, whether those counts can group under §3D1.2 when a defendant is also convicted of a § 924(c) count. Because the § 924(c) count carries a mandatory term of imprisonment, it is covered by §2K2.4, not §2K2.1. And the Commentary to §2K2.4 (Application Note 4) provides that "[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." §2K2.4 cmt. (n.4). In other words, §3D1.2 allows grouping as a specific offense characteristic, whereas §2K2.4 seemingly does not. Thus, as the Seventh Circuit has correctly observed, there is no basis for grouping § 922(g) and drug trafficking counts because grouping rules are to be applied only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other."[103]

The Department agrees, however, that there are cases in which the firearms and drug trafficking counts are closely related and, but for the language in current Application Note 4, would be grouped. The Department thus does not oppose the Commission's proposal to amend Application Note 4 to permit grouping "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2."

Draft Sentencing Guidelines (Sept. 1986). The Commission, in its 1987 Guidelines, ultimately included a "1-level enhancement," *see* U.S. SENT'G COMM'N, GUIDELINES MANUAL, §2K2.1(b)(1) (1987), but increased it to a "2-level" enhancement in 1989 to "better reflect the seriousness of this conduct," USSC §2K2.1(b)(4) (Nov. 1989). And the Commission revisited the enhancement again, in 2006, and noted that an increase to a "4-level enhancement" was necessary to reflect "both the difficulty in tracing firearms with altered or obliterated numbers, and the increased market for these types of weapons." *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2006 (May 11, 2006).

[101] USSG §3D1.2(c).

[102] USSG §§2D1.1(b)(1), 2K2.1(b)(6)(B).

[103] *United States v. Sinclair*, 770 F.3d 1148, 1157-58 (7th Cir. 2014). B*ut see United States v. Bell*, 477 F.3d 607, 615-16 (8th Cir. 2007) (permitting grouping); *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010) (unpublished) (same); and *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006) (unpublished).

VI. Miscellaneous

a. *Stop Act*

The Department supports the Commission's proposal to incorporate the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, Pub. L. 117-258 (2022), into the Guidelines by adding the new offenses to Appendix A, linking the new offenses to the existing §2B1.5, and amending the commentary to §2B1.5 to reflect that 25 U.S.C. § 3073 is referenced in the guideline. The Department is committed to enforcing federal laws that enhance Tribal sovereignty by preserving the historical, cultural, and religious heritage of Native Americans and Alaskan Natives, and supports the STOP Act. The Commission's proposal helps progress Tribal public safety goals by protecting Tribal patrimony, which is welcomed by the Department, and will likely receive Tribal support.

b. *National Security Controls*

The Department supports the Commission's proposed revisions to §2M5.1, including the bracketed language, and appreciates the Commission's action on this Administration priority. Export controls are a critical tool to prevent U.S. adversaries from threatening national security, enhancing their own military capabilities, or engaging in mass surveillance programs that enable human rights abuses. Recognizing this threat, the Department, along with the Department of Commerce's Bureau of Industry and Security, launched the Disruptive Technology Strike Force to counter efforts by nation-state adversaries who engage in unlawful conduct to acquire sensitive technologies. Such sensitive technologies include those related to supercomputing, artificial intelligence, and advanced manufacturing equipment, as well as the components those technologies are built on, like semiconductors and microelectronics. The Strike Force represents "a more concerted approach to investigating those who seek to exploit technology to undermine our national security."[104] Keeping our country's most sensitive technologies out of the world's most dangerous hands is a mission essential to America's national security. "At no point in history has this mission been more important, and at no point have export controls been more central to our national security, than right now."[105]

The Commission's proposal to revise §2M5.1 to insert "controls related to national security" in place of "national security controls" appropriately reflects both the seriousness of the threats posed and the variety of controls at issue in Strike Force investigations. In its current form, §2M5.1's reference to "national security controls" could be narrowly construed to mean that the enhancement applies only where there was the unlawful export of items bearing the "NS" (for National Security) designation under the Export Administration Regulations (EAR). But the EAR regulates a broader array of export controls beyond the NS designation that are

[104] *See* Statement of Matthew G. Olsen, Assistant Att'y Gen., National Security Division, Before the Committee on the Judiciary, United States Senate, at a Hearing Entitled "Cleaning up the C-Suite: Ensuring Accountability for Corporate Criminals" (Dec. 12, 2023).
[105] *See* Statement of Matthew S. Axelrod, Assistant Sec'y of Com. for Export Enforcement Before the House Foreign Affairs Subcommittee on Oversight and Accountability, at a Hearing Entitled "Reviewing the Bureau of Industry and Security, Part II: U.S. Export Controls in an Era of Strategic Competition" (Dec. 12, 2023).

appropriately related to national security, including controls for missile technology,[106] regional stability,[107] and anti-terrorism,[108] and those for prohibited end-uses or end-users.[109]

Along with specific goods-based controls, other controls restrict the flow of money and services where appropriate and necessary. The EAR restricts exports to certain military end-users and certain foreign entities where the government has determined that they present an unacceptable security risk. In addition, sanctions and country embargoes imposed pursuant to the International Emergency Economic Powers Act protect national security by providing additional controls on the export of goods and services to certain countries.[110] The Commission's proposal helps ensure that the language of §2M5.1 unambiguously encompasses the full spectrum of appropriate national security-related controls, including those that could apply to the transfer of goods or services.

The proposed amendment to §2M5.1 will ensure that a judge's analysis under the guideline does not start and end with an examination of whether the items at issue bear the "NS" designation under the EAR.[111] Rather, the proposed amendment would ensure that courts examine the array of possible national security underpinnings of the applicable controls on the flow of goods, money, and services in each case. Additionally, "controls relating to" would make the first clause of §2M5.1(A) for national security export offenses parallel to the second clause of §2M5.1(A), which provides a higher base offense level for offenses that involve evasion of export "controls relating to the proliferation of nuclear, biological, or chemical weapons or materials."[112]

The proposed amendment does not suggest, nor does the Department support, revising §2M5.1 such that an enhancement would apply to the entirety of export controls under the EAR, such as violations of controls related to Short Supply or to all violations involving items

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[106] 15 C.F.R. § 742.5.
[107] 15 C.F.R. § 742.6.
[108] 15 C.F.R. §§ 742.8, 742.9.
[109] 15 C.F.R. § 744.6.
[110] *See, e.g.*, *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997) (holding that §2M5.1 applies to "any offense that involves a shipment (or proposed shipment) that offends [a country] embargo"); *United States v. Hanna*, 661 F.3d 271, 294 (6th Cir. 2011) (same).
[111] In *Komoroski*, the government argued at sentencing for a broad interpretation of the phrase "national security controls" pursuant to §2M5.1, one that would encompass the totality of the controls that are available under the EAR. *See* United States' Sentencing Memorandum, ECF No. 51, *Komoroski*, at 11 ("[A]ll of the controls imposed by the EAR are national security controls."). The court rejected the government's interpretation of the guideline, noting that it would result in a sentencing enhancement—on national security grounds—for violations of export controls that apply to goods like horses, cedar wood, whips, and cattle prods. *See* Order, ECF No. 61, *United States v. Komoroski*, Case No. 3:CR-17-156 (M.D. Pa. July 30, 2019) ("*Komoroski*"), at 2-3 ("[T]he materials in question here have been identified . . . as controlled for Firearms Control (FC), Crime Control (CC) and Embargoes and Other Special Controls (UN), *not* National Security (NS).").
To be clear, DOJ does not support such a broad application of §2M5.1, whereby an enhancement would apply to violations of all controls under the EAR. DOJ does not seek an enhancement that would apply, for instance, to violations of controls related to Short Supply, such as horses by sea or unprocessed western cedar, or to all violations involving items designated as Crime Control, such as whips and cattle prods — the very items mentioned in the court's order in *Komoroski.*
[112] The second clause of §2M5.1(A) states "*or controls relating to* the proliferation of nuclear, biological, or chemical weapons or materials were evaded." (emphasis added).

designated as Crime Control. The Commission's proposal appropriately allows for examination of the applicable statutory and regulatory text, as well as the facts of the case, when determining whether a sentencing enhancement is warranted.

The proposed amendment is consistent with the Commission's prior revisions to §2M5.1. In 2001, the Commission revised the guideline to add a reference to biological and chemical weapons in response to the National Defense Authorization Act of 1997, which expressed the sense of Congress that stricter sentences were warranted for offenses involving the import and export of nuclear, chemical, and biological weapons, materials, or technology.[113] The following year, the Commission again expanded the scope of §2M5.1 to cover financial transactions with countries supporting international terrorism.[114] There, too, the Commission revised the Guideline in response to congressional action, specifically to incorporate the prohibition in 18 U.S.C. § 2332d against engaging in a financial transaction with the government of a country designated as supporting international terrorism.[115]

As the Commission observed in its synopsis of the proposed amendment, when Congress passed ECRA in 2018, it included new provisions relating to export controls for national security and foreign policy purposes, including, for the first time, explicitly identifying U.S. economic security as a component of national security. Just as in 2001 and 2002, this congressional action merits a corresponding change in the Guidelines, and the proposed amendment would help ensure that §2M5.1 is better aligned with the current export control regime set forth in ECRA.

c. *Structuring*

The Department supports the proposal to amend the specific offense characteristic at §2S1.3(b)(2)(B) to apply when the defendant committed the offense "while violating another law of the United States." The proposed technical fix is simple and straightforward, and we appreciate the Commission's consideration of this issue. Amending §2S1.3 to match the currently enacted statutory enhancement at 31 U.S.C. § 5322(b) will ensure, without the necessity of additional litigation, that the Guidelines are consistent with the current statute and that they properly reflect the intent of Congress.

Currently, §2S1.3(b)(2)(B) provides for a two-level increase when a defendant is convicted of a specified Title 31 offense and committed that offense "as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." This specific offense characteristic was added to reflect the statutory penalty enhancement in Title 31. But it only reflects part of it. The Section 5322(b) enhancement applies to certain willful violations committed "*while violating another law of the United States* or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." (Emphasis added). The proposed amendment will give full effect to the enhanced penalty provisions in 31 U.S.C. § 5322(b), reflecting Congress's determination that criminal violations of these core Title 31 requirements

[113] USSC §2M5.1 (Nov. 2001) (Amendment 633).
[114] USSC §2M5.1 (Nov. 2002) (Amendment 637).
[115] *Id*., Reason for Amendment.

are more serious when they occur as part of other criminal activity or when they are part of a pattern of criminal activity.

Title 31's reporting and recordkeeping requirements are intended to support efforts to combat fraud, money laundering, tax evasion, and terrorist financing, and to safeguard the integrity of the financial system and national security. 31 U.S.C. § 5311. Secret offshore financial accounts not only cost the Treasury billions of dollars each year, but also facilitate corruption and finance terrorism and other crime. Section 2S1.3(b)(2) was added in 2002 in response to the statutory amendments providing enhanced criminal penalty provisions under 31 U.S.C. § 5322(b).[116] But the guidelines omit the language in the statute "while violating another law of the United States," which leaves a gap benefitting wealthy and especially culpable defendants. Currently, §2S1.3(b)(3) provides that if the elevated base offense level under §2S1.3(a)(2) applies but the specific offense characteristics under §§2S1.3(b)(1) and (b)(2) do not, then under the safe harbor provision of §2S1.3(b)(3), the offense level could drop back to 6, which is below the minimum offense levels under §2S1.3(a). For example, notwithstanding the "or" in § 5322(b), a defendant who commits a Title 31 offense *while violating another law* may be eligible for the "safe harbor" reset under §2S1.3(b)(3)(C),[117] unless the government also proves the other statutory enhancement – that the defendant "committed the [Title 31] offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." This technical fix would avoid this result.

The Department has had some success convincing courts that a defendant's commission of tax crimes alongside Title 31 offenses satisfies the "pattern of unlawful activity" requirement.[118] But not in all cases. In *United States v. Wommer*, 584 F. App'x 815, 816 (9th Cir. 2014) (unpublished), the court reversed the two-level increase even though the defendant used the unreported funds to evade taxes, because the "pattern of unlawful activity" did not involve more than $100,000 (he withdrew only $72,500 and caused $66,200 from those same withdrawals to be deposited). *See also, United States v. Simon*, No. 10-CR-56, 2011 WL 924264, at *9-10 (N.D. Ind. Mar. 14, 2011) (district court found defendant eligible for safe harbor reset even though defendant also committed wire fraud). The government has an interest in disrupting a criminal network before the crimes cross the $100,000 threshold. Adding the phrase "while violating another law of the United States" to §2S1.3(b)(2) would remove any ambiguity, thus fulfilling the provision's purpose of "giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)."[119] We recognize that this change may not affect a large number of cases, but it will help ensure proper enforcement of Title 31's reporting and recordkeeping requirements, which are critical to the government's efforts to strengthen the global financial system, provide greater transparency, and combat the use of offshore bank accounts to commit money laundering, corruption, and offshore tax evasion.

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[116] *See* Reason for amendment, USSG §2S1.3(b)(2) (amendment 637) (November 2002).

[117] Assuming the defendant meets the other requirements of the safe harbor provision under §2S1.3(b)(3) – that the defendant did not act with reckless disregard for the source of the funds, the funds in the undisclosed foreign bank account were amassed legally, and used for a lawful purpose.

[118] *United States v. Peterson*, 607 F.3d 975, 979-80 (4th Cir. 2010); Sentencing Transcript of Mar. 7, 2019, *United States v. Manafort*, No. 18-CR-83 (E.D. Va., Mar. 27, 2019), ECF No. 328); Sentencing Transcript of July 7, 2014, *United States v. Desai*, No. 11-CR-846 (N.D. Cal., July 8, 2014), ECF No. 286).

[119] *See* Reason for Amendment, USSG §2S1.3(b)(2) (amendment 637) (November 2002).

d. *Clarifying the Antitrust Statutory References*

We agree with the Commission's proposed amendment of the statutory references in Appendix A and the Commentary to §2R1.1. The proposed technical fix is simple and straightforward, and we appreciate the Commission's consideration of this issue. By its terms, §2R1.1 is intended to apply "only" to "agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation," that "have been recognized as illegal *per se*." U.S.S.G. §2R1.1, cmt. background. Such offenses are proscribed by Sections 1 (for interstate or foreign trade) and 3(a) (for trade in or involving the United States territories or the District of Columbia) of the Sherman Act. 15 U.S.C. §§ 1, 3(a). Yet Appendix A and the Commentary to §2R1.1 list Sections 1 and "3(b)" as the covered statutory provisions. (Section 3(b) proscribes monopolization conduct in or involving the United States territories or the District of Columbia; monopolization conduct may be committed by a single entity and thus does not depend on an agreement among competitors. 15 U.S.C. § 3(b).)

This discrepancy has the potential to sow confusion in the Department's antitrust prosecutions. Specifically, Section 3(a) offenses fall within the intended scope of the current guideline, but Section 3(a) is not listed as a covered statute. Section 3(b) offenses fall outside the intended scope of the current guideline, but Section 3(b) is listed as a covered statute. The proposed amendment – replacing the references to Section 3(b) with references to Section 3(a) – would fix the discrepancy. We likewise agree with the proposed technical changes to the Commentary to §2R1.1.

e. *Death or Serious Bodily Injury Resulting from Controlled Substances*

i. *Summary*

It is the policy of this Administration that the mandatory minimum penalties set forth in 21 U.S.C. §§ 841 and 960 should be applied cautiously and only in cases that merit them. As Attorney General Garland stated in his December 16, 2022 charging policy memorandum, "[the] proliferation of provisions carrying mandatory minimum sentences has often caused unwarranted disproportionality in sentencing and disproportionately severe sentences."[120] Mandatory-minimum penalties should be reserved for instances in which the remaining charges "would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, [and] harm to victims" and serve the punishment, public safety, deterrence, and rehabilitation purposes of criminal law.[121] We also recognize that fentanyl and other controlled substances have led to an unprecedented number of overdose and drug poisoning deaths, and that traffickers should be held accountable when death or serious bodily injury results from their conduct. In some cases, it will be appropriate to charge an offense carrying a mandatory minimum penalty, and the government will do so. In others, the statutory mandatory minimum will not be

[120] Att'y Gen. Merrick Garland, *General Department Policies Regarding Charging, Pleas, and Sentencing*, December 16, 2022, available at Attorney General Memorandum - General Department Policies Regarding Charging Pleas and Sentencing (justice.gov).
[121] Att'y Gen. Merrick Garland, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases*, December 16, 2022, available at Attorney General Memorandum - Additional Department Policies Regarding Charges Pleas and Sentencing in Drug Cases (justice.gov)

appropriate, and judicial consideration of a sentence below the mandatory minimum – but often above the quantity-driven guideline range – will be appropriate.

We advanced a proposal to accomplish this approach in our annual report to the Commission last year. We recommended that the Commission "adopt a new base offense level and enhancements" that "meaningfully account[] for death and serious bodily injury resulting from drug distribution, regardless of whether charges carrying mandatory minimum terms of imprisonment were brought."[122] As we noted, "consistent with the Department's charging policy, there may be particular cases where the circumstances suggest that it is inappropriate to pursue charges carrying a 20-year mandatory minimum term of imprisonment."[123] [124] This approach would still provide accountability when drug trafficking results in death or serious bodily injury without requiring reflexive charging and application of mandatory minimum penalties. It would allow consistent and more moderate sentences, reserving the highest penalties only for cases that warrant them. We continue to support that approach, and we ask the Commission to defer consideration of this issue so that it can consider other options – including ours – to assist judges in these difficult cases.

The Commission's proposed amendments to §2D1.1 would remove options that judges around the country are using to resolve these cases fairly, and it would result in negative unintended consequences. Option One would require the government either to charge an offense carrying a mandatory-minimum penalty or leave conduct resulting from death or serious bodily injury unaddressed in the guideline calculation. In many cases, neither result is appropriate. Should the Commission pursue Option One, we recommend adding language that would trigger the alternative base offense levels when prosecutors and defense counsel enter a stipulation establishing death or serious bodily injury without charging the offense carrying a mandatory-minimum penalty. This would enable the parties to resolve cases equitably. The government can avoid charging an offense carrying a mandatory minimum for the sake of ensuring that the guidelines range appropriately reflects the seriousness of the offense, and courts would have discretion to impose an appropriate sentence below what could have been the mandatory minimum. We think Option Two would partially accomplish the same result. We believe the same considerations suggest retaining the options that are being used now by judges and parties around the country to resolve these cases fairly.

ii. *Background*

The courts of appeals that have considered this issue have held that guideline offense levels for death or serious bodily injury are only triggered when the defendant is convicted of an offense that requires proof of death or serious bodily injury as an element because these provisions specifically refer to death or serious bodily injury being established by the "offense of

[122] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEP'T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 31, 2023), available at Public Comment Received on Proposed Priorities (ussc.gov).

[123] In instances where death or serious bodily injury results, the "safety valve" would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

[124] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEP'T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 31, 2023), available at Public Comment Received on Proposed Priorities (ussc.gov).

conviction."[125] Although some cases have upheld the application of the death or serious bodily injury offense levels absent a death-resulting conviction under specific circumstances, as the Seventh Circuit noted in *Lawler*, "these opinions are not on point."[126] Without a genuine circuit conflict on either the need for a conviction for the enhancement or on the newly-amended language in the recidivist provisions, we do not view these amendments as necessary at this time. And in light of possible negative unintended consequences, we think the Commission should consider a more holistic review of §2D1.1 as part of its multi-year simplification efforts. If the Commission proceeds with an amendment this cycle, we have concerns about the proposed options and recommend changes to them.

iii. *Option One's Unintended Consequences*

The portion of Option One that limits the death or serious bodily injury offense levels to cases where the government has charged and proven that death or serious bodily injury resulted from the drug trafficking offense reflects current case law. But because Option One would seem to permit these heightened offense levels only when an offense carrying a mandatory minimum has been charged, we are concerned that it would no longer allow us to charge statutes without mandatory minimums yet account for the death or serious bodily injury by stipulating to the application of these base offense levels.[127] These stipulations have been used to allow judges to account for the death or serious bodily injury resulting from the offense in the sentencing guidelines calculation without triggering the statutory mandatory-minimum sentence. As a result, we think Option One may lead to an increase in charges carrying mandatory-minimum penalties to account for the conduct's result, including in cases where such a charge would not otherwise be warranted. To avoid this, we recommend that the guidelines make clear that prosecutors and defendants may continue to stipulate to the application of these provisions in the absence of charged offense carrying a mandatory minimum. Although Option One with the stipulation provision would constrain the parties to the base offense levels at or near the mandatory-minimum penalties, it would allow for downward adjustments when warranted.

Even with these changes, we are concerned that Option One's changes to requiring § 851 filings for application of the recidivist provisions will have the unintended result of more

[125] *United States v. Lawler*, 818 F.3d 281, 283-85 (7th Cir. 2016) (the death resulting enhancement applies only when the elemental facts supporting the 'offense of conviction' establish beyond a reasonable doubt that death resulted from the use of the controlled substance and not through relevant conduct) (internal citations omitted); *United States v. Greenough*, 669 F.3d 567, 573-76 (5th Cir. 2012); *United States v. Rebmann*, 321 F.3d 540, 543–44 (6th Cir. 2003). The Third Circuit expressed the same view in dicta. *United States v. Pressler*, 256 F.3d 144, 157 n. 7 (3d Cir. 2001).

[126] *Lawler*, 818 F.3d at 284, n. 4 (distinguishing as "not on point": *United States v. Shah*, 453 F.3d 520 (D.C. Cir. 2006) (no plain error to apply §2D.1.1(a)(2) without charging death-results element when defendant plead guilty to causing death); *United States v. Rodriguez*, 279 F.3d 947 (11th Cir. 2002) (upholding judge finding of death resulting under preponderance standard and rejecting *Apprendi* claim because sentence did not exceed 20-year maximum under 21 U.S.C. § 841(b)(1)(C)); and *United States v. Deeks*, 303 Fed. Appx. 507 (9th Cir. 2008) (unpublished)).

[127] Some districts have used plea agreements to provide for the application of these higher base offense levels without the application of mandatory minimum sentences. Although the parties could also agree to a lower offense level or to an agreed-upon sentence, explicitly allowing stipulations is a reasoned alternative to pursuing charges carrying mandatory minimum penalties and can yield results that are more individually tailored to the circumstances of particular cases.

mandatory life sentences being sought and imposed.[128] Because the § 851 notice affects the applicable mandatory-minimum sentence, the adoption of Option One may significantly increase the sentences for individuals with prior convictions in cases in which death or serious bodily injury resulted. A conviction for a drug offense that resulted in death or serious bodily injury in a case where a notice of prior conviction under § 851 is filed triggers a mandatory-minimum life sentence under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 960(b)(1), 960(b)(2), and 960(b)(3). In that situation, the sentencing guideline calculations are no longer relevant to determining the actual sentence imposed and the sentencing court has no discretion in determining the final sentence.

iv. *Option Two*

The Department does not oppose the portion of Option Two that removes the term "offense of conviction" from §2D1.1(a). This option would permit judges to apply the death or serious bodily injury offense levels without requiring prosecutors to charge offenses carrying mandatory-minimum penalties.[129] In cases where the statutory mandatory-minimum sentence is not applicable, applying these guidelines would provide a mechanism for holding defendants accountable for the death or serious bodily injury that resulted from their conduct. It also would provide sentencing judges with the flexibility to grant departures or variances and make individualized sentencing determinations that are not limited by mandatory-minimum sentences. The parties also would be free to argue for, or stipulate to, variances or departures from the applicable base offense level.

The Seventh Circuit's *Lawler* case provides an example of how Option Two could affect charging decisions. In *Lawler*, the defendant was a heroin trafficker who pleaded guilty to selling heroin to an individual who died from its use. Without accounting for the death, the defendant's guideline range was 15 to 21 months.[130] If the defendant had been charged with and convicted of a death-resulting offense, she would have faced a 20-year mandatory-minimum sentence. But under Option Two, although the defendant's base offense level would be 38, the sentencing judge would have the discretion to adjust the sentence based upon individualized sentencing factors, likely resulting in a sentence below the otherwise-applicable 20-year mandatory minimum but higher than the 15 to 21 months that would be applicable if the death were not accounted for at all. The parties also would have the flexibility to negotiate a plea agreement under Fed. R. Crim. P. 11(c)(1)(B) or (C) that is lower than the otherwise-applicable mandatory-

[128] This will have an effect in at least some circuits. For example, in the Sixth Circuit *Johnson* interpreted "prior similar offense" (the prior guideline language) to be synonymous with "felony drug offense" (the language in 21 U.S.C. § 841(b)(1)(C) that has now been added to §§ 2D1.1(a)(1)(B) and 2D1.1(a)(3)) and has held that 21 U.S.C. § 851 notices are not required to trigger the increased recidivism penalty. *United States v. Johnson*, 706 F.3d 728, 731 (6th Cir 2013). Thus, under current Sixth Circuit precedent, courts would likely continue to apply the guidelines recidivism provisions even without the filing of a § 851 notice. The adoption of Option One would necessarily change that practice and result in lower guidelines sentences for recidivists if the § 851 enhancement is not filed.
[129] Option Two would apply the same base offense levels to death and serious bodily injury cases regardless of whether the death or serious bodily injury was charged and proved beyond a reasonable doubt or proven by a preponderance of evidence at sentencing. The Department's proposal would have retained the higher base offense levels of §2D1.1(a)(1)-(4) for those cases where the death or serious bodily injury was charged and proved but provided for a lower base offense level for cases where the death or serious bodily injury was proved by a preponderance of evidence during a sentencing proceeding.
[130] *Lawler*, 818 F.3d at 282.

minimum sentence. Should the Commission adopt this portion of Option Two, the additional flexibility provided by this option is likely to be beneficial to defendants, attorneys, and judges and may limit the circumstances under which the Department pursues mandatory-minimum sentences in these cases.

Our concerns about the effect of the recidivism provisions in Option One also apply to Option Two, although the concerns are somewhat diminished. Even absent a death-resulting conviction, filing the § 851 notice will increase any applicable mandatory-minimum sentence, thus curtailing judicial discretion and likely resulting in longer sentences.

f. *Definition of "Sex Offense" in the New §4C1.1*

i. *Summary*

We support the Commission's proposed Option Two to correct the definition of "sex offense" in the newly-enacted §4C1.1(b)(2), to include all victims of sex offenses, not just minor victims. We view this change as necessary to effectuate the Commission's intent to exclude from eligibility for the two-level reduction under §4C1.1 defendants who perpetrate sex offenses. This change also addresses the common misconception that most sexual assaults involve violence or threats of violence. We further note that this change is necessary to make the definition of "sex offense" in §4C1.1(b)(2) consistent with the existing definition of "serious bodily injury" in Note M to §1B1.1.

The newly-promulgated §4C1.1 reduces by two offense levels the guideline range for defendants with zero criminal history points who satisfy all ten exclusionary criteria. The Commission noted in their "Reasons for Amendment" that the exclusionary criteria are meant to "appropriately exclude[]" certain defendants from receiving the reduction "in light of the seriousness of the instant offense of conviction or the existence of aggravating factors in the instant offense."[131] Despite specifically citing "where the instant offense of conviction was a 'sex offense'" as one of the examples for the exclusionary criteria in the "Reasons for Amendment,"[132] the new §4C1.1(b)(2) narrowly defines "sex offense" to exclude only defendants who victimize minors. This leaves substantial gaps, including offenses committed against adult victims that do not otherwise fit under other exclusions, like the use of violence or threats of violence. It fails to exclude defendants, such as federal law enforcement, corrections officers, and human traffickers, who do not need to employ violence or threats to gain their victims' submission. These defendants target vulnerable victims and exploit their authority over them. But because other exclusions do not cover such conduct, these defendants are currently still eligible for the reduction. Option Two thus aligns the definition with the Commission's actions last year raising the offense level for sexual abuse of a ward.[133] Moreover, the current definition fails to account for sexual assault involving groping, fondling, and touching.

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[131] U.S. SENT'G COMM'N, *Adopted Amendments*, 81 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.
[132] *Id.* at 82.
[133] U.S. SENT'G COMM'N, *Adopted Amendments*, 32 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf

We also note that Option Two resolves an embedded ambiguity. Under §4C1.1(a)(4), the Commission excluded offenses that result in "serious bodily injury" as defined by the commentary to §1B1.1. That commentary defines "serious bodily injury" to include violations of 18 U.S.C. § 2241 (Aggravated Sexual Abuse) and 18 U.S.C. § 2242 (Sexual Abuse).[134] Even though §1B1.1's definition of "serious bodily injury" arguably excludes defendants who violate §§ 2241 and 2242 from receiving the two-level reduction under §4C1.1 – whether their victims are adults or minors – this provision is in the commentary to §1B1.1, not the substantive text. Against the backdrop of the evolving case law questioning the validity of guideline commentary (*see* discussion of loss above), it is unclear whether §4C1.1(b)(2)'s substantive text or §1B1.1's commentary would control when the offense involves an adult victim.[135]

ii. *Option Two's More Appropriate Definition Reflects the Realities of Sexual Assault*

By deleting the phrase "perpetrated against a minor," Option Two would expand the definition to include all victims of the sex offenses currently listed in §4C1.1(b)(2) rather than just minor victims. Doing so recognizes that sexual assault of adult victims perpetrated without the use or threats of violence is serious and warrants exclusion. In addition, Option Two clarifies that violations of 18 U.S.C. §§ 2241 and 2242 – even those against adult victims – are excluded from receiving the reduction, and thus the Department supports its adoption.

Violent sexual assault is abhorrent and appropriately subject to a higher total offense level.[136] But just like the falsity that most sexual assaults are committed by strangers, so too is the falsity that most sexual assaults involve violence or threats of violence or that defendants are first-time offenders.[137] The starkest examples include law enforcement officers, human traffickers, and defendants who target vulnerable victims unable to fight back. Officers who target those in their custody do so by weaponizing their authority to obtain their victims' submission. The Commission recognized that last cycle by raising penalties for defendants convicted of 18 U.S.C. § 2243(b) (Sexual Abuse of a Ward) and § 2243(c) (Sexual Abuse of an Individual in Federal Custody).[138] Those defendants are typically federal law enforcement and corrections officers who often have zero criminal history points but have sexually assaulted

[134] Serious bodily injury "is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." Commentary to §1B1.1 (Application Instructions).

[135] Even then, most sexual assaults do not result in "serious bodily injury" as defined in Chapter 109A by 18 U.S.C. §2246(4). In chapter 109A, "'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2246(4). As a result, §1B.1's differing and consequential definition of "serious bodily injury" is likely to be inadvertently overlooked.

[136] *See, e.g.,* §2A3.1(b)(1) ("If the offense involved conduct described in 18 U.S.C. § 2241(a) . . .increase by 4 levels.").

[137] Congress enacted Federal Rules of Evidence 413 (Similar Crimes in Sexual-Assault Cases) and 414 (Similar Crimes in Child Molestation Cases) with the understanding defendants commit sexual assaults multiple times and often their propensity to do so is the only way to corroborate the victim and hold offenders accountable.

[138] U.S. SENT'G COMM'N, *Adopted Amendments*, 32-34 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf

multiple victims.[139] Yet under the current §4C1.1, these defendants will almost always qualify for a two-level reduction, undermining the Commission's own amendment.

Similarly, sex traffickers who violate 18 U.S.C. § 1591 often do not employ violence. Their conduct is analogous to defendants who sexually abuse those in their custody. A trafficker (often repeatedly) sexually exploits emotional, mental, and physical control over an indentured victim in an inherently coercive setting. Although traffickers may use violence, often they do not.[140] Sometimes they employ "psychological harm" or "abuse or threatened abuse of law or the legal process," by, for example, withholding immigration documents to gain submission.[141] Other times they exploit drug addiction.[142]

As the various means set forth in the different provisions of 18 U.S.C. §§ 2241 and 2242 and their corollaries in § 2244 illustrate, defendants do not need to use violence to sexually assault victims who are disabled; who are asleep or unconscious;[143] who are voluntarily or involuntarily intoxicated; who do not consent or were coerced under threats of abhorrent but non-violent actions, such as of deportation, or threats of homelessness, job loss, or loss of their children. Defendants may isolate their victims, sometimes taking them to secluded places (or in the case of violations of Chapter 117 offenses, across state lines) and terrify them into submission, all without the use of violence or threats of violence. This often leads to a victim "freezing" during sexual assault where a defendant necessarily would not need to employ

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[139] *See, e.g. United States v. James Highhouse,* (N.D. Cal., August 31, 2022) (BOP chaplain repeatedly sexually assaulted the same victim for nine months; the investigation revealed that he sexually assaulted another inmate and engaged in sexually explicit conduct with several more); *United States v. Hosea Lee,* (E.D. Ky, August 1, 2022) (BOP corrections officer abused four victims while he also served as a drug treatment specialist); United States v. Ray Garcia, docket number (N.D. Cal., March 22, 2023) (BOP warden sexually assaulted three victims over the course of several years); *United States v. Andrew Jones*, (N.D. Cal., November 15, 2023) (BOP corrections officer sexually assaulted three victims during 2020 and 2021); *United States v. Robert Smith*, (N.D. Ala., January 11, 2024) (BOP corrections officer pleaded guilty and admitted to sexually assaulting two women in his custody).

[140] *See, e.g., United States v. Wysinger,* 64 F.4th 207, 213 (4th Cir.), cert. denied, 144 S. Ct. 175 (2023) (In §1591 prosecution, defendant, on appeal, claimed he "was not violent with the women, [but] the statute plainly condemns 'means of ... coercion' separate from and in addition to 'means of force [and] threats of force;' Nor is physical violence necessary to establish coercion under the statute.") (internal citations omitted).

[141] 18 U.S.C. §1591(e)(5); (e)(2)(C).

[142] *See, e.g. United States v. Mack*, 808 F.3d 1074, 1078, 1081–1082 (6th Cir. 2015) (upholding conviction for sex trafficking where defendant "recruit[ed] young female addicts" and exploited their addictions to coerce them "to prostitute themselves for his benefit"); *United States v. Fields*, 625 F. App'x. 949, 952 (11th Cir. 2015) (unpublished) (upholding sex trafficking conviction where defendant coerced his victims to engage in commercial sex acts by "causing them to experience withdrawal sickness if they did not engage in prostitution").

[143] In January 2022, in *United States v. Wagner*, No. 20-cr-3099, the defendant was sentenced in the District of Nebraska to 18 months in prison after pleading guilty to one count of 18 U.S.C. § 2244(a)(2), an offense punishable by up to three years in prison. Minute Entry, *United States v. Wagner*, No. 20-CR-3099 (D. Neb. Jan. 6, 2022), ECF No. 65. While on a commercial flight, the defendant, a 35-year-old male, rubbed the inner thigh of his sleeping seatmate, an 18-year-old female, who awoke to find him touching her for his own sexual gratification. She escaped to the bathroom but because it was a full flight, she was forced to return to her seat, where the defendant began masturbating while staring at the victim. The defendant's total offense level was 13, correlating to 12-18 months in prison. Prior to sentencing, the Department filed a memorandum outlining not only that the victim first awakened in a groggy state to see what she thought was the defendant's penis on her leg, but that there had been multiple prior instances of reported sexual misconduct where the defendant was caught masturbating toward women in public places. Yet because he had zero criminal history points, if the defendant was sentenced today, he would qualify for a two-level reduction under §4C1.1 and his guidelines range would be 6-12 months.

violence.[144] "Freezing" or "tonic immobility" is a common biological response to extreme fear, uncontrollable by a victim, that temporarily induces paralysis and muscle rigidity in response to real or perceived danger that sexual assault victims often describe, and is often accompanied by victims blaming themselves for their inability to fight back.[145]

Moreover, the restrictive definition of "sex offense" in §4C1.1 inadvertently infuses the provision with implicit gender bias because the resulting sentences will disproportionately affect women who are most often the victims of sexual assault. This is clear when juxtaposed against physical assault. If an offender punches his seatmate on an airplane in violation of 18 U.S.C. § 113, his offense is excluded under §4C1.1 because he used violence to commit the offense. If he fondles his seatmate's breasts or grabs her genital area, his offense is not excluded.

We ask the Commission to consider the egregious and predatory nature of sexual assault, whether it is committed via a knife to the throat, a drug in a drink, or under threat of being homeless on the street. Ruinous to a victim's life, its seriousness cannot be overstated on the continuum of federal crimes that one human can commit against another. It should therefore be subject to exclusion from §4C1.1's reduction.

VII. Technical

a. *Safety Valve and the Adjustment for Certain Zero-Point Offenders*

The Department agrees with the Commission's proposal to amend the two-level Adjustment for Certain Zero-Point Offenders in §4C1.1. Under §4C1.1, a defendant is eligible for the two-level adjustment only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) applies. Subsection (a)(10) requires that "the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848."[146] Subsection (a)(10) mirrors similar exclusionary language in Section 3553(f)(4), which provides that a defendant is eligible for relief under the safety valve only if "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act." 18 U.S.C. § 3553(f)(4). Courts have generally interpreted Section 3553(f)(4) as excluding a defendant from safety-valve eligibility if the defendant had *either* an aggravating role *or* was

[144] In *United States v. Sanchez-Azpeitia,* the defendant, an employee at Sequoia National Park, sexually assaulted the victim in a park cabin. Despite the victim saying "no," the defendant groped the victim's breasts, legs, and vaginal area, and then put his mouth on her nipple and then briefly on her vagina, telling her, "I just want a taste." During the assault, the victim explained that she "froze." The defendant pleaded guilty to one count of violating 18 U.S.C. § 2244(b), which carries a maximum sentence of two years in prison. Minute Entry, *United States v. Sanchez-Azpeitia*, No. 23-CR-161 (E.D. Cal. Oct. 23, 2023), ECF No. 29. The defendant is pending sentencing, and because he has zero criminal history points, he potentially meets the criteria for a two-level reduction under §4C1.1. Instead of a total offense level of 12 (10-16 months) in Zone C, it would be a level 10 (6-12 months) in Zone B, a forty percent decrease at the bottom of the guidelines range.

[145] Jen Percy, *What People Misunderstand About Rape*, N.Y.Times, Aug. 22, 2023, available at https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html.

[146] USSG §4C1.1(a)(10).

engaged in a continuing criminal enterprise.[147] That interpretation makes sense both grammatically and practically. As the Commission recently noted, Section 3553(f)(4) has exclusionary language beginning each phrase (*i.e.*, "the defendant was not . . ." and ". . . was not engaged in"), implying that a defendant is ineligible if he satisfies either of the exclusionary criteria. Interpreting §4C1.1(a)(10) to exclude only those defendants who *both* had an aggravating role adjustment *and* were engaged in a continuing criminal enterprise is self-defeating. This is likely a null set. That is because Application Note 1 of §2D1.5 and Application Note 6 of §5C1.2 instruct that the aggravating role adjustment under §3B1.1 is unavailable to defendants engaged in a continuing criminal enterprise. This means that, in reality, a defendant may receive an aggravating role adjustment, or a continuing criminal enterprise application, but not both.

We agree with the Commission that §4C1.1 is best read to make the defendant "ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision." We also agree that, to avoid confusion caused by the word "and" in the current Guideline, it would be helpful to divide subsection (a)(10) into two separate provisions. This would reduce any possible litigation over the exclusionary criteria in subsection (a)(10). This amendment would also ensure that current subsection (a)(10) appropriately excludes from eligibility for the adjustments defendants who engaged in more serious conduct, either because they played an aggravating role in the offense, such as by managing or organizing the offense, or because they participated in a continuing criminal enterprise.

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[147] *See, e.g.*, *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020); *United States v. Bazel*, 80 F.3d 1140, 1143 (6th Cir. 1996).

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW
Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
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Office of the Deputy Attorney General
Washington, D.C. 20530

February 22, 2024

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

Dear Judge Reeves:

As the Commission considers the various proposed guideline amendments published for public comment in December, I write to supplement our written comments on these proposals and to highlight for the Commission two critically important public safety issues that are cutting short far too many lives in communities across our country: fentanyl poisoning and firearms violence. Fentanyl contributed to the deaths of about 73,600 Americans in the year leading up to September 2023.[1] In all of 2023, nearly 19,000 Americans died of firearms violence.[2]

The Department identified these issues in our July 31, 2023, letter to the Commission, and we raise them again now so the Commission will keep them front of mind in the coming months as you consider and vote on the pending amendment proposals. While we appreciate that sentencing policy alone cannot solve these national crime problems, we believe the Commission has a vital role to play in addressing them.

Fentanyl poisoning and firearms violence both disproportionately affect youthful individuals. Fentanyl is one of the leading causes of death for Americans between the ages of 18 to 45,[3] and firearm injuries are among the leading causes of death among children and teens.[4]

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[1] Centers for Disease Control and Prevention, National Center for Health Statistics, *Provisional Drug Overdose Death Counts*, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (synthetic opioids, September 2022 to September 2023) (last accessed Feb. 21, 2024).

[2] Chip Brownlee, *Gun Violence by the Numbers in 2023,* THE TRACE, Dec. 31, 2023, https://www.thetrace.org/2023/12/data-gun-violence-deaths-america/ (last accessed Feb. 21, 2024).

[3] Centers for Disease Control and Prevention, National Center for Health Statistics, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm (Synthetic opioids caused 71,238 deaths in 2021, up from 57,834 the year before.); Centers for Disease Control and Prevention, "Data Analysis & Resources" (last accessed Feb. 21, 2024), https://www.cdc.gov/opioids/data/analysis-resources.html (last accessed Feb. 21, 2024). Fentanyl appears to be the leading cause of death amongst 18- to 45-year-olds in 2019 and 2020, but not among all America adults. *See* Nusaiba Mizan, *Fact-check: Is fentanyl the leading cause of death among American adults?*, EL PASO TIMES (Feb. 2, 2023), https://www.elpasotimes.com/story/news/2023/02/02/fentanyl-overdose-cause-of-death-among-adults-greg-abbott/69867350007/ (last accessed Feb. 21, 2024).

[4] Centers for Disease Control and Prevention, National Center for Health Statistics, *Summary of Initial Findings from CDC-Funded Firearm Injury Prevention Research*, Summary of Initial Findings from CDC-Funded Firearm

I urge you to consider what effect the changes you are considering now will have on reducing violent crime and helping address fentanyl poisoning and firearms violence.

The Fentanyl Epidemic. Fentanyl is cheap to make, easy to disguise, and all too often, deadly to those who take it. Fueling the problem is the ease with which fentanyl can be produced, bought, and sold, as cartels use the dark web and social media to market "to unsuspecting children, young adults, and members of the public who think they are getting legitimate prescription drugs" but are actually purchasing potentially fatal doses of fentanyl.[5] Making matters worse, fentanyl mixed with xylazine is appreciably deadlier. Xylazine can render lifesaving medications, like naloxone, less effective in treating overdoses.

The Department thanks the Commission for the initial steps it took last amendment cycle to address these issues, but substantial work remains. As we more fully explain in our letter commenting on the amendment proposals, we recommended that the Commission adopt a new base offense level and enhancements – lower than those applicable when a mandatory minimum is charged but higher than that applicable to drug distribution that does not result in death – for cases involving death or serious bodily injury but in which the particular circumstances suggest it may be inappropriate to pursue charges carrying a 20-year mandatory term of imprisonment.[6] It is the policy of this Administration that the mandatory minimum penalties set forth in 21 U.S.C. §§ 841 and 960 should be applied cautiously and only in cases that merit them.[7] We also recognize that fentanyl and other controlled substances have led to an unprecedented number of overdose and drug poisoning deaths, especially involving young people, and that traffickers should be held accountable when death or serious bodily injury results from their conduct.

The Department has recommended other amendments intended to combat these problems. *First*, we recommended an enhancement applicable to all distributions of controlled substances to children and young adults under 21. *Second*, we recommended that the Commission expand application of the existing enhancements in §2D1.1(b)(7) to apply to drug traffickers who use direct private communications associated with interactive computer services and to provide further enhancements for those who use anonymizing technologies to avoid

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Injury Prevention Research | Violence Prevention | Injury Center | CDC (last accessed Feb. 21, 2024). Taking into account all types of firearm injuries, including homicides, suicides, and unintentional injuries, firearm injuries were the leading cause of death among children and teens ages 1 to 19 in 2020 and 2021.

[5] Press Release, Drug Enforcement Administration, *Fentanyl Deaths Climbing, DEA Washington Continues the Fight* (Feb. 16, 2022), https://www.dea.gov/stories/2022/2022-02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight (last accessed Feb. 21, 2024); Press Release, Drug Enforcement Administration, *Fentanyl distributor who used the dark web and crypto currency sentenced to 30 years in federal prison* (Oct. 3, 2019), https://www.dea.gov/press-releases/2019/10/03/fentanyl-distributor-who-used-dark-web-and-crypto-currency-sentenced-30 (last accessed Feb. 21, 2024).

[6] In instances where death or serious bodily injury results, the "safety valve" would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

[7] The Attorney General has instructed prosecutors that "charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims and such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022), https://www.justice.gov/media/1265321/dl?inline (last accessed Feb. 21, 2024) (alterations and internal quotation marks omitted).

detection. *Third*, we explained that the Commission should consider amending the Guidelines to account for convictions involving fentanyl that is adulterated with xylazine. *Finally*, we recommended that the Commission consider an enhancement for possession of especially dangerous firearms or quantities of firearms, including three or more firearms, a semiautomatic firearm capable of accepting a large capacity magazine, or a firearm as described in 26 U.S.C. § 5845.[8] We look forward to renewing these proposals—and identifying additional ones—that would help us turn the corner in our campaign to overcome the fentanyl epidemic.

Firearms Violence. Far too many Americans continue to die from firearms violence, and current anomalies in §2K1.1 continue to result in sentences that do not reflect the severity and dangerousness of that conduct. "Glock switches," which convert "an already dangerous firearm into an extremely dangerous machinegun,"[9] remain a significant concern in our communities and for our law enforcement officers. And defendants with prior misdemeanor domestic-violence convictions or prior firearm-related convictions who then commit additional firearms offenses do not currently qualify for the recidivism enhancement in §2K2.1. Regrettably, the presence of a firearm substantially increases the lethality of domestic-violence offenses.[10] Moreover, as the Commission has observed, firearms offenders recidivate at a higher rate than non-firearms offenders. For these reasons, as we more fully explain in our letter commenting on the pending amendment proposals, we urge the Commission to preserve application of the existing four-level enhancement for "altered or obliterated serial numbers" even where the serial number remains legible despite the alteration.

The Department has submitted other recommendations addressing firearms violence. *First*, the Department recommended that the Commission amend the definition in Application Note 1 to make clear that it includes firearms under both § 5845(a) and § 921(a)(3). *Second*, we urged the Commission to treat prior misdemeanor crimes of domestic violence and prior firearm-related convictions as qualifying predicates for §2K2.1's recidivism enhancement. *Finally*, to reduce the complexity of the calculation and allow the type of offense to dictate the base offense level, the Department recommended converting the base offense levels for dangerous firearms and prior serious crimes into specific offense characteristics. Simplifying the base offense level structure will also make it easier for the Commission to research and analyze §2K2.1 sentencing data to better inform future amendments.

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[8] Consistent with the current Guidelines, we do not propose that this enhancement be used in conjunction with violations of 18 U.S.C. § 924(c). USSG §2K2.4, comment. n.4.

[9] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022) ("The dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it.").

[10] DEP'T OF JUSTICE, *Firearms and Domestic Violence: The Intersections* (Dec. 13, 2016), https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections (last accessed Feb. 21, 2024).

We appreciate the opportunity to reaffirm the importance of these requests. We look forward to continuing our collaboration and to renewing these requests and addressing them more substantively during the next amendment cycle.

Sincerely,

Lisa Monaco
Deputy Attorney General

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

801 I Street, 3rd Floor
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Chair: Heather Williams Phone: 916.498.5700

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 Youthful Individuals (Proposal 2)

February 22, 2024

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I. Part A: Computing Criminal History for Offenses Committed Prior to Age 18.

Defenders commend the Commission for proposing to amend its long-outdated treatment of prior offenses committed before age 18.[1] Section 4A1.2(d), the primary rule which governs the treatment of youth priors,[2] has remained unamended since the rule first appeared in the original 1987 Guidelines Manual.[3] Yet much has changed since 1987.

Today, the Commission is equipped with decades of data, scientific research, and caselaw confirming not only that children are different, but that our juvenile legal system is deeply fractured and flawed. Treatment of youth offenses varies drastically among states and communities. Myriad different rules (and exceptions to those rules) lead to adjudications that lack critical procedural safeguards and yield convictions and sentences that fail to reflect the nature of the prior offense. And racial and ethnic disparities remain pervasive: at all processing points in the juvenile legal system children of color, particularly Black, Native, and Latino children, fare worse.[4]

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[1] *See* USSC, Proposed Amendments to the Sentencing Guidelines 13–37 (2023), http://tinyurl.com/43bpht56 ("Proposed Amendment").

[2] When Defenders use the term "youth priors," we are referring to any offense committed prior to age 18, regardless of whether that offense was classified by the presiding jurisdiction as a juvenile adjudication, adult conviction, or something else, like a "youthful offender" conviction. *See, e.g.*, Ian Marcus Amelkin & Nicholas Pugliese, *The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Federal Defendants' Prior Offenses Committed Before 18*, 19 Harv. L. & Pol'y Rev. __, *19 (forthcoming Spring 2024) ("*Delinquent Guidelines"*) (describing three categories of "pre-18 priors"), http://tinyurl.com/35c9vxxn.

[3] *See* Proposed Amendment at 13. *Compare* USSG §4A1.2(d) (1987), *with* §4A1.2(d) (2023).

[4] *See infra* Section I.A.2. Because of a lack of comprehensive and uniform ethnicity data collection, researchers have had difficulties calculating an accurate population estimate of Latino youth in the juvenile and criminal legal systems and determining how Latino youths are impacted by these systems. *See* Sonia Diaz et al., *The Latinx Data Gap in the Youth Justice System*, UCLA Latino Policy & Politics Initiative 15, 18–19 (2020), http://tinyurl.com/bdhaft5w. Despite the underreporting of Latino data, available data confirms that, like other children of color, Latino youth are overrepresented in the legal system. *See id.* at 15. *See also* Joshua Rovner, The Sentencing Project, *Latinx Disparities in Youth Incarceration* (2023),

In addition to advancements in knowledge about the juvenile legal system, the Commission now has information on the impact of its own rules. According to recently released data, a shocking 88.8 percent of those who received at least one criminal history point for a youth prior in Fiscal Year 2022 were non-white.[5] Almost 60 percent were Black.[6] The adverse impact §4A1.2(d) has on individuals of color exceeds even the career offender guideline[7]—a rule the Commission has long recognized as a source of significant and unwarranted racial disparities.[8]

To be sure, the Commission cannot fix how other jurisdictions treat their youth. But it can and should refuse to continue to engraft past injustices and disparities into its own guidelines.

Defenders strongly urge the Commission to adopt Option 3 of the proposed amendment without any upward departure or limitation. By excluding from the criminal history calculation all sentences resulting from offenses committed before age 18, Option 3 best ameliorates the jurisdictional, racial, and ethnic disparities resulting from the current rule; reflects the advancement of knowledge about the realities of the juvenile legal system and brain development and behavior; and is the simplest and fairest rule to apply. The Commission has authority to promulgate Option 3 and should swiftly do so.

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http://tinyurl.com/y2x6y8n4. In this comment we use both "Latino" and "Hispanic." Although these terms are not interchangeable, *see* BBC News, *Latino or Hispanic? What's the difference?*, YouTube (Nov. 5, 2019), http://tinyurl.com/yc6udrsz, the articles, studies, and data cited herein use both terms. In the interest of accuracy, we use whichever term the referenced source used. If we are not citing a source, we use "Latino."

[5] *See* USSC, *Public Data Presentation: Proposed Amendments on Youthful Individuals* 28 (2024) ("USSC Data Briefing"), http://tinyurl.com/422d9y4n.

[6] *See id.* (reporting 59.7 percent).

[7] *See* USSC, *FY 2022 Quick Facts on Career Offenders* 1 (2023), http://tinyurl.com/5n7wrtf5 (reporting in Fiscal Year 2022, 76.4 percent of people designated as career offenders were non-white and 57.7 percent were Black).

[8] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133–34 (2004), http://tinyurl.com/4hx9rsw6.

A. The Commission's current treatment of youth priors is outdated and problematic.

To determine whether a youth prior counts towards a person's criminal history, §4A1.2(d) first requires the court to ascertain whether the conviction was an adult conviction or not. If a juvenile "was convicted as an adult" and received "a sentence of imprisonment exceeding one year and one month" that was "imposed within fifteen years of the [ ] commencement of the instant offense," the youth prior is valued the same as any other adult sentence of the same length: three points.[9]

If the conviction was not an adult conviction, or if the sentence imposed was 13 months or less, the court must determine the length of "confinement" imposed and whether the prior is recent enough to count for points.[10] Any adult or juvenile sentence to confinement of at least 60 days is assessed two points so long as the person was released within five years of the instant offense.[11] Any other youth prior "not otherwise covered," imposed within five years of the instant offense, counts for one criminal history point.[12]

Last year, almost 70 percent of people who received criminal history points for youth priors were pushed into a higher criminal history category.[13] Higher criminal history categories yield higher guideline ranges. And "when a [g]uidelines range moves up or down, [the] sentence[ ] move[s] with it"[14]—meaning the Commission's treatment of youth priors lengthens the time our clients spend in prison.

Youth priors that receive criminal history points do more than enhance a person's criminal history category. They can be used to enhance Chapter 2

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[9] USSG §§4A1.2(d)(1), (e).

[10] *See* USSG §4A1.2(d)(2).

[11] *See* USSG §4A1.2(d)(2)(A).

[12] *See* USSG §4A1.2(d)(2)(B).

[13] *See* USSC Data Briefing at 32.

[14] *Peugh v. United States*, 569 U.S. 530, 544 (2013); *see also* USSC, *Final Quarterly Data Report FY2022* 28, fig. 5 (2022) (reflecting that, from Fiscal Years 2017–22, the average guideline minimum acted as an anchor for the average sentence), http://tinyurl.com/cn427v7t.

base offense levels,[15] and certain youth priors can trigger the draconian, racially disparate career offender designation.[16] Youth priors may contribute to a person's ineligibility to obtain safety-valve relief from mandatory minimums.[17] And, of course, if sentenced to imprisonment, a person's criminal history score affects their security designation at the BOP.[18]

Despite repeated criticism of the Manual's treatment of youth priors,[19] it has remained unchanged. It is time the Commission amend this rule.

1. Section 4A1.2(d) creates unwarranted disparities based on differing jurisdictional practices.

Since 1987, the Commission has recognized that counting youth priors in the guidelines "[has] the potential for creating large disparities."[20] Sure enough, by categorizing youth priors based on how state and county jurisdictions process them, the Commission bakes myriad jurisdictional practices into §4A1.2(d), necessarily treating similarly situated individuals differently.

Jurisdictional variation has been a hallmark of the juvenile legal system for decades. Starting in the 1980s and 90s, just as tough-on-crime

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[15] *See* USSG §2K1.3(a)(1)–(2), comment. (n. 9); §2K2.1(a)(1)–(4), comment. (n. 10); §2L1.2(b)(1)–(b)(3), comment. (n. 3).

[16] *See* USSG §4B1.2(c), (e)(4).

[17] *See* 18 U.S.C. §3553(f)(1).

[18] *See* Bureau of Prisons, Form BP-A0377, Inmate Load and Security Designation (last accessed Feb. 16, 2023) (showing in Security Designation Data box 8 that as criminal history points increase, so do the number of security points), http://tinyurl.com/yc5e92fc.

[19] *See, e.g.*, *Delinquent Guidelines*, *supra* note 2; Andrew Tunnard, Note, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under the Career Offender Guidelines*, 66 Vand. L. Rev. 1309 (2013); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 Va. J. Soc. Pol'y & L. 231 (2002); Letter from Heather Williams on behalf of the Fed. Defenders to the U.S. Sent'g Comm at 12–14 (Aug. 1, 2023), http://tinyurl.com/2fu34fub; Letter from Marjorie Meyers on behalf of the Fed. Defenders to the U.S. Sent'g Comm at 20–37 (Feb. 20, 2017), http://tinyurl.com/yc6cbdz5.

[20] USSG §4A1.2 comment. (n. 7) (recognizing disparities exist both "due to the differential availability of records" of juvenile adjudications and "from jurisdiction to jurisdiction in the age at which a [person] is considered a 'juvenile'").

laws were being enacted for criminal courts, "perceptions of a juvenile crime epidemic" fueled the enactment of punitive juvenile crime laws.[21] While much of this perception was unfounded,[22] "[b]etween 1992 and 1997, all but three states changed their laws" to "crack down on juvenile crime"[23] by "expand[ing] the treatment of juveniles as adults for purposes of sentencing and punishment," albeit in differing ways.[24] Some implemented or amended transfer provision laws—including adopting mandatory transfer provisions—to make it easier to transfer cases from juvenile court into adult criminal court.[25] Some states gave courts increased sentencing authority over youths, weakened confidentiality provisions, or increased the discretion of juvenile prosecutors.[26] And while several states have since moved away from some of these punitive laws, many have not.[27] What remains is a "patchwork quilt of juvenile justice systems resulting in inconsistent outcomes for youth, families, and communities[.]"[28]

It would be impossible to document all the ways youth cases vary from state to state. Indeed "even within states, case processing may vary from community to community, reflecting local practice and tradition."[29] However, we flag a few prominent examples, including variations in: (1) maximum age standards for juvenile court jurisdiction; (2) transfer and "reverse transfer"

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[21] Charles Puzzanchera et al., Nat'l Ctr. for Juvenile Just., Youth and the Juvenile Justice System: 2022 National Report 77 (2022), ("NCJJ National Report"), http://tinyurl.com/43cneswh; *see also* Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 Am. U. L. Rev. 743, 784–85 (2020) ("*Race, Rights, and Representation*"); Brief of Jeffrey Fagan, et al, as Amici Curiae in Support of Petitioners, Miller v. Alabama, at 9–18, 567 U.S. 460 (2012) (No. 10-9646), 2012 WL 174240 ("*Miller* Amici").

[22] *See, e.g.*, *Miller* Amici, at 18–29 (describing scientific evidence and empirical data that invalidated the "juvenile superpredator" myth).

[23] NCJJ National Report at 80.

[24] *Miller* Amici at 15; *see also Race, Rights, and Representation* at 785.

[25] *See* NCJJ National Report at 80; *Miller* Amici at 16.

[26] *See* NCJJ National Report at 80; *Race, Rights, and Representation* at 785.

[27] *See* NCJJ National Report at 81–82.

[28] Act 4 Juvenile Justice, *Juvenile Justice and Delinquency Prevention Act, What is JJDPA?*, http://tinyurl.com/5n83xhr6 (last visited Feb. 19, 2024) (recognizing more than 56 different juvenile legal systems independently operating).

[29] NCJJ National Report at 88.

mechanisms between juvenile and adult court; (3) sentencing disposition options; and (4) the availability of expungement. These examples show that by attempting to differentiate youth priors as either "adult" or "juvenile sentences" and assessing the severity of youth priors based on the length of imprisonment or confinement imposed, §4A1.2(d) necessarily perpetuates unwarranted disparities resulting from different jurisdictional practices.

Maximum Age Standards. States set a maximum age above which a case does not qualify for juvenile court jurisdiction. That is, states initially decide based on age—not the nature of the alleged offense—whether a case should be adjudicated in juvenile court. Today, most states set the maximum age for juvenile court jurisdiction at 17 years old.[30] But as of 2021, three states still set their upper age at 16.[31] Consequently, for many individuals, whether their youth prior counts for points (and, if so, for how many) depends simply on the location in which that youth prior was committed.

Indeed, defenders in Wisconsin, one of three states that still set the maximum age for juvenile court jurisdiction at 16, advise that they regularly argue §4A1.2(d) creates unwarranted disparities. Because all youth offenses committed by 17-year-olds in Wisconsin are classified as adult convictions, a person sentenced in federal court who received a 14-month sentence for a Wisconsin offense committed at age 17 would be assessed three points, while a 17-year-old who was adjudicated in juvenile court in neighboring Michigan for committing the same prior offense would receive less points—or no points at all.[32]

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[30] *See id.* at 87.

[31] *See* Anne Teigen, Nat'l Conf. of State Legislatures, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, (Apr. 8, 2021) ("Juvenile Age of Jurisdiction"), http://tinyurl.com/3tss6686. The three states are Wisconsin, Georgia, and Texas. *See id.*

[32] Michigan raised their maximum age for juvenile court jurisdiction to 17 in 2019, effective in 2021. *See id.*; Press Release, *Governor Whitmer Signs Bipartisan Bills to Raise the Age for Juvenile Offenders*, Governor Gretchen Whitmer (Oct. 31, 2019), http://tinyurl.com/492asm5r. A Wisconsin youth prior classified as an adult conviction with a sentence of 14 months would be assessed 3 points so long as that sentence was imposed within 15 years of the commencement of the instant offense. *See* USSG §§ 4A1.1(a); 4A1.2(d); 4A1.2(e)(1). A person cannot receive three points for a juvenile adjudication, meaning a Michigan juvenile adjudication would be

Further, while all states have an upper age limit of at least 16 today, this was not always the case. Recognizing the need for fairer policies, between 2000 and 2020, ten states passed laws to raise their upper age of original juvenile jurisdiction.[33] However, some people adjudicated in these states before their laws changed still have "adult" priors for youth offenses on their records. Thus, by attaching significance to whether a youth prior was characterized as an adult conviction, §4A1.2(d) creates not only inter-jurisdictional disparities, but also intra-jurisdictional disparities.

Take North Carolina as an example. Defenders in that district advise that before 2019 North Carolina classified any offense committed by someone 16 or older as an adult conviction. In 2019, North Carolina raised its upper age cap from 15 to 17.[34] Although the state law changed, pre-2019 adult convictions for 16- and 17-year-olds remain on the books and still count for criminal history under the guidelines today. Therefore, two people from the same district with the same youth prior committed at the same age could be treated differently under §4A1.2(d).

As state policies evolve to reflect advancement in knowledge about youthful behavior, the guidelines need to keep pace. Otherwise, disparities will persist due to the guidelines' outdated treatment of youth priors.

Transfers Mechanisms to Adult Court. Even if a person is within the age range to have their case handled in juvenile court, most states have rules for when a juvenile case can be transferred to adult court. Transfer may happen in one of three ways: (1) "judicial waiver" (permitting or requiring the juvenile judge to waive jurisdiction); (2) "statutory exclusion" (statutorily excluding some youth from juvenile court jurisdiction); and (3) "prosecutorial waiver" (permitting the prosecutor discretion to file a case in either juvenile or adult court).[35] As of 2019, 47 states had judicial waiver authority, 27 states

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assessed, at most, 2 points. *See* §4A1.2(d)(2). And since the decay period for juvenile adjudications is only five years (measured either from release from confinement or date sentence was imposed, depending on the sentence), if the Michigan offense resulted in a juvenile adjudication outside the five years, it would not count for points. *See id.*

[33] *See* NCJJ National Report at 87.

[34] *See id.*

[35] *Id.* at 95.

had statutory exclusions, and 14 states permitted prosecutorial waiver.[36] However, even in states that offer the same transfer mechanisms, disparities persist. For instance, many states have "once an adult, always an adult" provisions—requiring a juvenile's case to be handled in adult court if he was already convicted of an offense in adult court.[37] Some states provide "reverse waivers," which permit the transfer of a juvenile case being handled in adult court *back* to juvenile court.[38] And like with age limitations, states' transfer laws continue to evolve: between 2004 and 2019, 29 states and District of Columbia changed their transfer laws.[39]

Dispositions. Differing disposition options available in each jurisdiction means that whether a youth prior is countable under the guidelines (and if so, for how many points) may depend, not on the severity of the offense, but on the sentencing options available in a particular jurisdiction. For instance, even if a case is handled in adult court, approximately half the states permit the adult court to impose a sanction typically available only in juvenile court.[40] In some states, this "blended sentencing" works in the reverse, that is, juvenile courts have the authority to impose adult criminal sanctions.[41] So, similarly situated youths may receive dramatically different sentencing treatment based on the sentencing options of the jurisdiction where the offense occurred. In this way, §4A1.2(d) creates unwarranted disparities by focusing on sentence length.

Expungement. The availability of juvenile record expungement also produces unwarranted disparities.[42] "Sentences for expunged convictions are not counted" for criminal history points.[43] But whether a person is fortunate

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[36] *See id.*

[37] *See id.*

[38] *See id.* (of the 42 states in 2019 with mandatory judicial waiver, statutory exclusion, or prosecutorial waiver provisions, 26 also had reverse waiver provisions).

[39] *See id.* at 100.

[40] *See id.* at 95.

[41] *See id.*

[42] This fact has been recognized by the Commission since 1987. *See* USSG §4A1.2 comment. (n.7) (1987).

[43] USSG §4A1.2(j).

enough to have a youth prior expunged "varies widely from state to state."[44] As of 2019, only 19 states permitted expungement of juvenile records.[45] Further, while the goal of expungement "is to make it as though the records never existed[, t]he process is not always comprehensive in practice."[46] For instance, some states use the terms "expunge" and "seal" interchangeably.[47] But sealed records are considered just "removed from public view," and since most states allow records to be unsealed to inform future investigation or prosecution,[48] they could still be used to enhance federal sentences. Even if expungement is offered, it is not always automatic. States may require that the court, prosecutor, or another agency initiate the process, or require the person to file a petition.[49] The expungement process is "often complicated, expensive, and may require an attorney."[50]

At bottom, §4A1.2(d) assumes as fact what, in many cases, is not: that prior sentence type (adult or juvenile) and length (confinement or not) are meaningful proxies for offense seriousness and culpability. To be sure, Defenders recognize that people under age 18 can, and do, commit serious and sometimes violent crimes. But the seriousness of those crimes—and whether they need to be further accounted for in a later federal sentencing—should require a thoughtful 18 U.S.C. § 3553(a) review by the court. The Commission's one-size-fits-all treatment of youth priors cannot account for varying state practices.

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[44] *See* Andrea R. Coleman, U.S. Dep't of Just., Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices 2 (2020) ("Expunging Juvenile Records"), http://tinyurl.com/2p8ys6ru.

[45] *See* NCJJ National Report at 94.

[46] Expunging Juvenile Records at 2.

[47] *See id.*

[48] *See* NCJJ National Report at 93–94.

[49] *See id.* at 94; Expunging Juvenile Records at 3.

[50] NCJJ National Report at 94.

2. Section 4A1.2(d) compounds the gross racial and ethnic injustices prevalent in the juvenile legal system.

By using youth priors to enhance guideline ranges, §4A1.2(d) compounds and extends the racial and ethnic disparities endemic to the juvenile legal system. This is reason enough to jettison §4A1.2(d).

"Race has animated the juvenile court system since its inception."[51] Starting in the late nineteenth century, juvenile courts were developed ostensibly to provide youth with an alternative to the punitiveness of the criminal legal system.[52] Believing youth to be more amenable to rehabilitation, juvenile justice reformers created courts designed not to punish, but to provide a "benign, nonpunitive, and therapeutic" cure to delinquent youth.[53] But because the "juvenile court movement grew up under the watchful gaze of Jim Crow," Black children were underserved from the start.[54] Throughout the 1900s, Black children were seen as unworthy of juvenile justice's goal of rehabilitation and were excluded from many of the refuge homes and rehabilitative resources and services provided to other youth.[55]

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[51] Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform* 86 Geo. Wash. L. Rev. 1604, 1614 (2018) ("*Challenge of Race and Crime*").

[52] *See id.* at 1614–15 (explaining the "traditional rendition" of juvenile court history involves progressives' concern over children's welfare and development, but "[r]ecent revisionist accounts" are more skeptical of such benign motives and contend that progressive reformers wanted to "control the influx of poor immigrant youth . . . into American urban centers in the early to mid-1800s" by using the new juvenile courts to "assimilate the new poor immigrants").

[53] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 694–95 (1991).

[54] Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 Md. L. Rev. 607, 627 (2013)*; see also Challenge of Race and Crime* at 1615–16; *Race, Rights and Representation* at 764.

[55] *See Challenge of Race and Crime* at 1615–16.

In the late twentieth century, the concept of the juvenile "superpredator" was born.[56] In response to a perceived juvenile crime epidemic, Princeton professor John DiIulio, Jr. coined this term to describe "a fundamental transformation in child development"[57] that would create a new generation of "radically impulsive, brutally remorseless youngsters" to wreak havoc on society for years to come.[58] This nefarious and racialized trope—which ultimately proved baseless[59]—propelled nearly every state and the U.S. Congress to pass more punitive laws for juvenile crime.[60]

We see the results of this tainted history today. "[B]egin[ning] with over-policing youth of color in schools and the community, continuing through arrest, diversion or charging decisions, [and] at all stages of the juvenile justice process,"[61] research consistently shows that children of color are disproportionately represented.[62]

Disparate arrests. While national demographic data on arrests do not account for ethnicity, data reveal stark race-based differences in arrest rates.[63] In 2019, Black children comprised 17 percent of the juvenile population, but an estimated 34 percent of juvenile arrests.[64] That year,

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[56] *See supra* Section I.A.1; *Miller* Amici at 12; Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense*, 75 N.Y.U. L. Rev. 159, 165 (2000).

[57] *Miller* Amici at 12.

[58] *Challenge of Race and Crime* at 1621 (internal quotation and citation omitted); *see also Miller* Amici at 13.

[59] *See Miller* Amici at 18–37 (collecting studies that confirm the juvenile superpredator generation was a myth that "threw thousands of children into an ill-suited and excessive punishment regime."); *see also Challenge of Race and Crime* at 1621.

[60] *Miller* Amici at 15–17 (collecting laws).

[61] Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America,* 8 J. Marshall L. J. 437, 441 (2015) ("*What's Race Got to Do with It?*").

[62] *See id.* at 442–47; U.S. Dep't of Justice, Ofc. Of Juvenile Justice & Delinquency Prevention, *Racial and Ethnic Disparity in Juvenile Justice Processing* (Mar. 2022) ("OJJDP Racial and Ethnic Disparities"), http://tinyurl.com/4pzsu84f; NCJJ National Report at 163–67.

[63] *See* NCJJ National Report at 164.

[64] *See id.* at 108, 164 (using a national population of those age 10–17 years).

Black youths were 2.4 times more likely to be arrested than white youths,[65] and, according to another study, are twice as likely than whites to be arrested for the same conduct.[66] Native youths are 1.5 times more likely to be arrested than white youths.[67]

Disparate Referrals. Just because a child is arrested does not mean that child will be referred to juvenile court. Indeed, "many youth[s] who commit crimes (even serious crimes) never enter the juvenile justice system" at all.[68] In 2019, approximately 25 percent of juvenile arrests resulted in the child being released without referral for prosecution or to another agency.[69] However, in 2019, Black children were nearly three times more likely to be referred to juvenile court for a delinquency offense than white youth.[70]

Disparate Diversion. Once a child is referred to juvenile court, diversion is still an option and nearly half of all juvenile delinquency cases in 2019 were handled without a formal petition.[71] Unsurprisingly, this option is disparately applied. In 2019, Black, Hispanic, and Native youth were less likely to be awarded diversion than their white peers.[72]

Disparate Dispositions. If a child is adjudicated delinquent, there are several sentencing options, including community-based dispositions like probation, or residential placement.[73] Residential placement facilities vary. Some are a "secure, prison-like environment," but other placements include

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[65] *See* OJJDP Racial and Ethnic Disparity *supra* note 62.

[66] *See Race, Rights, and Representation* at 788 (citing underlying study).

[67] *See* OJJDP Racial and Ethnic Disparity, *supra* note 62.

[68] NCJJ National Report at 53.

[69] *See id.* at 88.

[70] *See id.* at 164.

[71] *See id.* at 88.

[72] *See id.* at 164; *see also* Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 La. L. Rev. 47, 48–49 (2016) ("*Right to Redemption*") ("[A]lthough [in 2013] the likelihood of formal case processing increased across all racial groups [for teens 16 and older], cases involving [B]lack youth were more likely to be formally processed than those involving white youth. In 2013, 61% of all petitioned delinquency cases involved [B]lack youth compared to 52% for white youth. Additionally, formal processing for [B]lacks was substantially more likely than for white across all offense categories.").

[73] *See* NCJJ National Report at 90–91.

group homes, treatment centers, training schools, or forestry camps.[74] Unfortunately, when determining whether a residential placement constitutes "confinement" under §4A1.2(d)(2), federal courts do not assess the carceral nature or purpose of the facility. Rather, most courts have found that any "commitment to the custody of the state's juvenile authority" constitutes confinement.[75] And while §4A1.2(d)(2) treats sentences of confinement more severely than those without confinement,[76] data show that juvenile placement is not reserved for the most serious offenses. In fact, in the years 2003 and 2013, approximately three quarters of all youth committed to placement were adjudicated of a nonviolent offense.[77] Available data confirm that placement is still overused today, including as punishment for technical violations, although it's "not recommended practice."[78]

These data are particularly disturbing because juvenile adjudication outcomes "var[y] considerably by race," and children of color, particularly Black, Native, and Latino children, are more likely to be sent to residential placement than their white peers.[79] In 2021, Black youth were almost five

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[74] *Id.* at 91; *see also id.* at 179.

[75] *United States v. Birch*, 39 F.3d 1089, 1095 (10th Cir. 1994)*; see also, e.g.*, *United States v. McNeal*, 175 F. App'x 546, 549–50 & n.8 (3d Cir. 2006) (finding that commitment to an "outward bound" "therapeutic" program was a sentence of confinement because McNeal was not free to leave during his 4-month commitment); *United States v. Pointer*, 1994 WL 43812, *2–3 (7th Cir. Feb. 14, 1994) (finding state commitment sufficient for confinement even if placed in a nonsecure facility); *United States v. Hanley*, 906 F.2d 1116, 1120 (6th Cir. 1990) (finding state commitment to a juvenile facility sufficient for "confinement"); *United States v. Williams*, 891 F.2d 212, 215–16 (9th Cir. 1989) (holding state commitment to juvenile hall is confinement even though the purpose of placement is rehabilitative, not punitive).

[76] *See* §4A1.2(d)(2) (assessing two points to certain sentences of confinement and one point to certain sentences without confinement).

[77] *See* Joshua Rovner, The Sentencing Project, *Policy Brief: Racial Disparities in Youth Commitments and Arrests* 7 (2016) ("*Youth Commitments and Arrests*"), http://tinyurl.com/vmu9z5j9.

[78] NCJJ National Report at 91. In 2019, 18 percent of the children in detention centers were there as result of technical violations. *See id.* at 91. Further, "[i]n four states, the proportion of youth detained for a technical violation exceeded the proportion detained for a person offense[.]" *Id.* at 188.

[79] *See id.* at 160; *Youth Commitments and Arrests* at 7 (citing data from DOJ's Office of Juvenile Justice and Delinquency Prevention).

times more likely to be held in juvenile facilities than whites.[80] For some states, that rate was vastly higher.[81] In 2021, Native youth were 3.7 times more likely to be detained or placed in juvenile facilities than their white peers.[82] Hispanic children are also more likely to be sent to out-of-home placement.[83] It bears noting that many secure detention facilities are anything but rehabilitative; recent allegations and findings of mistreatment, neglect, and abuse in these settings are numerous.[84]

Disparate Waivers. Children of color are also more likely to be waived into adult court. For most of 2005 to 2019, Black youth were more likely than white or Hispanic youth to be judicially waived into adult court, regardless of offense.[85] In 2020, 3,000 cases were judicially waived to adult court and over half involved Black youth.[86] For nonjudicial waivers like

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[80] *See* Joshua Rovner, The Sentencing Project, *Fact Sheet: Black Disparities in Youth Incarceration* 1 (2023), http://tinyurl.com/4exndnby (looking at combined rates of detention or commitment to juvenile facilities)

[81] *See id.* In Connecticut, Black children were over 31 times more likely to be held in placement; in New Jersey they were almost 29 times more likely and in Wisconsin, they were almost 15 times more likely to held in placement than white youth. *See id.*

[82] *See* Joshua Rovner, The Sentencing Project, *Tribal Disparities in Youth Incarceration* at 1 (Dec. 2023), http://tinyurl.com/jvhm2z2x.

[83] *See* OJJDP Racial and Ethnic Disparity, *supra* note 62; *Race, Rights, and Representation* at 788–89 ("Latino/Hispanic youth are 1.5 times as likely" to be committed to secure placement.).

[84] *See, e.g.*, Daniel Wu, *Detained Kentucky teens denied toilets, showers and clothes, suit says*, Wash. Post (Jan. 21, 2024), http://tinyurl.com/38bpew7k (alleging isolation in dark cells without running water or toilets, denied bathing opportunities, educational opportunities, and mental healthcare); Mike Catalini, *A New Jersey youth detention center had 'culture of abuse.' New lawsuit says*, AP News (Jan. 17, 2024), http://tinyurl.com/5abrzs9v (noting that in 2018 the state announced plans to close the facility after, in part, DOJ reported allegations of high rates of sexual abuse); Erin Cox & Steve Thompson, *Lawsuit alleges dozens were sexually abused in Md. Juvenile facilities*, Wash. Post (Oct. 2, 2023), http://tinyurl.com/52ne95fp (recounting allegations of "rampant sexual abuse" in six state facilities).

[85] *See* NCJJ National Report at 162.

[86] *See id.*

statutory exclusions or prosecutorial discretion, disproportionality similarly "remains a hallmark."[87]

Data on offending rates do not justify the disparities that occur throughout the juvenile legal system.[88] For instance, in 2019, Black high school seniors reported drug use rates far lower than their white or Hispanic peers for most types of drugs.[89] Research from 2013 indicate that Black and white children are "roughly as likely to get into fights, carry weapons, steal property, use and sell illicit substances, and commit status offenses, like skipping school."[90] Indeed, "studies have repeatedly shown that any statistical differences in offending patterns are simply not great enough to account for the racial disparities observed at any of the processing points in the U.S. juvenile justice system."[91]

3. Section 4A1.2(d) relies on adjudications that lack procedural protections and reliability.

Recently described as a "second-class criminal court," the juvenile legal system "mete[s] out the punishment without the protections of its criminal counterpart."[92] Because the accuracy, reliability, and fairness of juvenile adjudications cannot consistently be assured, they should not be considered under the guidelines.

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[87] *Right to Redemption* at 55–56 (collecting statistics establishing disproportionate rates of nonjudicial waivers of cases involving Black and Hispanic youth as compared to whites).

[88] *Race, Rights, and Representation* at 787–89 & n. 299 (collecting sources); Perry L. Morierty & William Carson, *Cognitive Warfare and Young Black Males in America,* 15 J. Gender Race & Just. 281, 301–02 (2012) ("*Cognitive Warfare*").

[89] *See* NCJJ National Report at 60.

[90] Youth Commitments and Arrests, at 6 (citing Centers for Disease Control and Prevention's 2013 Youth Risk Behavior Survey).

[91] *Race, Rights, and Representation* at 787 & nn.290–291 (citing studies)*; see also What's Race Got to Do with It?,* at 440 (citing support that minority "youth at virtually every stage of the juvenile justice process, receive harsher treatment than white youth, even when faced with identical charging and offending histories").

[92] *Race, Rights, and Representation*, at 754.

Right to Jury. Juries are "fundamental to the American scheme of justice."[93] "[A]rguably the most important check against prosecutorial overreach," juries provide not only "an inestimable safeguard" against overzealous prosecutors, but also protect the criminally accused against a "compliant [or] biased" judge.[94] Because convicting a person of a crime is so significant, our country has "insist[ed] upon community participation in the determination of guilt or innocence."[95]

Except for juveniles.

In *McKeiver v. Pennsylvania*, a plurality of the Supreme Court ruled that children do not have a right to a jury at juvenile adjudication hearings.[96] The Court came to its holding, in part, to attempt to preserve the juvenile legal system's "rehabilitative goals" to treat, not punish.[97] While rehabilitation may have been the central goal when *McKeiver* was decided, as discussed above, it is not anymore.[98] Without the right to a jury trial, juveniles are at a real disadvantage. Research shows juries are much more likely to acquit than judges even when presented with similar evidence, and that juries may weigh evidence, facts, and the standard of proof with greater care.[99] And juries require group decision-making, which ensures "more accurate outcomes by airing competing points of view."[100]

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[93] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

[94] *Race, Rights, and Representation,* at 775; *Duncan*, 391 U.S. at 156.

[95] *Duncan*, 391 U.S. at 156.

[96] *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

[97] *See id.* at 547.

[98] *See supra* at I.A.2; NCJJ National Report at 82; *Cognitive Warfare* at 294–300.

[99] *See generally* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1162–69 (2003) (summarizing advantages and reviewing study findings).

[100] *Id.* at 1165.

Closed Courtrooms. In many states, juvenile delinquency hearings are closed to the public.[101] While good reasons exist to keep these proceedings outside the public view,[102] "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power" that often does not accompany youth adjudications.[103]

Access to Counsel. In 1967, the Supreme Court articulated in *In re Gault* a juvenile's *right* to counsel.[104] But *access* to effective counsel is woefully lacking.[105]

Children consistently appear without counsel in juvenile court. In fact, as of 2017, "only 11 states provide[d] every child accused of an offense with a lawyer, regardless of financial status" and 36 states allowed children to be charged fees to obtain counsel.[106] Many states do not guarantee counsel for children during interrogation.[107] "Hundreds of thousands of children appear in juvenile court each year without counsel, or with lawyers who are undertrained, undersupervised, underpaid, and overworked."[108]

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[101] *See* NCJJ National Report at 93 (reporting as of 2019, 26 states and D.C. restricted the public from attending delinquency adjudication hearings, with limited exceptions).

[102] *See, e.g.*, Andrew Keats, *Keep Juvenile Court Out of the Public Gaze*, The Imprint (Oct. 5, 2022), http://tinyurl.com/msbczj4j (including protecting the child from public stigma, scrutiny, and collateral consequences).

[103] *In re Oliver*, 333 U.S. 257, 270 (1948).

[104] *In re Gault*, 387 U.S. 1, 41 (1967).

[105] *See* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles A Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175, 175 (2007) ("*Ensuring Juvenile's Right to Counsel*") ("[J]uveniles' access to timely, zealous, and effective legal representation remains a patchwork of disparate state and local laws, policies and practices that fail to assure that all youth receive skilled representation throughout their involvement with the juvenile justice system."); Nat'l Juvenile Defender Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel (2017), ("NJDC National Snapshot"), http://tinyurl.com/32tajbx3.

[106] *See* NJDC National Snapshot at 9 & 21.

[107] *See* Kate Bryan, *Recent State Laws Strengthen Rights of Juveniles During Interrogations*, Nat'l Conf. of State Legislatures (Jan. 10, 2024), http://tinyurl.com/4dup7wc4.

[108] *Race, Rights, and Representation* at 750.

One major problem preventing meaningful access to counsel is that children are permitted to waive their own counsel, and, in at least one state, 90 percent of them do.[109] "Many states permit waiver by a juvenile after cursory inquiry" that the waiver was knowing, intelligent, and voluntary.[110] Often, children are allowed to waive their right to counsel without first consulting a lawyer.[111] And, since at the adjudicatory stage "waiver of counsel is, almost without exception, connected to an 'admission,' or guilty plea,. . . waiver of counsel is also about waiving a right to trial."[112]

Whether children are even *capable* to waive counsel knowingly, intelligently, and voluntarily is questionable.[113] Studies show youth are less likely to understand their rights and relevant legal language than adults.[114] "[A]dolescents are less likely to consider the long-term consequences of waiving the right to trial. . . [and] are also more willing to falsely plead guilty than adults."[115] One study found that adolescents ages 11–18 failed to understand completely their attorney's role and that parents, when present, often could not compensate for their child's knowledge gap.[116]

Another obstacle to access to counsel is that the *Gault* right does not extend to "proceedings or hearings that precede or follow the adjudicatory hearing itself."[117] Such proceedings may include critical stages of the case,

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[109] *See id.* at 779 (citing a National Academy of Sciences study referencing Louisiana's waiver rates and indicating that about 50 percent of juveniles waived their right to counsel in "many other states," including Florida, Georgia, and Kentucky).

[110] Jennifer Woolard, *Waiver of Counsel in Juvenile Court*, Final Report to the National Institute of Justice 4 (May 30, 2019) ("*Waiver of Counsel*"), http://tinyurl.com/49yctamy.

[111] *See* NJDC National Snapshot at 25 (reporting 43 states allowed waiver without attorney consultation).

[112] *Waiver of Counsel* at 4 (citing studies that approximately 90 percent of youth waive their trial right in plea bargains).

[113] *See, e.g.*, *Ensuring Juvenile's Right to Counsel* at 177, n.6 & 191–93; *Race, Rights, and Representation* at 792–93; *Waiver of Counsel* at 6–8 (collecting studies).

[114] *See Waiver of Counsel* at 8.

[115] *Id.*

[116] *Id.* at 18–19.

[117] *Ensuring Juvenile's Right to Counsel* at 178.

like intake, detention, transfer to adult court, disposition, post-disposition parole or probation, and appeal.[118] For instance, although "the vast majority of youth transferred to the adult system are there because of [statutory exclusion laws],. . . [m]any states deny [statutorily excluded] youth any hearing procedure to challenge the appropriateness of their prosecution as adults."[119] Similarly, children are not guaranteed the meaningful assistance of counsel at disposition. This sentencing-like hearing "places a juvenile's liberty squarely at issue—and in jeopardy."[120] At the disposition hearing, the court is required "to consider the individual characteristics of the juvenile."[121] "It would be difficult for an adult [ ] to marshal all the facts and evidence necessary. . . to address at disposition;" for a child without competent counsel, "this task would be impossible."[122]

Without meaningful counsel at all critical stages of a case, mistakes necessarily happen. According to the National Registry of Exonerations, as of 2022, 34 percent of exonerated cases in which the person was under 18 at the time of the crime involved false confessions. Only ten percent of exonerated adults falsely confessed.[123]

Lack of Notice. Juveniles charged with youth priors are often unaware that those priors could later be used to enhance another sentence—in fact, they may be explicitly informed the opposite.

Take children in New York for example. Under New York's "youthful offender" statute, once an eligible child is found guilty in adult court and found to be a "youthful offender, . . . the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding."[124] "Youthful offender" records are sealed, and those adjudicated "youthful offenders" need

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[118] *See id.* at 178–79 (explaining each stage); NJDC National Snapshot at 31.

[119] *Ensuring Juvenile's Right to Counsel* at 179.

[120] *Id.* at 188.

[121] *Id.*

[122] *Id.*

[123] *See* Nat'l Reg. of Exonerations, *Age and Mental States of Exonerated Defendants Who Confessed* (Apr. 10, 2022), http://tinyurl.com/3h33r9a2.

[124] N.Y. Crim. Proc. Law § 720.10 (McKinney 2023).

not disclose their judgments on job or housing applications.[125] New York courts cannot use "youthful offender" adjudications to enhance later sentences.[126] It should come as no surprise, then, that New York juveniles are regularly informed—by both their attorneys and the court—that their "youthful offender" adjudications are "not a judgment of conviction for a crime or any other offense."[127]

But while the express purpose of "youthful offender" adjudications is to "reliev[e] the eligible youth from the onus of a criminal record," these adjudications are counted in federal court—contrary to the state legislature's intention and the representations made by attorneys and courts—and often with significant consequence.[128]

4. Section 4A1.2(d) fails to recognize case law and scientific research confirming that kids are different.

The Commission knows far more about people under 18 today than it did in 1987. Decades of research confirm the simple fact that children are fundamentally different from adults. The Supreme Court has similarly recognized that because children have "diminished culpability," they are "different from adults for purposes of sentencing."[129] But despite

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[125] *Delinquent Guidelines* at 22–23.

[126] *Id.* at 23; N.Y. Crim. Proc. Law. § 720.35(1) (McKinney 2023).

[127] *Delinquent Guidelines* at 19 & 42–43 (quoting N.Y. Crim. Proc. Law § 720.35(1)–(2) (McKinney 2023) (interviewing state public defenders at three different offices, none of whom were aware these adjudications could enhance later federal sentences).

[128] N.Y. Crim. Proc. Law § 720.10 (McKinney 2023); *United States v. Driskell*, 277 F.3d 150, 155 (2d Cir. 2002). Particularly perverse, the Second Circuit has held that, while "youthful offender" adjudications cannot be used to trigger mandatory penalties under the Armed Career Criminal Act, they are sufficiently "adult" to count under §4A1.2(d) and the career offender guideline. *Compare United States v. Parnell*, 524 F.3d 166, 170–71 (2d Cir. 2008) (New York State "youthful offender" adjudication qualifies as a "prior felony conviction" under §§4B1.1, 4B1.2), *with United States v. Sellers*, 784 F.3d 876, 886–87 (2d Cir. 2015) (New York State "youthful offender" adjudication cannot be a qualifying predicate under the Armed Career Criminal Act because these adjudications are "set aside" under New York law, making them excludable under 18 U.S.C. §§ 922(g)(1) and 921(a)(20)).

[129] *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

acknowledging these research and judicial developments years ago,[130] the Commission's treatment of youth priors fails to sufficiently reflect them.

Over the last several decades, research has repeatedly confirmed what "any parent knows": brain development and behavior "are profoundly in flux" from childhood through late adolescence.[131] While "cold" cognition—decisions without time pressure and with adult assistance, like voting—develop and plateau much quicker among early- and mid- adolescents, "hot" cognition—mental processing in charged situations—"follow a protracted development into adulthood."[132] Issues related to "hot cognition" include driving, criminal behavior, resistance to peer pressure, and risk seeking.[133] Experts agree that the prefrontal cortex, the part of the brain responsible for controlling impulses, "is among the last brain regions to develop."[134] So, even "when teenagers' *cognitive* capacities come close to those of adults, adolescent *judgment* and their actual decisions may differ from adults as a result of psychosocial immaturity."[135] Consequently, studies show "sensation seeking

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[130] *See* USSC, *Youthful Offenders in the Federal System* 5 (2017) ("Youth Offense Report"), https://tinyurl.com/5n8v62ah.

[131] Brief of Neuroscientists, Psychologists and Criminal Justice Scholars as Amici Curiae Supporting Defendant-Appellant, *Commonwealth v. Mattis*, SJC-11693 (Mass. Dec. 16, 2022) (presenting research confirming that "fundamental changes in brain development occur through late adolescence"); *see also Roper*, 543 U.S. at 569.

[132] Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L. & Hum. Behav. 69, 71 (2019).

[133] *Id.; see also Waiver of Counsel* at 5–6.

[134] *See, e.g.*, *Commonwealth v. Mattis*, 224 N.E.3d 410, 420, 422 (Mass. 2024) (collecting the "modern scientific consensus" on adolescent brain development to support its holding that the imposition of LWOP sentences on young adults ages 18 to 20 constitutes cruel and unusual punishment).

[135] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009, 1012 (2003), http://tinyurl.com/5fsecvjp (emphases added).

is higher during adolescence" while self-regulation skills develop gradually through the mid-20s.[136]

In a series of opinions, the Supreme Court has confirmed that a child's criminal conduct should be treated differently than that of an adult.[137] Relying on much of the research described above, the Court has identified that children are different from adults in three distinct ways. First, children's "lack of maturity [and] underdeveloped sense of responsibility lead[s] to recklessness, impulsivity, and heedless risk-taking."[138] Next, children have "limited control over their own environment," making them "more vulnerable to negative influences and outside pressures, including from family and peers" and less able to remove themselves from "crime-producing settings."[139] Third, because children's character traits are "less fixed," they have a heightened capacity for change and rehabilitation as they mature.[140]

By treating most youth priors the same as adult priors,[141] §4A1.2(d) fails to account for this advancement in knowledge.

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[136] Laurence Steinberg et al., *Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation*, 21(2) Dev. Sci. 2, 15–16, 20 (2018), http://tinyurl.com/mr3t2yup.

[137] *See Roper*, 543 U.S. at 571; *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller*, 567 U.S. at 471; *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) ("[C]hildren cannot be viewed simply as miniature adults."); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.").

[138] *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569) (internal marks omitted).

[139] *Id.* (internal marks omitted).

[140] *Id.*; *Montgomery*, 577 U.S. at 207–08.

[141] *See* USSC Data Briefing at 24 (reporting 2,172 people in Fiscal Year 2022 would have received relief from Option 3 (removing all youth priors, including adult convictions) but not Option 2 (removing only juvenile adjudications), meaning that, of the 3,112 individuals with convictions prior to age 18, nearly 70 percent were adult convictions).

5. Section 4A1.2(d) injects unnecessary complexity into Chapter 4.

Section §4A1.2 adds unnecessary complexity into an already complex Chapter 4 by creating a set of different triggering events and standards to assess certain youth priors that do not apply to post-18 priors.

In the normal course, the recency of a prior sentence is measured by the date the prior sentence was *imposed*.[142] But, according to §4A1.2(d)(2)(A), juvenile and adult prior sentences of at least 60 days are measured from the date of a person's *release*.[143]

Section §4A1.2(d) also requires a decay period of 5 years for many youth priors, while all other priors are subject to a fifteen- or ten-year decay period.[144] The rule further directs courts assess the length of "confinement" for certain youth priors, as opposed to the length of "imprisonment" standard used for all other prior convictions.[145]

Section §4A1.2(d)'s complexity is not just limited to its distinct rules. It can also be difficult to obtain and discern the necessary information to *apply* these rules. For example, what, exactly is a "sentence of confinement"? The answer may boil down to the evidence available in a given case. In *United States v. Stewart*, the Eighth Circuit affirmed a district court's finding that Mr. Stewart's placement at Glen Mills juvenile facility was not a sentence of confinement because the court heard testimony that Mr. Stewart was "not being physically confined. . . and he was free to leave."[146] Three years later, in *Howard v. United States*, the Sixth Circuit affirmed the district court's determination that placement at Glen Mills—the same facility at issue in *Stewart—was* a sentence of confinement because the evidence in that case

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[142] *See* USSG §4A1.2(d)(2)(B), §4A1.2(e)(1)–(2).

[143] The recency of adult and juvenile youth priors with sentences less than 60 days confinement are measured from the date the sentence was imposed. *See* USSG §4A1.2(d)(2)(B).

[144] *Compare* USSG §4A.2(d)(2), *with* §4A1.2(e).

[145] USSG §4A1.2(d).

[146] *United States v. Stewart*, 643 F.3d 259, 261 (2011) (citation omitted).

showed that while "Glen Mills's campus is 'very similar to a small private college,'" Mr. Howard was not free to leave the facility.[147]

Further, because Chapter 4 interchanges its emphasis on "adult *conviction*" and "adult *sentence*," courts have struggled to determine whether certain youth priors can trigger career offender designation if, while classified as adult convictions, they did not result in an adult sentence. According to §4B1.2(c), a "prior felony conviction" must be countable under §4A1.2(a)–(c) to be a career offender predicate. Section §4A1.2(d)(1) provides that youth priors classified as "adult *convictions*" are countable under §4A1.2(a) if they resulted in a prior sentence of imprisonment exceeding 13 months. But §4A1.2, Application Note 7 states that, "for offenses committed prior to age eighteen, only those that resulted in *adult sentences* of imprisonment exceeding [13 months] . . . are counted."

Section 4B1.2(e)(4), which defines "prior felony conviction" for purposes of the career offender guideline further adds:

> A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

Unsurprisingly, assessing whether a person was "expressly proceeded against as an adult" for some youth priors is not easy. In fact, courts are currently split as to whether only an adult conviction is needed for a youth

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[147] *Howard v. United States*, 743 F.3d 459, 463–67 (6th Cir. 2014) (acknowledging *Stewart* but noting that "determining whether a juvenile's attendance at a facility qualifies as confinement is a fact-intensive inquiry" and that "[t]he focus of our attention must be on whether a child's confinement is the direct legal consequence, as determined by a judicial body, of wrongdoing").

prior to qualify as a career offender predicate, or if both an adult conviction *and* an adult sentence are required.[148]

B. Option 3 is the best option to ameliorate §4A1.2(d)'s problems.

Option 3 best ameliorates many of §4A1.2(d)'s current problems. By focusing on the *age* of the individual committing the offense—a uniform standard—rather than the way the offense was subjectively characterized and resolved through various state rules, Option 3 best avoids the unwarranted jurisdictional disparities that stem from relying on state vagaries. While Option 2 (eliminating all juvenile adjudications) is a modest improvement, it still relies on the incorrect assumption that youth priors classified as adult convictions are uniformly more serious than those that are not. And Option 1, which leaves most of §4A1.2(d)'s rules in place, would hardly decrease jurisdictional disparities at all.

Option 3 is also the best of the promulgated options to mitigate the significant racial and ethnic disparities that plague the current guideline. While Options 1 and 2 would restrict or prohibit the use of youth priors resulting in juvenile adjudications, they would leave undisturbed the portion of §4A1.2(d) that counts youth priors resulting in adult convictions. Adult

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[148] *Compare United States v. Gregory*, 591 F.3d 964, 967 (7th Cir. 2010) (holding a youth prior for robbery could be used as a career offender predicate because, even though Mr. Gregory served his sentence in a juvenile facility, he was convicted as an adult, noting that the guidelines do not require courts to distinguish between adult and juvenile *sentences*, only convictions), *and United States v. Moorer*, 383 F.3d 164, 167–68 (3d Cir. 2004) (holding that a "prior felony conviction" is defined "purely in terms of the kind of conviction the defendant had, not the kind of sentence."), *and United States v. Carillo*, 991 F.2d 590, 593–94 (9th Cir. 1993) (noting that while defense's "argument is not without force" "there is no indication in the Guidelines that sentencing courts may consider the characterization or purpose of a particular sentence under state law."), *with United States v. Mason*, 284 F.3d 555, 560 (4th Cir. 2002) (holding that youth prior must have resulted in both an adult conviction and an adult sentence of imprisonment exceeding 13 months to qualify as a career offender predicate), *and with United States v. Pinion*, 4 F.3d 941, 944–45 (11th Cir. 1993) (requiring courts to focus on both the nature of the conviction and the sentence to determine whether a youth prior qualifies as a career offender predicate but refusing to "plumb the nuances" of the state scheme). *See also* Andrew Tunnard, *Not-So-Sweet Sixteen: When Minor Convictions have Major Consequences Under Career Offender Guidelines*, 66 Vand. L. Rev. 1309, 1321–23 (2013) (discussing split).

convictions comprise the vast majority of youth priors that currently count for points and research shows youth of color are more likely to have their cases handled in adult court.[149]

Further, Option 3 better ensures the reliability of convictions and protects the individual because it would prohibit courts from relying on juvenile adjudications imposed without critical procedural safeguards or without notice that the adjudication could be used to enhance a later federal sentence. By excluding juvenile adjudications, Option 2 would also solve this problem, but Option 3 is the simpler rule to apply. With Option 3, courts, counsel, and probation would no longer need to hunt for and interpret juvenile court records. They would not need to worry about whether the sentence imposed for the youth prior was an adult sentence or juvenile sentence or whether a person was sentenced to "confinement" and for how long.[150] They would not have to remember the different triggers for different decay rules, like whether to calculate decay from the date the sentence was imposed or the date the person was released.[151] And by excluding all youth priors from criminal history points, Option 3 has the added benefit of resolving the longstanding split as to whether a person's adult conviction resulting from a youth offense can be used to trigger career offender designation if a juvenile sentence was imposed.[152]

To be sure, Option 3 is by no means a perfect solution. For instance, it does not fully reflect our advancement in knowledge that a person's brain development is not complete until their mid-20s.[153] As has already happened in Vermont, states may consider this scientific knowledge to further increase their maximum age thresholds for juvenile court jurisdiction, which may prompt the Commission to rethink its own age threshold for youth priors in

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[149] *See* USSC Data Briefing at 24; *see also supra* at I.A.2.

[150] *See* §4A1.2(d)(2) & comment. (n. 7); §4A1.2(e)(4).

[151] *See* USSG §4A1.2(d)(2)(A) & (B).

[152] *See supra*, note 148.

[153] *See supra*, I.A.4; Youth Offense Report at 1 (defining "youth" as age 25 or younger, consistent with research).

the future.[154] But Option 3 is a significant improvement that ameliorates many of the problems confronting the current rule.

Defenders encourage the Commission to adopt Option 3 without an upward departure. Not only would an invited departure be inconsistent with the Commission's Simplification proposal, an invited departure would encourage courts to inject back in the disparities that Option 3 helps avoid. It is also unnecessary. Courts are well aware of their right under both §4A1.3 and 18 U.S.C. § 3553(a) to increase a sentence as a result of a youth prior when appropriate.

C. The Commission's recidivism research should not prevent the Commission from adopting Option 3.

In its synopsis of the proposed amendment, the Commission emphasizes its desire to "strike the right balance" between the numerous and strong policy reasons that justify amending its treatment of youth priors and recidivism.

On February 12, the Commission released a supplemental data briefing that reports rearrest data for the groups impacted by Options 1–3.[155] Included in this data is a comparison of the rearrest rates between people with at least one criminal history point not pursuant to §4A1.2(d) and people who received at least one criminal history point pursuant to §4A1.2(d). The data indicate that the §4A1.2(d) group has a higher rearrest rate than those who otherwise received at least one point.[156] These data should not dissuade the Commission from adopting Option 3.

First, these data do not show that youth priors cause recidivism. They show only that people with countable youth priors are rearrested more frequently than those who do not have youth priors. But that is not surprising. The group of people with youth priors are mostly people of color,

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[154] *See* Juvenile Age of Jurisdiction, *supra* note 31 (recognizing Vermont became the first state to expand juvenile jurisdiction to 18).

[155] *See* USSC, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (2024), http://tinyurl.com/5n7j32sz.

[156] *See id.* at 14.

and specifically Black.[157] It is well-known that Black individuals are over-policed and arrested more frequently than whites, even though higher arrest rates "often [do] not reflect a higher rate of criminal offending."[158] Data on exonerations also indicate that Black individuals are seven times more likely than whites to be falsely convicted of certain crimes and 19 times more likely to be falsely convicted of drug crimes.[159]

Second, unlike data provided on other criminal history rules,[160] the recent data briefing does not include any indication of whether §4A1.2(d) improves the criminal history rules' predictive value. So, while the data show a stronger correlation between the §4A1.2(d) group and a higher rearrest rate than the group without §4A1.2(d) points, it does not show that increasing

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[157] The Commission does not provide demographic information of the 2015 cohort it used to provide the recidivism data. *See id.* However, according to the Commission's data briefing released in January, almost 60 percent (59.7) of those who received at least one point for a youth prior in Fiscal Year 2022 were Black. *See* USSC Data Briefing at 28.

[158] Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* 6, 9, The Sentencing Project (Nov. 2023), http://tinyurl.com/2ns8k9fh ("[P]eople of color are more likely to be arrested even for conduct that they do not engage in at higher rates than whites. . . with drug offenses, . . .traffic stops, pedestrian stops, and with policing in schools."); *see also* Brendan Lantz et al., *What if They Were White? The Differential Arrest Consequences of Victim Characteristics for Black and White Co-offenders*, 70 Soc. Problems 297, at 3, 16–17 (2023), http://tinyurl.com/2ws5dbn4 (collecting research on arrest rates, including that "roughly 49 percent of Black men were arrested by age 23" and finding "significant evidence for the presence of racial bias against Black[s]," in part because Blacks were more likely to be arrested than whites after controlling for offending behavior); Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 Clev. St. L. Rev. 491, 500–01 (2017) (reviewing statistics on crime and arrest rates by race and concluding that the overrepresentation of people of color in the criminal legal system results from "racial disparity in law enforcement practices" rather than "a problem of crime within the Black community alone").

[159] *See, e.g.*, Samuel Gross et al., *Race and Wrongful Convictions in the United States* iii–v, Nat'l Registry of Exonerations (Sept. 2022), http://tinyurl.com/2tax7z36.

[160] *See, e.g.*, USSC, *Revisiting Status Points* 3, 5 (2022), http://tinyurl.com/y6jrc3jm (citing USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 26 (2005), http://tinyurl.com/3pmp8msy.

someone's sentence by one to three points for a youth prior strengthens the criminal history score's prediction of rearrest.

Such information would be critical to support retaining §4A1.2(d). Ten years ago, the Robina Institute urged sentencing commissions to:

> eliminat[e] or reduc[e] the weight given to any criminal history score component that has been shown to have a strong disparate impact on non-white [individuals] especially when such a component cannot be shown to substantially increase the ability of the score to predict future recidivism risk.[161]

Considering the gross racial disparities resulting from the application of §4A1.2(d)—disparities worse than even the career offender guideline—the Commission should not maintain this rule without clear evidence of its efficacy. That evidence has not been produced.

D. The Commission has the authority to promulgate Option 3.

Option 3 is the best policy choice. But the Commission asks whether it has authority to adopt Option 3.[162] It does.

Section 994(h) requires the Commission to "specify a sentence . . . at or near the statutory maximum" "for categories of defendants in which":

- The individual is eighteen years old or older;
- has an instant felony offense that is either a "crime of violence" or "an offense described in [enumerated federal drug statutes];" and
- has been twice previously convicted of a felony "crime of violence" or "an offense described in [enumerated federal drug statutes]."

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[161] Richard S. Frase et al., *Criminal History Enhancements Sourcebook* 27 Robina Institute of Criminal Law and Justice (2015), http://tinyurl.com/y2e4yvnv.

[162] Proposed Amendment at 36.

The Commission has implemented § 994(h) through the career offender guideline. Because Option 3 would prohibit courts from considering youth priors when counting criminal history points, Option 3 would also restrict courts from using youth priors as career offender or other predicates under §§4B1.1, 4B1.2.[163] This amendment would be fully consistent with Congress's directive at § 994(h).

While § 994(h) requires the Commission to specify a sentence at or near the statutory maximum for "categories of defendants" who meet specified criteria, it left the Commission significant discretion to control which individuals fall within those categories. Indeed, the Commission has always understood that while it must provide sentences at or near the statutory maximum for certain "categories of defendants" with particular criminal records, it gets to decide how best to focus its guideline "on the class of recidivist [individuals] for whom a lengthy term of imprisonment is appropriate."[164] For instance, since the guidelines' inception, §4B1.2 has required prior convictions to be countable under Chapter 4, Part A to qualify as predicates.[165] Consequently, the Commission excludes from career offender any prior conviction that falls outside its decay rules.[166] It also excludes a prior conviction if it is not counted separately and instead treated as a single sentence with another prior sentence.[167]

The Commission has also specified the "categories of defendants" within the confines of § 994(h) by choosing to define "controlled substance offense" as including state drug priors, instead of only the federal drug crimes the directive enumerates, and by both narrowing and expanding the

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[163] *See* Proposed Amendment at 35. *See also* §4B1.2(c) (requiring career offender predicates to be countable under §4A1.1(a)–(c)).

[164] USSC §4B1.1 background comment.

[165] *See* USSG §4B1.2(3) (1987). *See also* USSG App. C., Amend. 268, Reason for Amendment (Nov. 1, 1989) (adding current Application Note 3 to clarify that "all pertinent definitions and instructions in §4A1.2 apply" to §4B1.2).

[166] *See* USSG §4A1.2(e)(3).

[167] *See* USSG §4A1.2(a)(2).

definition of "crime of violence" in 2016 based on empirical data and stakeholder feedback.[168]

The Commission's authority to exclude individuals with youth priors from the "categories of defendants" subject to § 994(h) also makes sense when reading the statute as a whole.[169] In § 994(d), Congress instructed the Commission to establish "categories of defendants for the use in the guidelines. . . governing the imposition of sentences."[170] The Commission executed this duty by creating the criminal history categories and deciding whether and to what extent prior convictions count for criminal history points. It has done and should continue to do the same thing here.

Further, in executing its mandate at § 994(h), the Commission is directed to develop a guideline that is certain, fair, avoids unwarranted disparities, and evolves to reflect the advancement of human knowledge.[171] As detailed above, removing youth priors from the career offender guideline's punitive reach advances these critical policy interests.

Of course the Commission's flexibility to implement § 994(h) is not "unbounded."[172] In *United States v. Labonte*, the Supreme Court determined that the Commission exceeded its authority when it interpreted "maximum term authorized" as used in § 994(h) to mean the statutory maximum term available excluding any statutory sentencing enhancements because "the

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[168] *See* USSG §4B1.2(b) (defining "controlled substance offense" as including "an offense under federal or state law"); USSG App. C, Amend. 268 (Nov. 1, 1989) (adding to §4B1.2's commentary that "crime of violence" and "controlled substance offense" includes inchoate offenses); USSG App. C, Amend. 798 (Aug. 1, 2016) (revising the way the Commission "[i]dentif[ies] a defendant as a career offender" by: removing burglary of a dwelling from §4B1.2(a)'s enumerated offenses; removing §4B1.2(a)(2)'s residual clause; and adding several enumerated offenses to §4B1.2(a)(2)'s text).

[169] *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal citation omitted)); *Graham Cty. Soil & Water Conservation Dist. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (recognizing we "construe statutes, not isolated provisions").

[170] 28 U.S.C. § 994(d).

[171] *See* 28 U.S.C. § 991(b)(1)(B), (C).

[172] *United States v. Labonte*, 520 U.S. 751, 753 (1991).

Commission [cannot] select as the relevant 'maximum term' a sentence that is different from the congressionally authorized maximum term."[173]

But *Labonte* does not hold that the Commission lacks authority to exclude individuals with youth priors from the "categories of defendants" subject to § 944(h), just like *Labonte* does not hold that the Commission lacks authority to exclude individuals with stale priors from the "categories of defendants" subject to § 994(h).[174] *Labonte*'s holding focused on the meaning of "maximum term authorized"; its holding said nothing about the Commission's authority to decide who is subject to a sentence at or near that "maximum term." And unlike the amendment invalidated in *Labonte*—which would have made Congress's enhanced statutory penalties in 21 U.S.C. § 841 "a virtual nullity"— excluding youth priors from criminal history points does not render any other statute or statutory penalty to which § 994(h) refers meaningless.[175]

E. Section 3B1.4 (upward adjustment for the use of a minor) should not be expanded.

If the Commission promulgates any of the proposed options to limit the use of youth priors, it should not expand §3B1.4.[176]

First off, this adjustment is rarely used—it applied in less than one half percent of cases in the last five years.[177] Of that half percent, over 60 percent were from two districts within the same state.[178] The adjustment has a severe disparate impact on Hispanic individuals, who comprise 75 percent

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[173] *See id.* at 753 & 760–61.

[174] In *Labonte*, the respondent argued that "categories of defendant" should be read "to encompass all repeat offenders charged with violating the same criminal statute"—including those for whom an enhanced statutory maximum applied and those who were subject to an unenhanced penalty, so that "maximum statutory term" could be reasonably read to mean the unenhanced maximum. 520 U.S. at 759. The Court rejected that "strained construction," but was not asked to (and did not) otherwise determine what "categories of defendants" in § 994(h) meant. *Id.*

[175] *Id.* at 760.

[176] *See* Proposed Amendment at 37.

[177] USSC, *Individual Datafiles* (FY 2018–22) (reporting .4 percent of cases in which this adjustment applied).

[178] *See id.* The two districts are the Southern and Western Districts of Texas.

of those who receive it.[179] And it is currently the subject of a circuit split.[180] All this confirms that expanding §3B1.4 would only compound unwarranted disparities between the few cases in which it is applied, and the many cases where it is not.

Further, there is no data that point to this adjustment needing to be expanded—in fact, data show the opposite. In the last five years, over 56 percent of cases where the adjustment applied involved sentences below the guidelines range; less than three percent of cases were imposed above the range.[181]

II. Part B: Sentencing of Youthful Individuals.

Defenders welcome the Commission's recognition that a person's age—whether young or old—may warrant a mitigated sentence and that courts are free to consider a person's youth when determining whether a sentence other than imprisonment is sufficient to meet the purposes of sentencing.[182] If, consistent with the proposed Simplification Amendment and Defender comment, the Commission simplifies the Guidelines Manual and removes Chapter 5H, we acknowledge that §5H1.1 would be deleted, and the amendment proposed in Part B would not be adopted.[183]

If, however, the Commission retains §5H1.1, Defenders recommend the proposed amendment be simplified by deleting scientific studies and rearrest data as enumerated factors that a court should consider. We suggest:

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[179] *See id.*

[180] *See* Order Granting *En Banc* Review, *United States v. Gutierrez*, No. 22-1157 (1st Cir. Feb. 1, 2024) (granting *en banc* review to address whether §3B1.4 requires the individual to affirmatively act to help involve the minor in the criminal enterprise, as the Third, Tenth, and Ninth circuits have held, or simply to reasonably foresee a co-conspirator's use of a minor, as currently held in the First Circuit).

[181] *See* USSC, *Individual Datafiles* (FY 2018–22).

[182] *See* Proposed Amendment at 38.

[183] *See id.* at 124; Defender Comment on Simplification (Proposal 7).

> Age ~~(including youth)~~ may be relevant in determining whether a departure is warranted~~, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines~~. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

We appreciate the Commission's recognition that scientific studies on youth brain development are critical considerations for federal courts when sentencing youthful individuals.[184] We agree. However, there are countless reasons why a below-guidelines sentence based on age—whether elder or youth—may be appropriate. Age will impact every case differently because no two convicted individuals are the same. Because the Commission's amendment, as proposed, could be interpreted as elevating some considerations relevant to age above others, we urge the Commission to not identify specific factors courts should consider when determining whether a below guidelines sentence based on age is appropriate.

III. Conclusion.

Defenders hope that the Commission will finally amend the guidelines' treatment of youth this year. For Part A of the proposed amendment, we encourage the Commission to adopt Option 3, without an invited departure or limiting language, and exclude all youth priors from the criminal history calculations. For Part B, we support the Commission's proposal to simplify the three-step sentencing process, including its proposal to delete Chapter 5H and recognize that if the Commission simplifies the Manual, §5H1.1 would be removed. If Chapter 5H is not removed this year, we urge the Commission to confirm in §5H1.1 that youthfulness may be a reason for a sentence of non-

[184] *See supra* I.A.4.

imprisonment, without specifying criteria courts should consider when assessing whether a below-guidelines sentence is warranted.

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

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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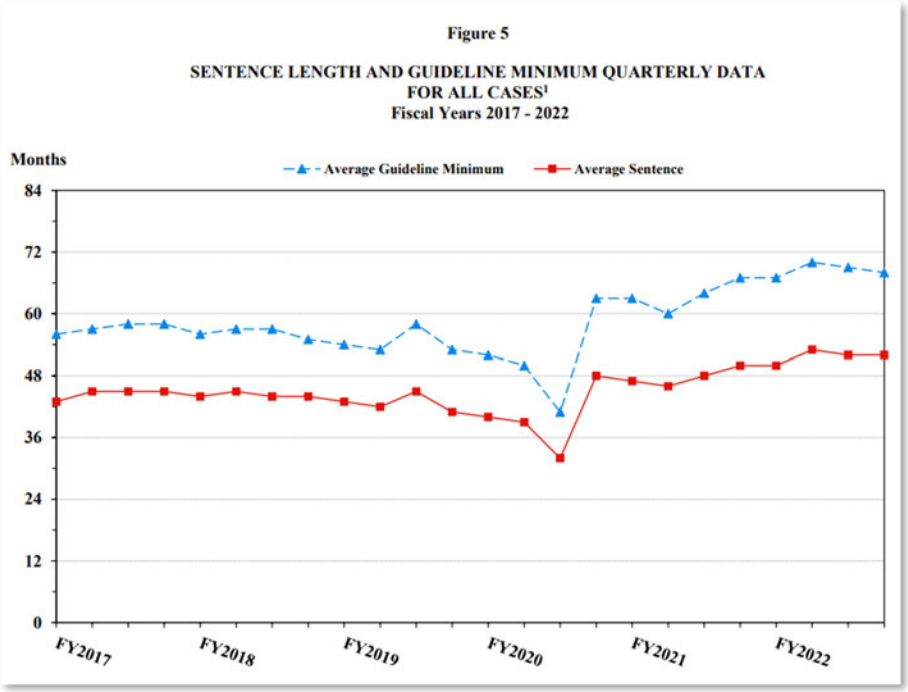
basis for sentence), http://tinyurl.com/2m766wc7; Am. College of Trial Lawyers, *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Amer. Crim. L. Rev. 1463, 1485–87 (2001); *see also* Council on Crim. Just., 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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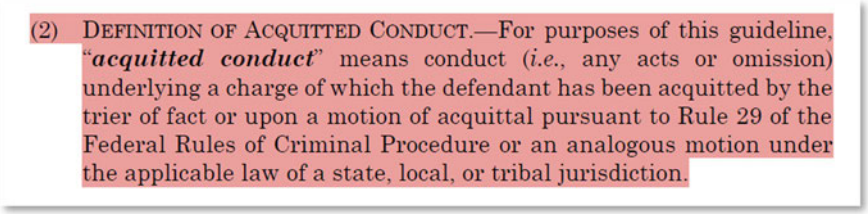
[109] *Id.*; *see also* Brief of NAFD and FAMM Supporting Petitioner McClinton at 12.

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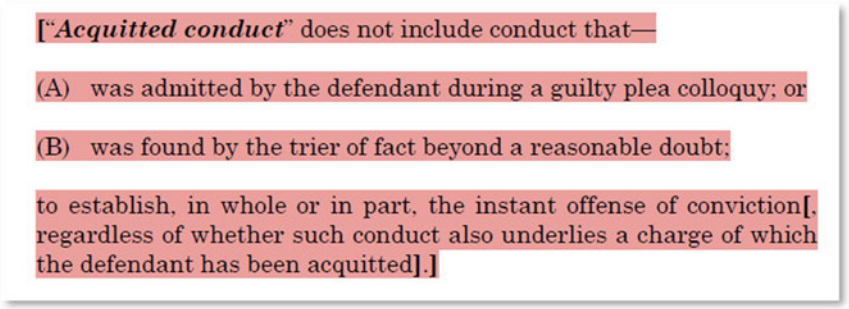
[114] Transcript of Public Hearing before the U.S. Sent'g Comm., Washington, D.C., at 118–23 (Feb. 24, 2023) (Melody Brannon).



[“***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.

Federal Public and Community Defenders
Comment on Simplification of Three-Step Process
(Proposal 7)

February 22, 2024

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The proposal titled "Simplification of Three-Step Process" holds tremendous promise. Federal Public and Community Defenders support eliminating "departures" from the Guidelines Manual, as a matter of sound policy and also a legal necessity given the Supreme Court's description of the post-*Booker* legal framework for determining federal sentences.

However, Defenders have serious concerns about the proposal as it stands. It maintains all departure language currently in the Guidelines Manual, by recharacterizing departure-related considerations as § 3553(a) considerations. This raises several concerns, including:

- *The proposal elevates identified factors over other, unidentified factors.* The considerations that are elevated in this proposal were copied from departure-related provisions that were each created in a particular historical context and, as § 3553(a) factors, don't make sense. But the overarching concern is that a court's § 3553(a) analysis can encompass *any* relevant information, and looks different in every case.[1] The Commission cannot, and should not try to, reduce this analysis to a list.

- *The proposal weaves § 3553(a) considerations into the guideline-range-calculation provisions in Chapters Two through Five.* This is confusing and threatens to conflate the sentencing process into a single, guideline-focused exercise, contrary to Supreme Court precedent and contrary to how the proposed §1B1.1 explains the new process is meant to work.

- *The proposal diminishes § 3553(a) and makes it vulnerable to shifting policies.* We presume that this proposal is intended to clarify § 3553(a)'s primacy in the sentencing process and acknowledge judicial discretion, updating the Guidelines Manual in line with Supreme Court precedent. This is an important goal. But the proposal diminishes § 3553(a) by treating it less like an overarching framework for sentencing that instructs courts to determine a sentence that's sufficient

[1] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (explaining that sentencing courts are "to 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" (internal quotation marks omitted)).

> but not greater than necessary to serve the purposes of our criminal justice system—just punishment, deterrence, protection of the public, and rehabilitation—and more like a checklist.

Happily, the proposal's problems are easily solved. The proposal deletes more language than it adds, and Defenders agree with essentially all the proposed deletions. Generally, the Commission should simply delete without adding. Deleting departure language without reworking it into a new context better aligns the Manual with the appropriate sentencing process and has the added benefit of genuine simplification.

Our comment proceeds as follows: Section I discusses broad principles and concerns, explaining why the Commission should eliminate "departures" as a concept but should not attempt to provide substantive guidance on § 3553(a)'s individualized analysis beyond the language of the statute and Supreme Court caselaw interpreting the statute. We further explain that, if the Commission delays eliminating departures entirely this year, we would implore the Commission to at least delete nearly all of Chapter One, Part A, and Chapter Five, Parts H and K2, as proposed.

Section II gets into the weeds. We address the proposed amendments chapter-by-chapter, to show how the Commission can entirely eliminate departures this amendment cycle, without creating new problems. The focus is on moving forward with deleting departure provisions, but not adding new § 3553(a)-focused provisions—again, not going beyond the statute's terms and the Supreme Court's guidance. Section II suggests substitute language wherever appropriate and discusses four current departure provisions (§4A1.3 and in commentary to §§2L1.2, 5C1.1, and 5G1.3) that require special treatment.

We have designed our suggestions to be outcome-neutral: we are not asking the Commission to elevate factors that would reduce sentences and delete factors that would increase them. We offer modifications to the Commission's proposal that we hope all stakeholders can accept. We presume that all stakeholders would benefit from a Guidelines Manual that acknowledges what has been true since 2005: calculating the guideline range is just one part of a process that must always remain focused on determining a sentence for an individual that is sufficient, but not greater than necessary, to further the purposes of sentencing.

I. The Commission's "Simplification" proposal presents an opportunity to update the Guidelines Manual in light of *Booker* and its progeny.

A. The time has come for the Commission to eliminate "departures" from the Manual.

Federal Public and Community Defenders raised concerns about departures long ago—when *United States v. Booker*[2] was still relatively new. As our witness told the Commission in 2009:

> Sentencing is needlessly complicated if the court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions.[3]

Fifteen years later, this is still a problem.

It is time—or, perhaps, long past time—for the Commission to eliminate departures from the Sentencing Guidelines Manual. Since *Booker*, the Supreme Court has never elevated "departures" above other considerations. To the contrary, that Court has held that a Commission pronouncement that a particular factor cannot serve as a basis for departure need not impact a court's § 3553(a) analysis, under which the court can—and may be required to—rely on that very factor.[4]

Post-*Booker*, the Supreme Court has described sentencing holistically. Section 3553(a)'s "overarching provision" instructs courts "to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing."[5] In determining the appropriate sentence under this framing, "the court should consider a number of factors, including 'the nature and circumstances of the offense,' 'the history and characteristics of the

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[2] 543 U.S. 220 (2005).

[3] Statement of Alan Dubois & Nicole Kaplan on behalf of Fed. Defenders to the U.S. Sent'g Comm. on The Sentencing Reform Act of 1984: 25 Years Later, at 17 (Feb. 10, 2009) ("Statement of Dubois & Kaplan").

[4] *See Pepper*, 562 U.S. at 500–01.

[5] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). This "broad command" is often called the "parsimony principle." *Dean v. United States*, 581 U.S. 62, 67 (2017).

defendant,' 'the sentencing range established' by the Guidelines, 'any pertinent policy statement' issued by the Sentencing Commission . . ., and 'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'"[6]

The Supreme Court has described the determination of sentence as involving two, not three, steps:

1) The district court begins by "'correctly calculating the applicable Guidelines range.'"[7]

2) The court "must then consider the arguments of the parties and the factors set forth in § 3553(a)."[8]

Although calculating the guideline range is the first step, the Supreme Court has "reject[ed]" any invitation to "elevate . . . § 3553(a) factors above all others."[9] Indeed, after considering the Guidelines Manual, a court is free to reject the Commission's sentencing advice outright, based on a disagreement with the policies underlying that advice.[10]

Given this settled law, the Manual's three-step process, elevating "departures" above other considerations, is anachronistic. Further, the Manual's substantive departure provisions are problematic. Provisions that declare various matters not relevant to sentencing, or relevant only if present to an unusual degree, if read literally, encourage judges to determine sentences unlawfully.[11] Provisions that invite departures aren't much better: they function like prohibitions, by prohibiting departures for individuals who

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[6] *Kimbrough*, at 111.

[7] *Peugh v. United States*, 569 U.S. 530, 536 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

[8] *Id.* There is a third step, but it's related to appellate review rather than determination of the sentence: The court "must explain the basis for its chosen sentence on the record." *Id.*

[9] *Pepper*, 562 U.S. at 504.

[10] *See Spears v. United States*, 555 U.S. 261, 265–66 (2009); *Kimbrough*, 552 U.S. at 110.

[11] *See, e.g.*, USSG §5K2.0 and the entirety of Chapter Five, Part H.

do not fit strict criteria.[12] Moreover, the encouraged departures are far too complicated and also largely irrelevant in a post-*Booker* world.[13]

Tellingly, the origin of "departures" is found in § 3553(b)(1), which explains that a court "shall" impose a guideline-range sentence "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[14] Section 3553(b), of course, is the provision that the Supreme Court in *Booker* "excised" from the statute.[15] Quite astoundingly, §5K2.0 ("Grounds for Departure") still—nearly 20 years after *Booker*—instructs courts to consider whether a departure may be warranted under the excised § 3553(b).[16]

To be sure, Defenders are apprehensive about eliminating departures. As discussed below, we don't think data can accurately distinguish outside-the-guideline-range sentences where judges relied on Commission-endorsed "departures" from sentences where judges relied on § 3553(a) factors. And even if accurate data existed, it would be impossible to know whether or how

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[12] *See, e.g.*, USSG §2D1.1, comment. (n. 27(E)(ii)) ("[T]here may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted."); USSG §4A1.3, comment. (n. 3(A)(i)) (explaining that a downward departure from the criminal history category may be warranted where, for example, "[t]he defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period").

[13] *See id.* Section 4A1.3 is extremely complicated, and it is that section's most specific, complex provisions that are the least relevant. Notably, §4A1.3(b)(3)(A) strictly limits downward departures for individuals labeled as career offenders, although judges can, and often do under § 3553(a), impose significantly-below-guideline sentences in career-offender cases because §4B1.1 calls for sentences that are simply too harsh. *See* USSC, FY 2022 *Quick Facts: Career Offenders* 2 (2023).

[14] 18 U.S.C. § 3553(b)(1). *See also* USSG §1A1.4(b) (Departures).

[15] *Booker*, 543 U.S. at 259. While *Booker* excised (b)(1) and "had no occasion to give explicit consideration" to (b)(2), "[t]here is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005).

[16] USSG §5K2.0(a)(1)(A), (a)(2)(A), (b).

eliminating departures might change judges' habits.[17] There is a possibility that some judges will misapprehend the elimination of departures as an instruction from the Sentencing Commission to impose guideline-range sentences without deviation.

But after careful consideration, we think eliminating departures is unlikely to change sentencing outcomes. In most sentencing proceedings, departures hardly get mentioned: the process already centers on calculating the guideline range and then addressing other § 3553(a) factors, as the Supreme Court has instructed. When judges do rely on departures, it is generally not *because* they are departures, but because they describe something relevant to sentencing (and would be under § 3553(a), regardless).[18] Judges differ in how they treat departures, but this is a reason to eliminate departures, not keep them: to eliminate any unwarranted disparities that may arise from this differing treatment.

So, while some judges and practitioners may find the elimination of departures jarring, it is time for the Commission to update the Guidelines Manual to comply with applicable law. To avoid misunderstanding, though, the Commission should clearly explain in its "Reason for Amendment" that the elimination of departures is not meant to discourage courts from imposing sentences above or below the guideline range based on individual circumstances, whether those circumstances used to be relevant to an old departure provision or not. To the contrary, eliminating departures is intended to *encourage* courts to comply with § 3553(a)'s mandate for individualized sentencing. At the same time, in guideline text in both Chapter One and the new Chapter Six, the Commission needs to very clearly articulate § 3553(a)'s demand for an individualized sentencing process under

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[17] It is our understanding that the Commission intends its Simplification proposal to be outcome-neutral; the proposal is intended to rationalize the Manual's description of the sentencing process, not increase or decrease sentences.

[18] For example, a drug-trafficking case that targeted an individual with substance-abuse disorder who'd never had access to treatment and committed the offense only to support his habit might currently get a downward departure under §5K2.0 (aggravating or mitigating); but the circumstances could be seen as mitigating without §5K2.0. And a case resulting in death might currently get a departure §5K2.1; but a death would factor heavily into sentencing no matter what.

which the guideline range is (while important) only one of many factors to consider in determining a just-sufficient sentence.

B. The Manual should set out § 3553(a)'s framework for sentencing, without attempting to substantively guide courts' § 3553(a) analyses.

While Defenders have essentially no concerns with the Simplification proposal's deletions, we have grave concerns with most of the additions—that is, the additional language purporting to guide courts' § 3553(a) analyses.[19] We support adding new language to Chapter One and Chapter Six that accurately describes § 3553(a)'s statutory framework for sentencing. But the Commission should stop there.

As it stands, the proposal takes all the circumstances addressed in departure provisions and recharacterizes them as § 3553(a) considerations. It does this in Chapters Two through Five by creating a new category of § 3553(a) considerations that is nested within commentary but set apart from other commentary with the label "Additional Offense Specific Characteristics" or "Additional Characteristics." (This comment will refer to these new categories, collectively, as "AOSCs.") It does this in the new Chapter Six by creating two new sections, §§6A1.2 and 6A1.3, listing circumstances that may factor into a court's § 3553(a) analysis.

In this section, we first explain that the blanket recharacterization does not work: departure language is inappropriate for the new context. Then we explain that the Commission should not attempt to find replacement language. It should leave the individualized § 3553(a) analysis to the courts.

1. A "departure" is entirely different from a court's § 3553(a) analysis, and the conversion of departures into § 3553(a) considerations falls flat.

Departures are creatures of the old mandatory-guideline system. The idea was that courts could only deviate from the applicable guideline range if there existed "'an aggravating or mitigating circumstance of a kind, or to a

[19] We, of course, support the Commission's proposal to maintain and update guidance regarding "Substantial Assistance" (USSG §5K1.1) and "Early Disposition Program" (currently, USSG §5K3.1; proposed as USSG §3F1.1).

degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'"[20]

Since *Booker*, the Manual's departure provisions have been advisory, but they remain tethered to the guideline rules. The Commission created these provisions based on judgments about what guideline ranges did or did not account for. Here are just a few examples, from permitted departures:

- §2D1.1, Application Note 10: upward departure where "using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense." The Commission added this departure when it decided to no longer base LSD weight calculations on carrier weight, presumably to ensure that this decision would not create a windfall for large-scale dealers.[21]

- §2M5.2, Application Note 1: downward departure where the offense conduct posed no risk of harm "to a security or foreign policy interest of the United States." The Commission added this provision when amending the guideline "to better distinguish the more and less serious forms of offense conduct covered."[22]

- §5K2.3: upward departure where "a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense." This, like all 5K departures, is crafted to address an *exceptional* circumstance, which would not have factored into the guideline calculation.

In addition to specific departures identifying unusual circumstances, like the above, there are less specific departures covering, generally, aggravating or mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[23]

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[20] *See* USSG §1A1.4(b) (quoting 18 U.S.C. § 3553(b)).

[21] *See* USSG App. C, Amend. 488 (Nov. 1, 1993).

[22] USSG App. C, Amend. 337 (Nov. 1, 1990).

[23] §5K2.0(a)(1); *see also, e.g.,* USSG §2A3.2 comment. (n. 6) (where the offense level "substantially understates" the seriousness of the offense); USSG §2B5.3, comment. (n. 5) (where "the offense level determined under this guideline substantially understates or overstates the seriousness of the offense").

But whether specific or general, all departures are a creature of the guidelines—born of them and existing solely in relation to them.

A court's § 3553(a) analysis is different: it is framed not by the guidelines but by the goal of determining a sentence that is sufficient, but not greater than necessary, to meet the purposes of sentencing. The court must 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."[24] And the § 3553(a) inquiry is "'broad in scope [and] largely unlimited either as to the kind of information [the court] may consider, or the source from which it may come.'"[25]

This inquiry need not—and should not—be tethered to the guidelines. A court may consider circumstances that did not factor into a guideline and use that information in deciding whether to impose a sentence within, or above or below, the guideline range. But the court may also consider circumstances that *did* factor into a guideline and decide to weigh them differently or give them no weight at all. Or, it may reject a guideline categorically because it disagrees with the Commission's policy choices.[26]

What's more, most departure-related considerations are not the sorts of factors that Defenders see courts relying on in their § 3553(a) analyses. Certainly, courts rely on general personal characteristics like "age," which is addressed in USSG §5H1.1, but not in the restrictive manner that §5H1.1 calls for. And even the most Manual-bound judges understand that they must consider characteristics like age under § 3553(a), without needing further guidance. As another example, if a large-scale LSD trafficker is being sentenced, a court may well reason that his guideline range is too low under the circumstances. But that court is extraordinarily unlikely to factor into its § 3553(a) analysis the Commission's 1990 decision to exclude carrier weight from the guideline calculation, *see* §2D1.1, Application Note 10; it will simply reason its way to an appropriate sentence.

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[24] *Pepper*, 562 U.S. at 487 (citation omitted).

[25] *Concepcion v. United States*, 597 U.S. 481, 482 (2022) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)).

[26] *Peugh*, 569 U.S. at 536; *Spears*, 555 U.S. at 265–66; *Kimbrough*, 552 U.S. at 110–11.

2. More broadly, the Commission should not attempt to enumerate considerations for courts' § 3553(a) analyses.

Defenders' concerns about the Simplification proposal go beyond the problems associated with its blanket repurposing of departure provisions as § 3553(a) considerations. More fundamentally, it would be folly to attempt to make a list of potential § 3553(a) considerations—period.

First, the § 3553(a) analysis is not amenable to list-making. The Supreme Court has emphasized that § 3553(a) requires consideration of every convicted person as an "individual" and every case as a "unique" study in human failings.[27] Also, the information that a judge can consider when engaging in this endeavor is "largely unlimited."[28] Defenders can attest to the fact that our clients are, without exception, unique and complicated individuals—like all of us. When judges conduct § 3553(a) analyses as the Supreme Court has instructed—and in our experience, most do—they assess our clients as whole people and consider their offenses as tragic errors of judgment that were impacted by personal and larger forces and that, in turn, have impacted others (*e.g.*, family members, victims, and communities).[29]

The Commission, in contrast with judges, writes rules in the abstract; it cannot know what circumstance might be relevant in any given case among the tens of thousands of cases that are prosecuted in federal court each year.[30] And it certainly cannot know about unique constellations of distinct

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[27] *Pepper*, 562 U.S. at 487 (citation omitted).

[28] *Concepcion*, 597 U.S. at 482 (citation omitted).

[29] As one judge has explained, "[n]o two defendants or offenses are identical, and the number of factors that may appropriately affect a sentence is virtually unlimited, as are the weights that may be properly placed on such factors." Hon. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 304 (2013); *see also*, *e.g.*, *Concepcion*, 597 U.S. at 491 (referring to the "'long' and 'durable' tradition that sentencing judges 'enjoy discretion in the sort of information they may consider' at an initial sentencing proceeding") (quoting *Dean*, 581 U.S. at 66) (bracket omitted)).

[30] *See Rita v. United States*, 551 U.S. 338, 357–58 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."); *Gall*, 552 U.S. at 51 ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.") (quoting Brief for Federal Public and

circumstances that might not seem meaningful, or even relevant, on their own, but together in a particular case can help reveal a sentence that would be sufficient, but not greater than necessary, to further the goals of just punishment, deterrence, protection of the public, and rehabilitation.

Second, any list of § 3553(a) considerations would elevate listed considerations above others. The lists the Commission has proposed, both through the AOSCs and in Chapter Six, do not purport to be exhaustive—nor could they.[31] But any list, even a non-exhaustive list, will by its nature enhance the prominence of the items listed, and the likelihood that those items are considered, over items not listed. Thus, there is serious tension between the Supreme Court's discussion of the "largely unlimited" information on which courts may rely at sentencing and a list that attempts to enumerate some of what courts may rely on at sentencing.[32] Also, if the Commission invites courts to consider certain circumstances (and not others) in their § 3553(a) analyses, this could substantively distort sentencing outcomes in ways we can't possibly predict.

Third, any list of § 3553(a) considerations would be vulnerable to policy shifts. If the Commission ever attempts to collect and publish a list of § 3553(a) considerations, it is inevitable that future Commissions will continue to debate what should get listed, which would make courts' § 3553(a) analyses vulnerable to shifting policies. With § 3553(a), Congress and the Supreme Court have already set the policy, and Article III judges must implement that policy through the individualized sentencing process.

Community Defenders et al. as *Amici Curiae* Supporting Petitioner at 16, *Gall v. United States*, 552 U.S. 38 (2007) (No. 06-7949)).

[31] Until November 2003, when the Commission further narrowed departure provisions in light of the PROTECT Act, the Commission acknowledged that "[c]ircumstances that may warrant departure from the guideline range . . . cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis." §5K2.0 (2002). One popular resource for defense attorneys is a collection of caselaw by Michael R. Levine titled "171 Easy Mitigating Factors." *See* https://sentencing.typepad.com/files/toc-for-171-easy-mitigating-factors-august-1-2023.docx (table of contents, showing that the collection is over 180 pages long). Even this collection does not purport to be exhaustive as to mitigating factors and it does not attempt to collect aggravating factors.

[32] *Concepcion*, 597 U.S. at 482 (citation omitted).

Defenders close this section where we began it: Although we are gravely concerned with the proposal to enumerate potential § 3553(a) considerations, we are pleased that the Simplification proposal emphasizes and elevates the § 3553(a) analysis in the Guidelines Manual (in Chapter One and the new §6A1.1). We simply ask that discussion of the § 3553(a) analysis hew to the statutory language and Supreme Court guidance.

C. At a minimum, the Commission should use this opportunity to delete most of Chapter One, Part A, and Chapter Five, Parts H and K2.

We do not know what all stakeholders think of the Commission's Simplification proposal. But we suspect some may express alarm—perhaps at the idea of converting departures to § 3553(a) considerations, but perhaps just at the proposal's length and scope. They may ask the Commission to slow down and turn this into a longer project.

Defenders suspect that some stakeholders may react this way because it was our initial instinct. However, we are too concerned with the disconnect between § 3553(a) (and post-*Booker* caselaw interpreting § 3553(a)) and the Guidelines Manual's discussion of the sentencing process. So, we have engaged with the proposal. And having engaged, we think the proposal has enormous potential. The elimination of departures will require a shift in thinking for judges, probation officers, and practitioners who still elevate departures over § 3553(a), but that shift is needed.

Substantive changes to the proposal are needed (detailed in Section II), but we hope the Commission can eliminate departures this year. If, however, the Commission decides *not* to move forward with eliminating departures altogether this year, at a minimum, it should delete most of Chapter One, Part A, and also Chapter Five, Parts H and K2, as proposed, to better align the Guidelines Manual with post-*Booker* sentencing law and practice. Deleting these sections of the Manual is not all that is needed; much more can be done to update and simplify the Manual, and future reforms should also aim to make the guidelines less harsh. But deleting these anachronistic sections is a start.

1. Anachronistic history and process: Chapter One

We agree with the Commission's proposal to delete nearly all of Chapter One, Part A. When judges and practitioners open the Guidelines Manual, the first thing they find is an introduction that was promulgated in 1987—nearly 40 years ago. The section's historical account is not a neutral, academic history of federal sentencing. Indeed, we have concerns starting with the very first line of "The Statutory Mission":

> The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.[33]

Neither 18 U.S.C. § 3553(a) nor 28 U.S.C. §§ 991 or 994 refer to "incapacitation"; they refer to "protect[ing] the public from further crimes of the defendant."[34] Incapacitation is one tool for protecting the public, but incapacitation is not itself the goal; protecting the public is the goal.[35] And while the lengthiest sentence possible will always serve the goal of incapacitation, lengthy sentences often do not protect the public.[36]

From here, the "Original Introduction" describes the Guidelines Manual's origins and its operation, from the vantage point of a pre-*Booker* world. It is not until page 14 that the Manual acknowledges that the mandatory-guideline system it just detailed is no longer reality.[37] This is in a

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[33] USSG §1A1.2 (The Statutory Mission).

[34] 18 U.S.C. § 3553(a)(2)(C); *see also* 28 U.S.C. §§ 991(b)(1)(A) & (2) (citing § 3553(a)(2)), and 994(a)(2), (g) & (m) (citing same).

[35] *See Dean*, 581 U.S. at 67–68 ("Take the directive that a court assess 'the need for the sentence imposed . . . to protect the public from further crimes of the defendant.' § 3553(a)(2)(C). Dean committed the two robberies at issue here when he was 23 years old. That he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether . . . still more incarceration is necessary to protect the public.").

[36] *See* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 220 & n.163–64 (2019) (discussing studies showing that "longer sentences lead to *increased* recidivism after release").

[37] *See* USSG §1A2.

section, "Continuing Evolution and Role of the Guidelines," that was added in 2008 without public notice and comment.[38] In 2009, Defenders raised objections, including, among other things, that the new section described a three-step process that was "not at all what the statute says and is contrary to what the [Supreme] Court has said."[39]

Federal Public and Community Defenders recognize that, even in a post-*Booker* world, the Sentencing Guidelines still matter. As the Supreme Court said in *Peugh v. United States*, they "anchor" the sentencing process.[40] However, the current Chapter One's recitation of history and discussion of sentencing law and process (including the guidelines' role in that process) are outdated and incomplete, and should be deleted without delay.

2. Anachronistic departure restrictions: Chapter 5, Parts H and K2

The last time the Sentencing Commission proposed significant amendments to Chapter Five's departure provisions was during the 2009–10 cycle.[41] Defenders recommended back then, as now, that the Commission delete 5H and 5K2, which were designed to restrict judicial discretion and have no place in the post-*Booker* scheme.[42] The Commission made some changes in 2010 but did not reconsider its approach. Indeed, although the Commission added introductory commentary to 5H acknowledging *Booker*, it also advised (and still advises):

> Although the court must consider 'the history and characteristics of the defendant,'. . . in order to avoid

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[38] Statement of Dubois & Kaplan, *supra* note 3, at 34.

[39] *Id.* at 34–39.

[40] 569 U.S. at 549.

[41] *See* USSC, Notice of Final Priorities 3–4 (Sept. 3, 2009); USSC, Notice of Proposed Amendments 18–29 (Jan. 14, 2010). The Commission has identified big changes regarding departures as a priority since then. *See* USSC, Notice of Final Priorities 4–5 (Sept. 2, 2010); USSC, Notice of Final Priorities 5 (Aug. 14, 2014). But until now, it has not followed through by proposing amendments.

[42] *See* Statement of Thomas W. Hillier II & Davina Chen on behalf of Fed. Defenders to the U.S. Sent'g Comm on The Sentencing Reform Act of 1984: 25 Years Later, at 36 (May 27, 2009).

> unwarranted sentencing disparities the court should not give them excessive weight."[43]

Fifteen years later, and nearly 20 years post-*Booker*, this remark on individualized sentencing should have no place in the Guidelines Manual.

It has been clear at least since *Gall* that courts are to factor into their sentencing determinations all relevant matters, regardless of whether the Commission encourages, prohibits, or limits consideration of a particular matter.[44] The Supreme Court underscored this in *Pepper*, in holding that a district court at resentencing was right to consider post-sentencing rehabilitation, notwithstanding that the Manual then prohibited it as a ground for departure.[45] The sentencing court's freedom to consider, and rely upon, all relevant matters is essential to its ability to consider every convicted person as an "individual" and every case as "unique."[46]

At best, the various provisions in 5H and 5K2 that prohibit, discourage, or limit (generally, where something is not present in an

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[43] USSG App. C, Amend. 739 (Nov. 1, 2010); USSG ch. 5, pt. D, introductory comment. This line well encapsulates the general philosophy of 5H and 5K2: restricting judicial discretion in service of reducing disparities. But then, a difference in sentencing outcome that is based on individualized factors related to the individual being sentenced and the offense is not an unwarranted disparity; it is a *warranted* disparity. *Cf. Gall*, 552 U.S. at 55 (recognizing that sentencing courts should avoid "unwarranted similarities" in the sentences of defendants who committed the same offense but are not similarly situated). Further, time and again, Defenders have pointed out that it was following the implementation of the mandatory guideline system and mandatory minimum statutes that the most pernicious disparity (racial) grew out of control. *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 116, 135 (2004). We have also long explained that judicial discretion can *reduce* disparities, by reducing the disparate effects of mandatory-minimum sentences, charging decisions, and guidelines that have baked-in disparities (like the career offender guideline). *See* Statement of Carol A. Brook on behalf of Fed. Defenders to the U.S. Sent'g Comm on The Sentencing Reform Act of 1984: 25 Years Later, at 19–23 (Sept. 10, 2009).

[44] *See Gall*, 552 U.S. at 56–58 (2007) (affirming a below-guideline sentence that was based largely on matters that the guidelines either prohibited or limited as grounds for departure).

[45] *See Pepper*, 592 U.S. at 499–505.

[46] *Concepcion*, 597 U.S. at 492.

"unusual" or "exceptional" way) departures based on particular factors, are at this point irrelevant: courts can (and do) consider any of these factors under § 3553(a).[47] At worst, these provisions encourage judges to act contrary to settled law. They were *designed* to restrict judicial discretion in a pre-*Booker* system.[48] Post-*Booker*, and with the Supreme Court repeatedly explaining that judicial discretion is essential to individualized sentencing under § 3553(a), the Commission should strike these provisions.

Unlike provisions prohibiting or restricting departures, provisions in 5H and 5K2 that *permit* certain departures do not contradict settled law. But they do not promote courts' consideration of the broadest possible information relevant to sentencing. To the contrary, they discourage such consideration by narrowly defining permissible bases for departure. Also, nearly all the permitted departures are aggravating—not mitigating[49] —contributing to a guideline system that is oft-criticized as a "one-way upward ratchet."[50]

The Commission can and should delete Chapter Five, Parts H and K2 in their entirety this amendment cycle, to ensure that the Guidelines Manual is consistent with Supreme Court precedent holding that courts must consider any and all relevant circumstances when determining a sentence

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[47] *See, e.g., United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) ("Johnson's framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.").

[48] The Guidelines Manual's initial prohibited departures were based on 28 U.S.C. § 994(d) and (e), which the Commission seems now to agree was meant only to place restrictions on the Commission in setting guideline ranges, not to place restrictions on judges. *See* USSC, *Proposed Amendments to the Sentencing Guidelines* 520–21 (Dec. 26, 2023). Further restrictions were generally added in response to courts permitting departures. *See* USSC, *Simplification Draft Paper, Departures and Offender Characteristics* Pt. II(B)(3) (1996). That is, at least during the mandatory-guideline period, when judges indicated that a factor outside the guideline system was relevant to sentencing, the Commission would respond by restricting reliance on that factor.

[49] *See* USSC, *Compilation: Departure Provisions* (2023).

[50] *See, e.g.,* Frank O. Bowman, III, *The Federal Sentencing Guidelines: Some Valedictory Reflections Twenty Years After* Apprendi, 99 N.C. L. Rev. 1341, 1361 (2021).

that is sufficient, but not greater than necessary, to further the goals of sentencing.

If the Commission decides *only* to delete 5H and 5K2 this year (with or without deletion of most of Chapter One, Part A), to prevent anyone from misapprehending this as a move *away from* individualized sentencing, we would still ask the Commission to clearly explain in its "Reason for Amendment" that the elimination of departure provisions is not intended to discourage courts from deviating from guideline ranges. And we would still ask the Commission to also describe in the text of the Manual § 3553(a)'s demand for individualized sentencing.

D. The Commission has the authority to promulgate the simplification amendment as modified by Defenders' chapter-by-chapter suggestions.

The Commission has asked for comment on whether its Simplification proposal is consistent with federal law. Federal Public and Community Defenders' comments on the proposal are largely motivated by a desire to help the Commission align the Guidelines Manual with current law. If the Commission were to adopt the Simplification proposal as modified by Defenders' suggestions, we would have no concerns about its compliance with federal law.

28 U.S.C. §§ 994 and 995. The Commission has specifically asked about the Commission's enabling statutes, which we assume relates to two issues: (1) whether the Commission is authorized to provide guidance regarding courts' individualized § 3553(a) analysis; and (2) whether the Commission can delete departure provisions in Chapter 5, Part H, that arose out of directives in § 994.[51]

Regarding the first potential issue, we question whether the Commission can insert itself into courts' § 3553(a) analyses. Under

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[51] Defenders' general discussion about deleting departure provisions without adding anything in their place might raise questions about § 994(n)'s directive regarding "substantial assistance" and/or § 994(j)'s directive regarding "first offender[s]." But, as noted above, we agree with the Commission's proposal to leave §5K1.1 (Substantial Assistance) where it is. And below, we explain how the Commission can preserve the language in USSG §5C1.1, Application Note 10(B), that is needed to comply with § 994(j).

§ 995(a)(22), Congress authorized the Commission to perform functions as "required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18." Certainly, the Commission can accurately describe courts' § 3553(a) responsibilities. However, creating lists of factors for consideration under § 3553(a) may *inhibit* courts' ability to meet their responsibilities, for the reasons discussed above: it would diminish § 3553(a)'s individualized sentencing process, elevate listed considerations above others, and make the § 3553(a) framework vulnerable to shifting policies. Section 3553(a) demands that judges 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."[52] Any substantive advice the Commission provides would speak in the abstract, and could not address the nearly limitless factors that could arise in any particular case.

Regarding the second potential issue, § 994(d) and (e) pose no obstacle. As the Commission recognizes in its proposed new Chapter Six's introductory commentary, Congress's directives in § 994(d) and (e) govern what the Commission may take into account in formulating guidelines, not what courts may consider at sentencing. Beyond constitutional prohibitions related to racial bias and the like, there is "no limitation" on "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."[53]

Other congressional directives. No other directive prevents the Commission from eliminating departures. The Guidelines Manual contains hundreds of departure provisions. A small percentage are related to uncodified congressional directives but the terms of those directives either do not require the departure provisions that were adopted or, if they do, they don't require the provisions adopted to persist in perpetuity.

The overwhelming majority of departure provisions related to congressional directives were never required. On many occasions, Congress

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[52] *Pepper*, 562 U.S. at 487 (citation omitted).

[53] 18 U.S.C. § 3661; *see also Concepcion*, 597 U.S. at 494 ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.").

issued a general directive, instructing the Commission to take some action "if appropriate," or to "consider" particular factors, or used other permissive language; and, in response, the Commission chose to adopt departure language.[54] On other occasions, the Commission created or amended guideline text according to a directive and, at the same time, added departure language as a matter of discretion (such as to implement a direction that the Commission account for aggravating or mitigating circumstances that might justify exceptions to the rules).[55] There is no reasonable argument that the Commission cannot delete these sorts of provisions outright.

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[54] *See, e.g.,* USSG §2A3.1 comment. (n. 6) (upward departure where a "victim was sexually abused by more than one participant," related to the Violent Crime Control and Law Enforcement Act of 1994 ("VCCA"), Pub. L. No. 103-322, § 40112(a)(4), 108 Stat. 1796 (1994) ("The Commission shall review and promulgate amendments to the guidelines, if appropriate, to enhance penalties if more than 1 offender is involved in the offense.")); USSG §2B1.1 comment. (n. 21(B)) (upward departure applicable where disruption of critical infrastructure has a "debilitating impact" on certain national interests, related to the Homeland Security Act of 2002, Pub. L. No. 107-296, § 225(b), 116 Stat. 2136 (2002) (directing the Commission to consider various "factors and the extent to which the guidelines may or may not account for them," including "whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure")); USSG §2D1.1 comment. (n. 18(A)) (upward departure applicable where the guideline does not "account adequately for the seriousness of the environmental harm or other threat to public health or safety," related to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 303(a), 110 Stat 3099 (1996) (directing the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses)).

[55] *See, e.g.,* USSG §2B1.1 comment. (n. 21(D)) (downward departure applicable where the defendant was actually a victim of a disaster, related to the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 5(a)(1), 121 Stat. 2556 (2008) (directing the Commission to "provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under [42 U.S.C. § 5170] or an emergency declaration under [42 U.S.C. § 5191]")); USSG §2X7.2 comment. (n. 1) (upward departures applicable where the defendant engaged in certain criminal activities involving a submersible or semi-submersible vessel, related to the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, § 103, 122 Stat 4296 (2008) (directing the Commission to promulgate guidelines for the crime created in that Act and, in doing so, to account for any aggravating or mitigating circumstances that "might justify exceptions" including the repeated use of a submersible vessel or semi-submersible vessel to facilitate other felonies)).

At the other end of the spectrum, there is the PROTECT Act of 2003.[56] Section 401(b) of that Act directly amended §5K2.0 by creating subsection (b), prohibiting departures in specified cases based on any unenumerated factor. Section 401(b) also created §5K2.22 (offender characteristics as grounds for departure in certain sex offense cases) and amended §§5K2.20 (aberrant behavior), 5H1.6 (family ties and responsibilities), and 5K2.13 (diminished capacity), in each case prohibiting departures based on personal characteristics in specified cases.[57] These changes related to § 401(a) of the Act, which created 18 U.S.C. § 3553(b)(2), *statutorily* prohibiting departures in specified cases.[58]

Booker abrogated these PROTECT Act subsections; thus the Commission can, *and should without delay*, remove the resulting Chapter Five provisions from the Guidelines Manual. True, *Booker*'s remedy saved the PROTECT Act's direct amendments to Chapter Two guidelines, Chapter Three's acceptance-of-responsibility adjustment, and Chapter Four's pattern enhancement, by rendering those guidelines advisory only.[59] But one cannot read the Act's Chapter Five amendments as advisory only because those provisions do nothing other than instruct judges that they *must treat as mandatory* guideline ranges in specified cases.

Since *Booker*, PROTECT Act-related departure provisions have continued to exist in the Manual, but based only on the post-*Booker* idea of *departures* versus *variances*: these provisions prohibit and strictly limit departures under the Guidelines Manual but not variances outside the Manual. But when Congress enacted the PROTECT Act there was no such thing as a "variance." The PROTECT Act's departure provisions prohibited judges from imposing below-guideline sentences; they did not call for a convoluted three-step sentencing process that ultimately permits any reasonable sentence. Thus, *Booker* already nullified PROTECT Act § 401(b) as Congress enacted it, and the Commission has the authority to delete the departure provisions promulgated under § 401(b).

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[56] Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

[57] *Id.* at § 401(b).

[58] *See id.* at § 401(a).

[59] *See id.* at § 401(g) & (i).

There is an *additional* reason the Commission is permitted to delete the PROTECT Act departure provisions: Congress directed only that these provisions be "add[ed]" to the Manual, not retained in perpetuity. This is true generally of directives (as discussed below) but, with the PROTECT Act, Congress said as much. Section 401(j)(2) of the Act says that the Commission "shall not promulgate any amendment" that is "inconsistent with" the § 401(b) amendments or add any new downward departures to Chapter Five, Part K, "*[o]n or before May 1, 2005*."[60] In contrast, § 401(j)(3) says of *another* of the Act's subsections (§ 401(i), which amended §§4B1.5, 2G2.4, and 2G2.2) that the Commission could make further amendments but not if they would lower sentencing ranges, *without time limitation*. And § 401(j)(4) says of *still another* of the Act's subsections (§ 401(g), which amended §3E1.1) that "*[a]t no time* may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section."[61] The date before which the PROTECT Act prohibited the Commission from amending § 401(b)'s mandated departure provisions—May 1, 2005—passed nearly 19 years ago. Thus, the Act's plain language authorizes the Commission to now do away with those provisions, to reflect current law and practice.

Going back to the spectrum of Congressional directives, on just a few occasions, Congress issued a specific directive to the Commission and, in response, the Commission implemented the directive by way of departure. Defenders have identified just three—or perhaps only two—departure provisions falling in this category[62]:

1) The Violent Crime Control and Law Enforcement Act of 1994 directed the Commission to exercise "its authority to make . . . amendments" to "ensure" that "the applicable guideline range for a defendant convicted of a crime of violence against an elderly victim is sufficiently stringent to deter such a crime, to protect the public from additional crimes of such a defendant, and to adequately reflect the heinous nature of such an offense"; and that, in carrying out this directive, it should "ensure" that

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[60] (emphasis added).

[61] (emphasis added).

[62] We acknowledge that we might have inadvertently missed other, similar provisions, but our discussion would apply to any such provision.

"the guidelines provide enhanced punishment for a defendant convicted of a crime of violence against an elderly victim who has previously been convicted of a crime of violence against an elderly victim."[63] In response, the Commission found that "the penalties currently provided generally appear appropriate" but it decided to permit an upward departure if both the current offense and a prior offense involved *any* vulnerable victim, "regardless of the type of offense."[64] *Arguably, this does not belong in this category because, from the start, Congress granted the Commission discretion to review existing guidelines to "ensure" that they were sufficient to accomplish stated purposes. We include it here just to be safe.*

2) A different section of the same Act directed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence (as defined in section 924(c)(3) of title 18, United States Code) or a drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code) if a semiautomatic firearm is involved."[65] In response, the Commission found after study that it would not be appropriate to amend guideline ranges based on possession of a semiautomatic firearm, because "semiautomatic firearms are used in 50–70 percent of offenses involving a firearm," so "offenses involving a semiautomatic firearm represent the typical or 'heartland' case."[66] Instead, it created §5K2.17, permitting an upward departure for possessing a semiautomatic firearm capable of accepting a large-capacity magazine in connection with any crime coming within §4B1.2.[67]

3) The Violence Against Women and Department of Justice Reauthorization Act of 2005 directed the Commission to "make appropriate amendments . . . to assure that the sentence

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[63] VCCA, *supra* note 54, at § 240002(a) & (b)(3).

[64] USSG App. C, Amend. 521 (Nov. 1, 1995) (Reason for Amendment).

[65] VCCA, *supra* note 54, at § 110501(a).

[66] USSG App. C, Amend. 531 (Nov. 1, 1995) (Reason for Amendment).

[67] *See id.*

> imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of [18 U.S.C. § 716] reflects the gravity of this aggravating factor."[68] In response, the Commission explained that § 716 is a "Class B misdemeanor which is not covered by the guidelines"; so instead, it created §5K2.24, providing for an upward departure in *any* case if the "defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716."[69]

In each of these situations, the Commission from the start recognized that it has discretion. The Commission recognized its authority to implement the directive by way of departure, rather than guideline amendment, and it also expanded upon Congress's concerns.

What is important for our purposes is that the language of the above directives says nothing about retaining the provisions once they are created (in whatever form the Commission has chosen), as did the PROTECT Act's § 401(j)(4), discussed above, regarding § 401(g). They instruct the Sentencing Commission to amend the Guidelines Manual ("make . . . amendments" to "ensure"; "amend"; "make appropriate amendments") but do not, by their plain language, tie the Commission's hands beyond the making of those amendments. They are not codified as permanent law.[70] Thus, having promulgated departure provisions to comply with Congress's directives to account for various aggravating considerations, the Commission may now—many years later—account for other considerations (including *Booker*'s sea change in federal sentencing law) and take further actions as appropriate.[71]

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[68] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1191(c), 119 Stat. 2960 (2006).

[69] USSG App. C, Amend. 700 (Nov. 1, 2007) (Reason for Amendment).

[70] Defenders grant that directives that are codified, as in § 994, require ongoing compliance. *See About Classification of Laws to the United States Code*, Off. of L. Revision Counsel, U.S. Code, https://uscode.house.gov/about_classification.xhtml (last visited Feb. 19, 2024) (explaining that "the United States Code contains only the general and permanent laws of the United States").

[71] PROTECT Act § 401(j) shows that Congress understands that the Commission, after complying with a directive to amend the Manual, has discretion

To be sure, there are other solutions for these three—or perhaps just two—provisions. Thus, if the Commission is concerned that any of the rarely used, idiosyncratic departure provisions enumerated above (or any similar provision that Defenders might have missed) pose a barrier to finally updating the Guidelines Manual in light of *Booker* and its progeny, it can address such provision as needed, individually.[72] But there is no need for special treatment: The Commission, having complied with the relevant directives, is not powerless to amend the provisions as needed to reflect developments in both the legal landscape and human knowledge.

E. The Simplification proposal, as modified by Defenders, promises to make data collection more accurate and more useful for policy-makers and stakeholders.

Defenders developed our positions on the Simplification proposal based on our own experience, internal conversations, and surveys, along with our review of Supreme Court caselaw. The Commission collects data on departures, but our experiences raise concerns that the available data inaccurately captures whether outside-the-guideline-range sentences are based on guideline-approved departures versus § 3553(a)-focused variances. At sentencing hearings, the distinction between "departures" and "variances" has become largely irrelevant. Also, there is a disconnect between these hearings and the information that is captured on "Statement of Reasons" (SOR) forms that serve as the basis of the Commission's data.

In our experience, sentencing proceedings these days focus on § 3553(a) factors, not departures. And the line between departures and variances is blurry; this is illustrated by Commission data showing that "mitigating circumstances" is the top reason for departure (beyond substantial assistance and fast track).[73] Whether a below-range sentence based on "mitigating

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to make further amendments impacting the matter. Otherwise, Congress would not have seen the need to prohibit further actions regarding specified directives.

[72] For example, §3A1.1 Application Note 4 could be amended to state that an additional upward adjustment may be warranted in the specified circumstance (without using the term "departure" or creating an AOSC). And while the Commission is at it, the specified circumstance could be more narrowly tailored to elderly victims and crimes of violence, which is all that the directive mentioned.

[73] USSC, *Supplemental Data: 2024 Proposed Amendment Relating to Simplification* (2024). Relatedly, the 2022 Sourcebook shows that the most common

circumstances" gets recorded as a "departure" or a "variance" has more to do with the habits of judicial staff who fill out the forms than with judges' reasons for imposing a sentence. Indeed, the Commission's recently released data report on departures surprised individuals in several districts identified as departure-heavy, who report that sentencing proceedings focus on § 3553(a) factors, not Commission-endorsed departures.

Responding to the Commission's Issue for Comment #8, Defenders are hopeful that eliminating departures, which would necessitate significant reworking of the SOR form, could dramatically improve data accuracy and usefulness. Currently, the SOR form is preoccupied with distinguishing between departures and variances, making it long and complicated (and thus more prone to user variation and error), although the distinction between departures and variances, again, has become largely irrelevant.

Further, the Commission's reporting of data that is captured in SOR forms, focused on distinguishing between departures and variances, makes the resulting reports less, not more, helpful to practitioners and stakeholders. Defenders' 2019 annual letter to the Commission criticized the Commission's decision to stop releasing data that would clearly show the total number of below- and above-guideline sentences for each guideline.[74] Since 2019, sentences have been reported as "under the Guidelines Manual" or "Variances," with sentences involving *any* departure reported as "under the Guidelines Manual." But a sentence based on a departure (even if one assumes the "departure" box was properly checked) is more like sentence based on a variance than a within-guideline sentence. The number of "departures" and "variances" from a particular guideline, together, may reveal that the guideline is not appropriately calibrated.[75] The Commission's data reports, in contrast, obscure for policy-makers and stakeholders how the guidelines are actually functioning.[76]

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reason given for departures (other than substantial assistance and fast track) and variances is "history and characteristics of the defendant." *See* USSC, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 43 & tbl. 44 (2023).

[74] *See generally* Letter from Michael Caruso on behalf of the Fed. Defenders to the U.S. Sent'g Comm (Oct. 10, 2019).

[75] *See id.*

[76] Take, for example, the Sentencing Commission's Quick Facts on Career Offenders: it tells us that 45.2% of career offenders were sentenced "under the

Defenders recognize that it is the Administrative Office of the Courts (AO), not the Sentencing Commission, that produces the Statement of Reasons form. But in a world without departures, we expect the AO will dramatically simplify and shrink the form. And for sentences outside the guideline range, Defenders, at least, will urge the AO to focus on the most important questions for policy-makers and stakeholders. When a sentence falls outside the guideline range, did the applicable guideline result in a range that would be too low or two high for most defendants, or that does not account for the most relevant factors? Or, was the sentence based on a mandatory-minimum or a binding plea agreement? Or, was the sentence based on individualized circumstances?

If and when the Commission eliminates the concept of departures, and the AO amends the Statement of Reasons form to reflect that, we expect that data submitted to the Commission will be more accurate and consistent, and the Commission's data reports can be clearer and more useful.

Guidelines Manual." USSC, *2022 Quick Facts: Career Offenders* 2 (2022). But this does not mean that 45.2% of career offenders were sentenced within the guideline range—far from it. One must go to the end of this document, past the graphics, to learn that only 20.2% of individuals labeled as a "career offender" actually get a within-guideline sentence. And the document nowhere provides the total number of *below-guideline* sentences, which Defenders determined (using the Sentencing Commission's raw data) in Fiscal Year 2022 was 79.2%. This number raises alarm bells. The Commission's Quick Facts muffles those bells.

II. Defenders' comments and suggestions: chapter-by-chapter

This section may look, at first glance, long and complicated. But our suggestions are designed to simplify, not complicate, the Simplification proposal. All our suggestions fall into just a few categories:

- We urge the Commission to move forward with deleting language, as proposed, related to departures.

- In Chapter One and the new Chapter Six, we support adding language accurately describing courts' § 3553(a) responsibilities. These chapters address the framework for sentencing and the court's ultimate sentencing determination, as distinguished from chapters focused on calculating guideline ranges. Thus, they are ideal locations for accurately describing § 3553(a)'s framework. However, discussion of § 3553(a) should hew closely to its statutory language and Supreme Court guidance. And Chapter Six should not attempt to enumerate specific § 3553(a)-related considerations.[77]

- In Chapters Two through Five, we oppose creating AOSCs—a new category (by whatever name) of specific factors that are set out and listed for § 3553(a) consideration. More generally, we oppose adding § 3553(a)-focused language to these chapters, to avoid conflating a court's duty to calculate and consider the guideline range with its duty to consider other factors.[78] In nearly every instance where the Commission has proposed AOSC language, the departure language can be deleted and nothing added in its place. In just four places, Defenders have identified departure language that plays a special role, in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3. With each of these, we have suggested how the Commission can eliminate departure language while retaining necessary guidance, to avoid creating new problems, in a sentencing-outcome-neutral way.

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[77] The new Chapter Nine (Sentencing of Organizations) presents the same issue, at §9C5.1.

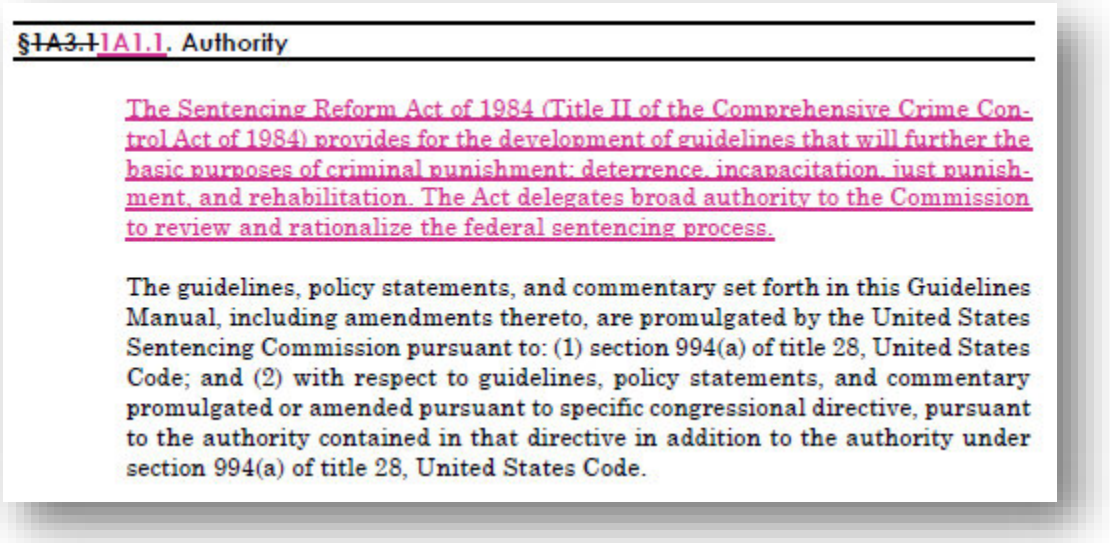
[78] AOSCs also arise in the new Chapter Eight (Violations of Probation and Supervised Release) and Chapter Nine, and we have the same concerns.

A. Chapter One: Accurately describing the sentencing framework

1. Chapter One, Part A

As discussed, Defenders support all proposed deletions in Chapter One, Part A. Also, we have no concerns regarding Part A's amended introductory language, referencing the Commission's authority and mission, and noting that historical materials are moving to Appendix D.

We do suggest slightly different language for what would become §1A1.1. This is the section as proposed by the Commission:



~~§1A3.1~~1A1.1. Authority

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

First, as discussed in Section I.C.1., above, the Sentencing Reform Act of 1984 nowhere refers to "incapacitation"; rather, it refers to "protect[ing] the public from further crimes of the defendant."[79] Further, Defenders think it is essential that this introductory section more clearly describe the § 3553(a) framework for sentencing.[80] Here is our proposed language (only the first sentence is new):

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[79] 18 U.S.C. § 3553(a)(2)(C); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat 1837 (1984).

[80] This necessarily includes § 3553(a)'s parsimony principle. *See Kimbrough*, 552 U.S. at 111 (explaining that a court "appropriately frame[s] its final determination

> *§1A1.1. Authority*
>
> *Section 3553(a) of Title 18 provides that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.*[81] *The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the purposes of sentencing. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.*
>
> *The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.*

This starts the section—and the Manual—by identifying the sentencing court's overarching statutory mission, placing the Sentencing Commission's authority and mission within this larger context.

2. Chapter One, Part B

In Part B of Chapter One, Defenders again support the deletions. We also support the proposed new text (and commentary) for §1B1.1—the section of the Manual that most directly explains what the Commission is doing in its Simplification proposal, in that it eliminates "departures" as an intermediate step between calculating the appropriate guideline range and determining the sentence.

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in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary'" (citation omitted)).

[81] Our suggestion reorders these purposes from how they appear in the proposed §1A1.1, to avoid any suggestion that the Commission is making a judgment about the relative importance of the purposes of sentencing. By keeping the purposes in the order that Congress listed them, the Commission maintains neutrality.

We suggest *additionally* creating an introduction for §1B1.1, before subsection (a), to frame all the subsections. Here is our suggested language:

> *According to 18 U.S.C. § 3553(a), the overarching goal of sentencing is to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. To guide sentencing courts in this endeavor, § 3553(a) enumerates seven factors to be considered, including (at § 3553(a)(4) and (a)(5)) consideration of the guideline range and applicable policy statements. Thus, § 3553(a) is understood as providing for a two-step process: first the court calculates the guideline range, then it considers that range and applicable policy statements in the context of a larger analysis of all the statutory sentencing factors, to determine the appropriate sentence.*

As with §1A1.1, this ensures judges understand that § 3553(a)'s "overarching instruction" frames the entire sentencing process and it gives context for §1B1.1's description of a two-step process. In addition, by clearly explaining that consideration of the guideline range and applicable policy statements are two of seven sentencing factors that all must be considered (as relevant) at sentencing, this language may help to dispel any misapprehension that the Commission's goal in eliminating departures is to insist that courts impose sentences within the guideline range.

As for the other proposed changes in Chapter One, Part B, we have just three concerns:

- Proposed §1B1.3, creating "Additional Offense Specific Considerations." For the reasons discussed above (and also below), Defenders object to converting "departures" into AOSCs. There is no reason the Commission cannot simply delete §1B1.3's departure language.

- Proposed §1B1.4 Background, explaining that Chapter Six "details factors which generally are not considered in the calculation of the guideline range." Assuming that the Commission does not adopt the proposed §§6A1.2 and 6A1.3, as Defenders very strongly urge, this sentence should be deleted.

- Proposed §1B1.7, referring to "additional considerations for the court to take into account in determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a)." Assuming that the Commission does not move forward with its proposal to enumerate considerations relevant to § 3553(a) factors as AOSCs, again, as Defenders very strongly urge, the Commission should either delete this sentence or change it to something like: "Second, the commentary may provide additional guidance in determining the appropriate sentence."

B. Chapter Two: Streamlining and simplifying

1. Generally

Defenders strongly oppose the portion of the Simplification proposal recharacterizing what are currently potential departures in Chapter Two as AOSCs. As discussed, creating lists of factors for consideration under § 3553(a) may inhibit courts' ability to meet their § 3553(a) responsibilities. Also, scattering § 3553(a) considerations throughout the portions of the Manual that are devoted to calculation of the guideline range (Chapters Two through Five) muddles the guideline calculation with the § 3553(a) analysis, which need not, and should not, be tethered to the guidelines.

In addition, converting departures into AOSCs throughout Chapter Two is anything but simple. Inevitably, there will be litigation about whether and how district courts are to factor AOSCs into their guideline calculations and larger § 3553(a) analyses. Indeed, given the uncertainty around this new category, if a client is harmed by a court's elevation of an AOSC above other factors (or the opposite—a court's failure to elevate an AOSC above other factors), a defense attorney may feel obligated to litigate the matter.

Further, many of the new AOSCs do not make sense. Currently, some departures are identified in the context of commentary that elucidates a particular point. Under the proposal, these departures are now consolidated at the end of the section, without context, which is confusing.[82] Also, many of

[82] *Compare, e.g.*, USSG §2K1.3 comment. (n.11) (departure coming after explanation of what offenses §2K1.3(b)(3) and (c)(1) do not cover), *with* Proposed Amendment at §2K1.3 AOSC 1(E) (no explanation).

the AOSCs are quite specific (*e.g.*, §2G2.1 ("more than ten minors")), which made sense as a departure but not as a § 3553(a) factor.

And the AOSCs that *do* make sense are wholly unnecessary. Many of the AOSCs suggest, generally, that a court might consider whether a guideline understates or overstates the seriousness of the offense. Courts are already required to consider this—in every case. Most AOSCs describe more specific circumstances, but relating to broader aggravating or mitigating matters that judges already know are highly relevant: number and/or vulnerability of victims (or lack of victims); harm to or endangerment of victims or the community; mens rea; culpability and role; and criminal livelihood and sophistication. These matters are addressed in nearly every case in which they arise—including but not limited to the specific factual circumstances that the Manual highlights—without the need for a departure or an AOSC.[83]

To summarize, Chapter Two's AOSCs add bulk and complexity to the Guidelines Manual, but not useful guidance. Fixing the problems created by this new category is easy: go forward with deleting the various departures scattered around Chapter Two and do not add the new AOSC language. Below, we discuss one guideline (§2L1.2) that has two departure provisions requiring more nuanced treatment; but treating those provisions differently would not impede the project of ridding the Manual of departure provisions that are generally obsolete and/or unnecessary.

If the Commission deletes the AOSCs, the Commission will need to update Chapter Two's introductory commentary, which, as proposed, reads:

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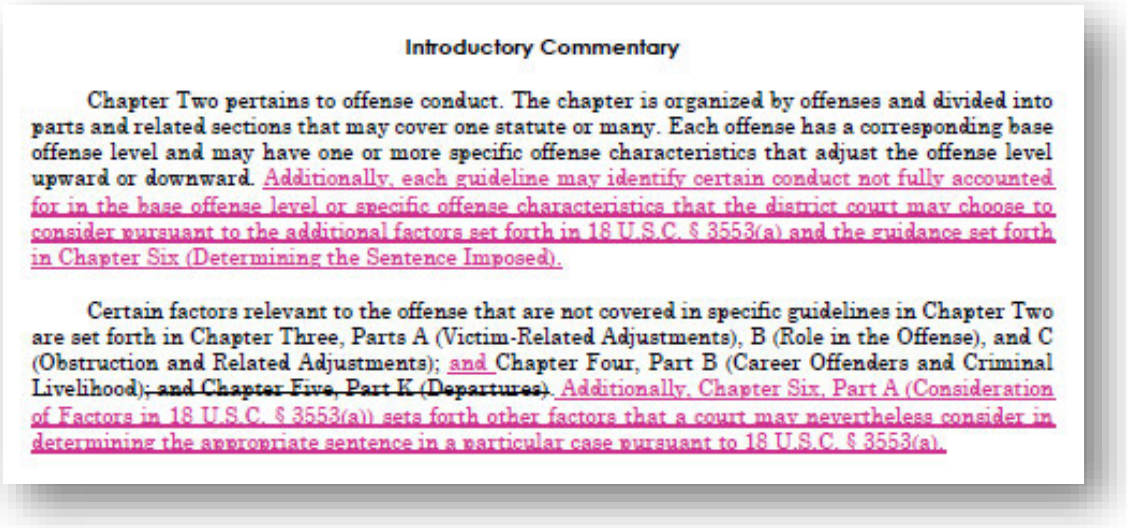
[83] For example, in a firearms case, there is no possibility the sentencing court would not consider, *e.g.*, that the offense posed a substantial risk of death, or that it involved more than 200 firearms or large quantities of armor-piercing ammunition. *See* Proposed Amendment at §2K2.1, Additional Offense Specific Characteristics (aggravating factors related to the offense). But then, the court would also surely consider that an offense involved just *one* round of armor-piercing ammunition, or that the offense posed no risk to anyone.



Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Additionally, each guideline may identify certain conduct not fully accounted for in the base offense level or specific offense characteristics that the district court may choose to consider pursuant to the additional factors set forth in 18 U.S.C. § 3553(a) and the guidance set forth in Chapter Six (Determining the Sentence Imposed).

Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); and Chapter Four, Part B (Career Offenders and Criminal Livelihood); ~~and Chapter Five, Part K (Departures).~~ Additionally, Chapter Six, Part A (Consideration of Factors in 18 U.S.C. § 3553(a)) sets forth other factors that a court may nevertheless consider in determining the appropriate sentence in a particular case pursuant to 18 U.S.C. § 3553(a).

We suggest the following, working from the current introductory language:

> *Introductory Commentary*
>
> *Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); and Chapter Four, Part B (Career Offenders and Criminal Livelihood).~~; and Chapter Five, Part K (Departures).~~*
>
> *The Sentencing Commission has endeavored to create guidelines that will promote the purposes of sentencing. However, guidelines are not capable of accounting for all potentially aggravating and mitigating circumstances that may present in a case. And they may, in individual cases, call for a sentence that is too high or too low. As addressed in Chapter Six, ultimately, it is for the sentencing court to determine what sentence in an individual case is sufficient, but not greater than necessary, to comply with the purposes of sentencing.*

This language would ensure that judges do not perceive the deletion of departures as a judgment that the guidelines account for everything or that the appropriate sentence is always a guideline-range sentence.[84]

To tie up loose ends, Defenders have identified one Chapter Two provision in which the Commission has proposed adding new language that does not create an AOSC: §2A1.1 Application Note 2. We have no concerns with this. Also, we are not concerned with the many technical changes in Chapter Two (and throughout the Manual) that update cross-references and the like. Our concern is with the creation of a new category (AOSCs) that elevates particular factors for a court's § 3553(a) analysis.

2. Section 2L1.2

Section 2L1.2 has two departure provisions that require special treatment. In response to the Commission's Simplification proposal, we surveyed Federal Public and Community Defenders to get a sense of how the different districts use departures, and whether any departures play a critical role in day-to-day sentencing.[85] This process has led us to conclude that although we object to recharacterizing departures as § 3553(a) considerations, and we think that most departure-related provisions can simply be deleted outright, §2L1.2 needs a bit more attention.

In some border districts, where most illegal-reentry cases are prosecuted, Defenders report that judges consider one or both of §2L1.2's first two potential departures in a large percentage of illegal-reentry cases. This could indicate that § 2L1.2 is not appropriately calibrated, which could be added to the Commission's list of priorities in the future. For now, though, we worry that simply deleting all of §2L1.2's departure provisions could significantly alter illegal-reentry sentencing outcomes, although we understand that the Commission's Simplification proposal is intended to provide for a simpler, more rational sentencing process, not change outcomes.

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[84] This point is so important that it bears repeating, which is why we are suggesting related language in multiple places, and also asking the Commission to explain the matter in its "Reason for Amendment."

[85] That is, departures other than §5K1.1 (substantial assistance) and §5K3.1 (fast track), which everyone agrees play a critical role. The Commission in its proposal has rightly treated these departures differently than others.

Also, both departure provisions play a unique role. Section 2L1.2's first departure provision (currently at Application Note 6), based on the seriousness of a prior offense, plays a role similar to §4A1.3, which Defenders also identify as requiring special attention (discussed below). This departure provision is necessary because §2L1.2's offense-level calculation is driven largely by criminal history—more particularly, by prior sentence length. When the Sentencing Commission in 2016 amended §2L1.2 to focus on prior sentence length, as a rough proxy for offense seriousness, the Commission presumably recognized that this change would incorporate disparate state sentencing practices into the Guideline calculus and could be both over- and under-inclusive.[86] Consequently, the Commission encouraged departures, similar to §4A1.3. In both situations, the guidance plays a critical role.

The second departure, related to time spent in state custody (currently at Application Note 7), plays a role similar to §5G1.3's "discharged sentence" departure, which Defenders also identify as requiring special attention (discussed below). In many cases, immigration officials find the person when he is incarcerated for another offense, but the government waits to initiate prosecution until the person is released, often after years of incarceration. Recognizing that "the amount of time a defendant serves in state custody after being located by immigration authorities may be somewhat arbitrary," and could result in a sentence that is greater than necessary, the Commission created this departure provision to help judges determine when it is appropriate to adjust a sentence to account for time served in state custody.[87]

However, Defenders remain uncomfortable with the current proposal to recharacterize §2L1.2's departure provisions as § 3553(a) considerations. Thus, we propose modifying that section's first two departure provisions in order to delete references to "departures," while keeping the guidance where it is.[88] Here are our suggested amendments, working from the current departure language:

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[86] *See* USSG App. C, Amend. 802 (Nov. 1, 2016).

[87] *See* USSG App. C, Amend. 787 (Nov. 1, 2014) (Reason for Amendment).

[88] Section 2L1.2's third departure provision (currently Application Note 8, related to cultural assimilation) is helpful for our clients, but not in a way that is unique or distinct from the myriad other departure provisions addressing

> *6. ~~Departure Based on~~ Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a ~~departure~~ sentence above or below the applicable guideline range may be warranted.*
>
> *7. ~~Departure Based on~~ Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense~~,~~ and the time served is not covered by an adjustment under §5G1.3(b) ~~and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case~~, the court may consider whether a ~~departure~~ sentence below the applicable guideline range is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. ~~Any such departure~~ The ultimate sentence should be fashioned to achieve a reasonable punishment for the instant offense.*

These modest amendments to §2L1.2's first two departure provisions would allow the Commission to realize its goal of eliminating departures and simplifying the Guidelines Manual, while avoiding both the problems related to enumerating § 3553(a) considerations and the problems that could arise from deleting this guidance outright.

C. Chapter Three: More streamlining, and creating a home for "fast track"

The proposed amendments to Chapter Three do not raise any new concerns. In several places, Chapter Three raises precisely the same concern

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aggravating and mitigating circumstances. Thus, Defenders are not advocating for special treatment of that one.

as Chapter Two. The proposal recharacterizes all of Chapter Three's current departure provisions as "Additional Considerations" for courts' § 3553(a) analyses—again, for simplicity, AOSCs. In Chapter Three, Defenders are satisfied that the Commission can delete all the current departure language outright, without creating new AOSC language.[89]

Last, but not least, the proposal places "Early Disposition Program"—better known as "fast track"—in Chapter 3, at §3F1.1. We do not object to this move or to the updated language. Indeed, this location makes sense, coming as it does after §3E1.1 (Acceptance of Responsibility).

D. Chapter Four: Preserving a safety valve

Chapter Four again presents the problem of AOSCs (recharacterizing departure provisions as § 3553(a) considerations)—in commentary to §§4A1.2, 4B1.2, and 4C1.1. For the same reasons articulated above, in these provisions, Defenders urge the Commission to move forward with deleting the departure language, but we object to recharacterizing departure language as § 3553(a) language. These deletions should simply be deletions.

But §4A1.3 is different.

Section 4A1.3 is one of the most common departures—possibly *the* most common departure—other than §§ 5K1.1 and 5K3.1.[90] Or at least, the portion of §4A1.3 addressing a situation in which Chapter Four's criminal history rules either under- or over-represent the seriousness of the individual's history may be the most common departure. And Defenders think this is for a good reason: Chapter Four's complex, rigid, points-based system demands that there be a safety valve for situations where the rules produce a result that, for whatever reason, is too high or too low to reflect the seriousness of the criminal history of the individual being sentenced.

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[89] As with Chapter Two, we found one addition of new language that does not purport to set out a category of considerations for the § 3553(a) analysis, at proposed §3D1.2 (Background commentary), and we have no objection to it.

[90] For what it's worth, the Commission's recent data report shows that "criminal history issues" are the second-most cited departure provision (excluding §§ 5K1.1 and 5K3.1), which supports what Defenders report from around the country: §4A1.3's "under-represents or over-represents" provision plays an important role. *Supplemental Data*, *supra* note 73.

Therefore, Defenders do not think it would make sense here (as it does elsewhere) to simply delete the departure language and add nothing in its place. At the same time, we have concerns about the proposed amended §4A1.3. First, §4A1.3 should not purport to address § 3553(a) factors. It addresses the operation of the Guidelines Manual: whether Chapter Four's rules result in a criminal history category that does not fit the particulars of an individual's history. Ultimately, §4A1.3 can help a court determine a sentence that is sufficient but not greater than necessary, and facts related to criminal history may be relevant in the § 3553(a) analysis. But §4A1.3 is about something more particular than that.

Second, the proposed §4A1.3 identifies examples of aggravating and mitigating circumstances that are so specific that they are confusing, rather than helpful. This is not surprising, since the language comes from old departure provisions. Subsection (a)'s prefatory language suggests that judges have discretion to apply §4A1.3 any time a criminal history category under- or over-represents the seriousness of a particular individual's criminal history. But then the examples—limited to such circumstances as "similar misconduct established by a civil adjudication or by a failure to comply with an administrative order" and "two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period"—strongly suggest that judges shouldn't exercise their full discretion after all.

Here is our suggested language:

> *§4A1.3 Inadequacy of Criminal History Category (Policy Statement)*
>
> *If the defendant's criminal history category substantially under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, the court should consider whether to impose a sentence above or below the applicable guideline range.*

This is simple, neutral, and accomplishes what is needed: encouraging courts to consider (although not necessarily impose) a sentence outside the guideline range where the criminal history category is incongruent with the particulars of the prior offenses underlying that category.

In accord with this proposed language, we also suggest the following amendment to §4A1.3's proposed background commentary (working from the proposed language):

> *This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. This policy statement recognizes that ~~consideration of whether additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism is appropriate in determining the appropriate sentence to impose pursuant to 18 U.S.C. §3553(a).~~ in some circumstances, where additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not appropriately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, it may be appropriate to consider a sentence above or below the applicable guideline range.*[91]

E. Chapter Five: Ridding the Manual of guidance that contradicts settled law and clarifying calculation rules without creating a new category related to § 3553(a)

Chapter Five's ten parts do very different work, from Part A's establishment of the Sentencing Table to Part K's policing of departures, and the Commission's proposed amendments also do very different work. In response:

(1) Defenders support the wholesale deletion of 5H and 5K other than §§5K1.1 and 5K1.2;

(2) We are pleased that the Commission has left "substantial assistance" substantively alone, in §5K1.1, along with §5K1.2; and

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[91] As with Chapter Two and Chapter Three, Chapter Four contains one proposal to add language that does not purport to create a new category of considerations or comment on a court's § 3553(a) analysis (§4B1.4 Application Note 2). Again, we have no concerns with this.

(3) In the earlier parts of Chapter Five, we have distinct concerns regarding §§5C1.1 and 5G1.3, but they are easily resolved.

1. Chapter Five, Parts H and K2

This comment has already thoroughly explained why the Sentencing Commission should delete Chapter Five, Parts H and K2—without delay, even if it does not adopt the other parts of its Simplification proposal this amendment cycle. Defenders will use this opportunity to remind the Commission, one more time, of the need to include in its "Reason for Amendment" a clear explanation of why the Commission is eliminating departures from the Manual (if it goes that far) or why it is deleting 5H and 5K2 (if it stops there), and also the need to add language to the text of the Manual regarding § 3553(a)'s demand for individualized sentencing.

Defenders are pleased that the Commission has proposed maintaining the language of §§5K1.1 and 5K1.2 with only minor changes, and leaving these provisions where they are.

2. Chapter Five's other parts

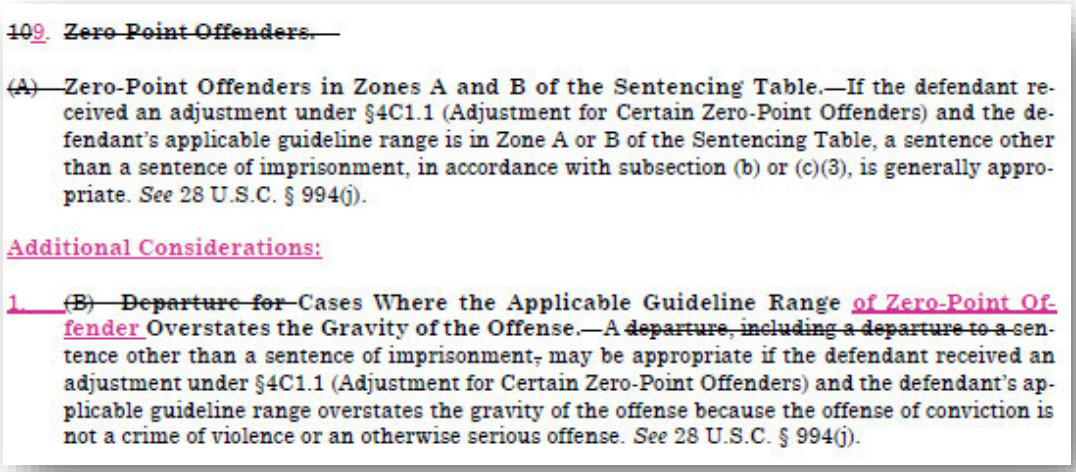
The first seven parts of Chapter Five (A–G) all relate to the technical work of calculating guideline ranges and determining sentencing options under the guidelines—as the proposed new chapter title helpfully describes, with each section doing quite different work.

Nearly all the amendments to Chapter Five, Parts A through G, are deletions, and we agree with nearly all of those. In §5E1.2, the Commission has proposed a new AOSC, which should be deleted, along with the departure provision it is based on (currently Application Note 4). Similarly, in both §§5C1.1 and 5G1.3, the Commission has proposed converting departure provisions to AOSCs. In 5C1.1, the first departure provision can be deleted outright. But §5C1.1's second departure provision and 5G1.3's two departure provisions require special treatment. Our concerns and suggestions for how to resolve each of these are distinct.

a. Section 5C1.1: guidance related to "Zero-Point Offenders"

Section 5C1.1's first departure provision (currently at Application Note 6), regarding "specific treatment purpose," can simply be jettisoned. Its

second departure provision, though, related individuals with zero criminal history points (currently at Application Note 10), is different. This is not the "Zero-Point Offender" guideline adjustment, which appears at §4C1.1. Rather, this provision encourages courts to consider a sentence other than imprisonment for individuals who qualify for that adjustment (regardless of what "zone" they fall into). Here it is, as proposed:



~~10~~9. ~~**Zero-Point Offenders.—**~~

~~(A)~~ **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

Additional Considerations:

1. ~~(B) **Departure for**~~ **Cases Where the Applicable Guideline Range** of Zero-Point Offender **Overstates the Gravity of the Offense.**—A ~~departure, including a departure to a~~ sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

The Commission created § 5C1.1's "Zero-Point Offenders" departure provision pursuant to a continuing statutory directive: 28 U.S.C. § 994(j), regarding the "general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[92] Therefore, this provision cannot be deleted outright.

Fortunately, it is simple to remove the departure language from Application Note 10(B) (to be renumbered 9(B) once Note 6 is deleted as proposed) without creating a new category. It is just a matter of amending the current Note 10(B). Here is our suggested amendment (working from the current departure language):

> *10. Zero-Point Offenders.—*
>
> *(A) Zero-Point Offenders in Zones A and B of the Sentencing Table.—If the defendant received an adjustment under §4C1.1*

[92] *See* USSG App. C, Amend. 821, Reason for Amendment (Nov. 1, 2023).

(Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. See 28 U.S.C. § 994(j).

(B) ~~Departure for~~ Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.—A ~~departure, including a departure to a~~ sentence below the guideline range, including a sentence other than ~~a sentence of~~ imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. See 28 U.S.C. § 994(j).

b. Section 5G1.3: guidance related to a related terms of imprisonment

Section 5G1.3 addresses the relationship of the sentence being imposed to an undischarged or anticipated term of imprisonment—whether the new sentence should be concurrent or consecutive, and how the new sentence might be adjusted for time served on the old sentence. The section's two departure provisions provide guidance that is very much needed, and Defenders worry that simply deleting it would change sentencing outcomes in the cases to which it applies.

The issue is that §5G1.3 provides useful guidance on how courts should account for other, related sentences, but it is incomplete. Its invited departures (currently at Application Note 4(E) and 5) fill the gaps.[93] The first departure provision explains that a court may impose a sentence below the guideline range to account for an undischarged term of imprisonment for an

[93] This is regarding a topic (when the BOP will not account for sentence credit, such that an adjustment is needed) that often confuses judges and practitioners. Indeed, courts have felt compelled to grant sentence reductions under 18 U.S.C. § 3582(c)(1)(A) in some cases where they learned that the BOP calculated the sentence differently than anticipated, resulting in a longer sentence than necessary. *See, e.g.*, *United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022); *United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021).

offense that involves *partially* overlapping conduct.[94] The second provision provides that a court may impose a sentence below the guideline range to account for a *discharged* prison term.[95]

Both of these provisions, together with the guideline text, help "to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings."[96] This scheme also reduces the likelihood that an individual feels compelled to plead guilty, rather than exercise his right to trial, simply to avoid duplicative punishment. It would appear that the Commission already recognizes the importance of such guidance: it provides similar guidance in §2L1.2's commentary, discussed above, and also in §5K2.23 (Discharged Terms of Imprisonment).

The situation here is unique in that, given the role that this guidance plays, the best way to eliminate the departure language would be to add to the guideline's *text*. Here is our suggested amendment (working from the current guideline text):

> *§5G1.3. Imposition of a Sentence on a Defendant Subject to a~~n~~ ~~Undischarged~~ Related Term of Imprisonment or Anticipated State Term of Imprisonment*
>
> *(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.*
>
> *(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:*

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[94] USSG §5G1.3 comment. (n. 4(E)).

[95] §5G1.3 comment. (n. 5).

[96] §5G1.3 comment. (n. 4(E)). This statement is made in Application Note 4(E), but the same reasoning would apply to departures under Note 5.

> *(1) the court shall adjust the sentence for any period of imprisonment already served on the ~~undischarged~~ term of imprisonment if it is undischarged, and may adjust the sentence for any period of imprisonment already served on the term of imprisonment if it is discharged, if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and*
>
> *(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of ~~the~~ any undischarged term of imprisonment.*
>
> *(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.*
>
> *(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment, and the court may adjust the sentence for any period of imprisonment already served, to achieve a reasonable punishment for the instant offense.*

This language is intended to be neutral; it is designed only to accomplish in §5G1.3's text what was previously accomplished through the text and departure provisions, together.[97]

Alternatively, the Commission could amend the existing departure language to swap out "downwardly depart" and "downward departure" for "sentence below the applicable guideline range" or "adjustment," or something of that nature. However, here, it makes more sense to delete the departure language and provide the guidance through guideline text.

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[97] We have identified one place where a conforming amendment would need to be made to commentary, to account for the possibility of an adjustment based on a discharged term of imprisonment. *See* §5G1.3 comment. (n. 2(C)(iii)) ("undischarged").

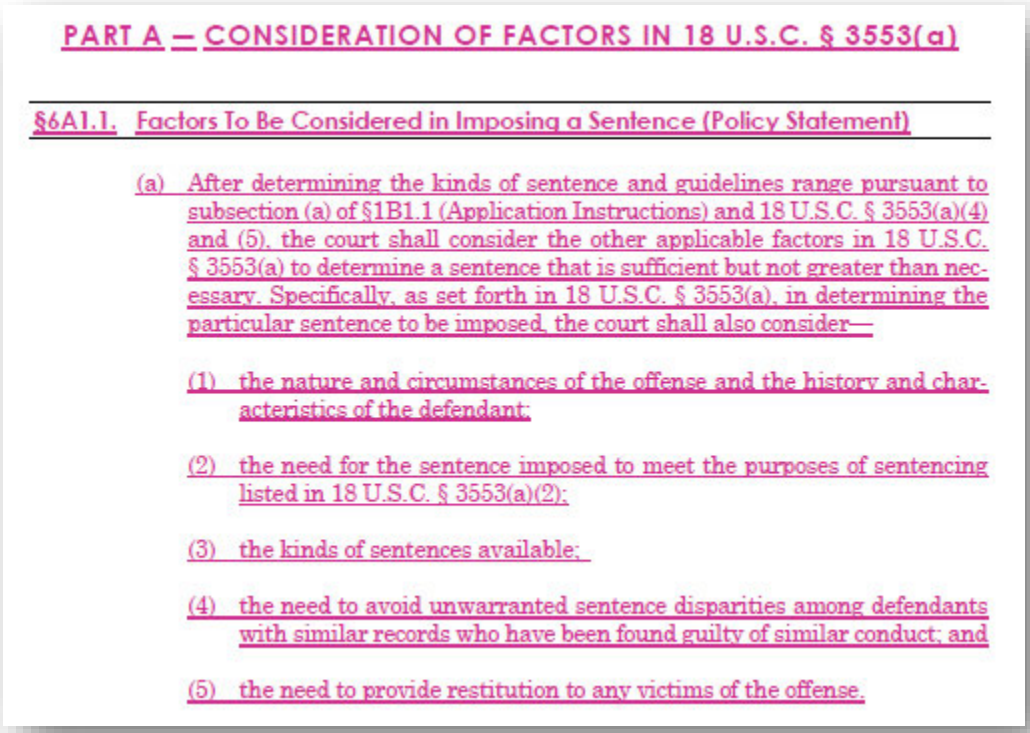
F. Chapter Six: Ensuring that the purposes of sentencing, as they relate the individual, are paramount

By this point in our comment, Defenders' position on the proposed Chapter Six should be clear. We are thrilled that the Commission proposes to set out a new chapter dedicated to "Determining the Sentence" and to the § 3553(a) analysis. We are hopeful this will help ground courts' sentencing decisions in § 3553(a)'s statutory framework and ensure that all understand that the applicable guideline range is one of many factors for consideration. This is already the law, and the Guidelines Manual will better reflect current law when it includes a Chapter Six that is dedicated to the full § 3553(a) analysis.

The devil is in the details. Most importantly, as discussed above, we object to the proposed §§6A1.2 and 6A1.3. The Commission should not comment on how district courts should apply § 3553(a)'s sentencing factors to individual cases other than the factors the Commission was designed to control: § 3553(a)(4) and (a)(5). The circumstances that may be relevant to a court's § 3553(a) analysis are effectively limitless, and depend on the unique circumstances of each case. Fixing §§6A1.2 and 6A1.3 is easy: delete them.

The proposed new §6A1.1, in contrast to §§6A1.2 and 6A1.3, should stay. It does something important: it gets § 3553(a) into the Manual, in the context of a chapter that is devoted to the court's ultimate determination of the appropriate sentence, rather than calculation of the guideline range.

Here is §6A1.1 as proposed by the Commission:



PART A — CONSIDERATION OF FACTORS IN 18 U.S.C. § 3553(a)

§6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)

(a) After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient but not greater than necessary. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

We do not object to this language per se, but we suggest that §6A1.1 more clearly and fully describe § 3553(a), including its prefatory language[98]:

> *§6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)*
>
> *(a) Under 18 U.S.C. § 3553(a), a court at sentencing "shall impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. In determining a sentence that meets this standard, § 3553(a) sets forth seven factors for consideration.*
>
> *Two of the seven factors are determined under Chapters 1–5 of this Guidelines Manual: applicable guidelines (§ 3553(a)(4)) and pertinent policy statements (§ 3553(a)(5)). After calculating the*

[98] Our suggested language is different enough from the proposed §6A1.1 that we present it entirely in red, as a new version of §6A1.1.

applicable guideline range and considering it along with pertinent policy statements according to Chapters 1–5, the court must consider the other factors, as they relate to the unique case at hand, in order to determine a sentence that is sufficient but not greater than necessary.

Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

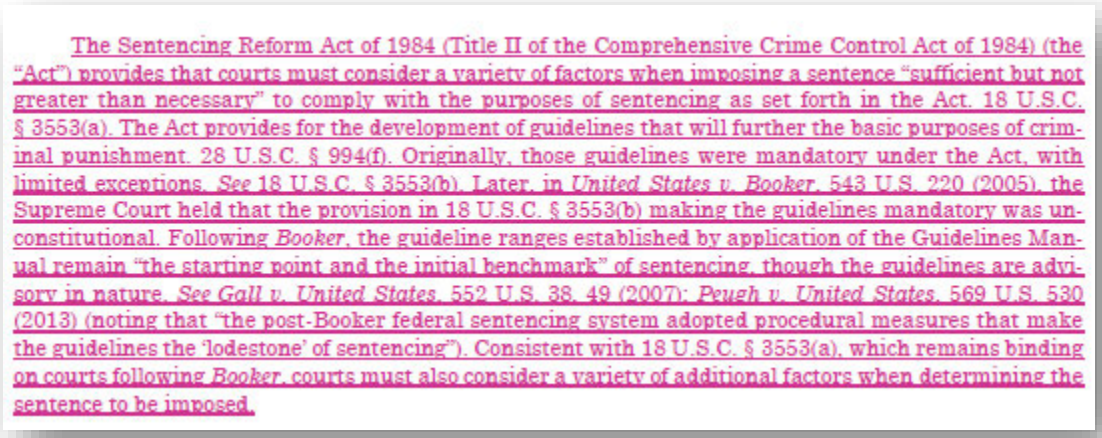
There would be no need for any commentary to this version of §6A1.1 because its text thoroughly explains how § 3553(a) operates.

Working backward through the new Chapter Six, once §§6A1.2 and 6A1.3 are deleted, and §6A1.1 is amended, the Commission would need to update the chapter's proposed introductory language:

- At a minimum, because §§6A1.2 and 6A1.3 would be deleted, most of the last paragraph of the proposed introductory language would need to be deleted, starting with "This chapter provides examples of factors…"
- Defenders further recommend deleting all the language after the first paragraph. The lengthy discussion of the fact that § 994(d) and (e) constrain the Sentencing Commission, not courts, seems designed to explain why the Commission decided that it was authorized to include the factors enumerated in § 994(d) and (e)

in its proposed new §§6A1.2 and 6A1.3, which we have marked for deletion.[99]

Here, then, is the first paragraph of the introductory commentary, which is all that would remain under the above suggestions:



The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides that courts must consider a variety of factors when imposing a sentence "sufficient but not greater than necessary" to comply with the purposes of sentencing as set forth in the Act. 18 U.S.C. § 3553(a). The Act provides for the development of guidelines that will further the basic purposes of criminal punishment. 28 U.S.C. § 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker*, the guideline ranges established by application of the Guidelines Manual remain "the starting point and the initial benchmark" of sentencing, though the guidelines are advisory in nature. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that "the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). Consistent with 18 U.S.C. § 3553(a), which remains binding on courts following *Booker*, courts must also consider a variety of additional factors when determining the sentence to be imposed.

Defenders have distinct concerns with this paragraph. We assume the Commission intends, with its Simplification proposal, to put § 3553(a) at the center of Chapter Six and, thus, at the center of the determination of sentence. But the above discussion does not accomplish this, because it describes only the Supreme Court's post-*Booker* statements about the continuing importance of the Guidelines Manual and none of that Court's statements about a sentencing court's ability—indeed, its obligation, if the facts of the case warrant it—to deviate from the Manual.

Below is our suggested language. Other than the sentences lifted from the Commission's current proposal, we quote the Supreme Court directly (just to be clear about where our language comes from):

> *The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") "contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing,*

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[99] This discussion could be repurposed for the "Reason for Amendment," related to the fact that Chapter Five will no longer prohibit or discourage courts from considering the factors listed in § 994(d) and (e).

including 'to reflect the seriousness of the offense,' 'to promote respect for the law,' 'to provide just punishment for the offense,' 'to afford adequate deterrence to criminal conduct,' and 'to protect the public from further crimes of the defendant.'"[100]

The Act provides for the development of guidelines that will further these purposes. 28 U.S.C. § 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. See 18 U.S.C. § 3553(b). Later, in United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b), making the guidelines mandatory, was un-constitutional. Following* Booker*, the guideline ranges established by application of the Guidelines Manual are advisory in nature, and "the district court must consider all of the factors set forth in § 3553(a) to guide its discretion at sentencing."*[101]

Under the advisory-guideline scheme, the applicable guideline range and pertinent policy statements remain "the starting point and the initial benchmark" of sentencing.[102] *After correctly calculating and considering the guideline range, the "district court must then consider the arguments of the parties and the factors set forth in § 3553(a)."*[103] *In doing so, the "district court 'may not presume that the Guidelines range is reasonable'; and it 'may in appropriate cases impose a non-Guidelines sentence based on disagreement with the Sentencing Commission's views.'"*[104] *Under § 3553(a), sentencing courts are*

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[100] *Kimbrough*, 552 U.S. at, 101 (quoting § 3553(a)); *see also Dean*, 581 U.S. at 67 ("[Section 3553(a)'s list of factors is preceded by what is known as the parsimony principle, a broad command that instructs courts to 'impose a sentence sufficient, but not greater than necessary, to comply with' the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.").

[101] *Peugh*, 569 U.S. 536; *see also Pepper*, 562 U.S. at 490 ("Accordingly, although the 'Guidelines should be the starting point and the initial benchmark,' district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'") (quoting *Gall*, 552 U.S. at 49–51).

[102] *Peugh*, 569 U.S. at 536 (quoting *Gall*, 552 U.S. at 49).

[103] *Id.* (citing *Gall*, 552 U.S. at 49–50).

[104] *Id.* (quoting first *Gall*, 552 U.S. at 50, then *Pepper*, 562 U.S. at 501 (which was in turn citing *Kimbrough*,, 552 U.S. at 109–110)) (internal brackets omitted).

> *permitted to "consider the widest possible breadth of information about a defendant," in order to "ensure[] that the punishment will suit not merely the offense but the individual defendant."*[105]

This introductory commentary, along our suggested §6A1.1, serves as a fitting end for the Guidelines Manual's most important chapters. Chapter One introduces the framework for sentencing, including where the Guidelines Manual come into it, then sets out rules for using the Manual. Chapters Two through Five govern the calculation of guideline ranges. Chapter Six then reminds courts of the framework for sentencing and explains to courts how the Supreme Court has described their duty to consider the guideline range as one factor among others and ultimately determine a sentence that is just sufficient for the particular individual being sentenced.

G. Chapters Seven through Nine: Related changes

In Chapters Seven through Nine, the majority of the proposed amendments are essentially technical: *e.g.*, renumbering, updating cross-references, and eliminating departure-related language. In these chapters, Defenders have concerns regarding the following:

- Section 8B1.4: Same concern regarding the conversion of departures to AOSCs, as throughout the Manual. The Commission can simply delete the departures.

- Section 9A1.2: The proposed new §9A1.2(b)(5) cross-references provisions that Defenders have recommended either deleting or restructuring; if the Commission accepts our recommendations, this subsection will need to be rewritten or deleted.

- Section 9C2.8: Same concern regarding the conversion of departures to AOSCs, as throughout the Manual. Federal Public and Community Defenders represent individuals, not organizations. But with that disclaimer, we do not know of any reason the Commission cannot simply delete the "pattern of illegality" departure in the commentary to §9C2.8.

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[105] *Pepper*, 562 U.S. at 488 (citation omitted); *see also Concepcion*, 597 U.S. at 492 (emphasizing this point).

- Section 9C5.1: This new provision mirrors the new Chapter Six as proposed: it converts departure-related language (which the Commission has proposed deleting in the preceding sections) into a new list of § 3553(a) considerations. Again, Defenders are not experts regarding sentencing of organizations. But we are hopeful that the Commission takes our concerns about Chapter Six to heart. And if so, we presume it would need to make similar changes to the proposed new §9C5.1.

III. Conclusion

Defenders have suggested many changes to the Commission's Simplification proposal, but we want to be clear: we are eager to move forward with the proposal. For this reason, we have combed through the proposal line-by-line and suggested changes that will ensure any amendment that the Commission promulgates would accomplish its goals, without creating new problems. We have aimed to present modifications to the Simplification proposal that could be acceptable to all stakeholders.

This Comment has gotten quite granular in suggesting changes to the Simplification proposal, so we will repeat the bullets from above, as a reminder that all our suggestions fall into just a few categories:

- We urge the Commission to move forward with deleting language, as proposed, related to departures. At a minimum, the Commission should delete Chapter One, Part A, and Chapter 5 Parts K and H, as proposed.

- In Chapter One and the new Chapter Six, we support adding language accurately describing courts' § 3553(a) responsibilities. These chapters address the framework for sentencing and the court's ultimate sentencing determination, as distinguished from chapters focused on calculating guideline ranges. Thus, they are ideal locations for accurately describing § 3553(a)'s framework. However, discussion of § 3553(a) should hew closely to its statutory language and Supreme Court guidance. And

Chapter Six (along with Chapter Nine) should not attempt to enumerate specific § 3553(a)-related considerations.[106]

- In Chapters Two through Five (as well as Seven and Eight), we oppose creating AOSCs—a new category (by whatever name) of specific factors that are set out and listed for § 3553(a) consideration. More generally, we oppose adding § 3553(a)-focused language to these chapters, to avoid conflating a court's duty to calculate and consider the guideline range with its duty to consider other factors.[107] In nearly every instance where the Commission has proposed AOSC language, the departure language can be deleted and nothing added in its place. In just four places, Defenders have identified departure language that provides essential guidance, in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3. With each of these, we have suggested how the Commission can eliminate departure language while retaining necessary guidance, to avoid creating new problems, in a sentencing-outcome-neutral way.

We look forward to discussing the Commission's Simplification proposal at the upcoming hearing, and to answering questions about our suggestions for making the proposal workable for this amendment cycle.

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[106] The new Chapter Nine (Sentencing of Organizations) presents the same issue, at §9C5.1.

[107] AOSCs also arise in the new Chapter Eight (Violations of Probation and Supervised Release) and Chapter Nine, and we have the same concerns.

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 22, 2024

Hon. Carlton W. Reeves
Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to Sentencing Guidelines, December 26, 2023

Dear Judge Reeves:

The Practitioners Advisory Group ("PAG") provides comments on the Commission's proposed amendments regarding: (1) the rule for calculating loss under §2B1.1; (2) the treatment of youthful individuals; (3) the use of acquitted conduct; (4) the resolution of two circuit conflicts; (5) miscellaneous amendments related to §2D1.1(a) and §4C1.1; and (6) the simplification of the three-step process for calculating the guideline range.

I. The Rule for Calculating Loss Under §2B1.1

The Commission proposes amending §2B1.1 in response to *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). In *Banks*, the Third Circuit found that "loss," as used in §2B1.1's text, unambiguously means "actual loss." Application Note 3(A), however, specifies that loss also includes "intended loss." The *Banks* court, finding that the note impermissibly expands the reach of the guideline, held that this expanded definition was not entitled to deference under *Stinson v. United States*, 508 U.S. 36 (1993) and *Kisor v. Wilkie*, 588 U.S. __, 139 S.Ct. 2400 (2019).

The Commission's proposed amendment moves Application Note 3(A) into the text of the guideline. Specifically, the guideline itself would now provide that loss is the greater of actual loss or intended loss and that gain is only to be used as an alternative measure "if there is a loss

but it reasonably cannot be determined."[1] The Commission has specifically requested comment on whether it should adopt this amendment during this amendment cycle or if it should defer making changes to §2B1.1 until a future amendment cycle during which the Commission expects to conduct a comprehensive examination of §2B1.1.[2]

The PAG recommends that the Commission refrain from adopting the proposed amendment at this time. Instead, the Commission should conduct a comprehensive examination of §2B1.1 in order to more efficiently reform this guideline. Currently, guideline ranges calculated using §2B1.1, which are mostly driven by the loss table, often overstate the seriousness of the offense and the culpability of the defendant. PAG members and our colleagues in the criminal defense bar have seen this result in cases that we have handled; the high guideline ranges under §2B1.1 are reflected in the data regarding the actual sentences courts impose; and there have been numerous critiques of how the loss table in §2B1.1 produces sentences that overstate the serious of the offense and a defendant's culpability.

A. The Defense Bar's Experiences with §2B1.1

PAG members and our colleagues have handled numerous cases in which the loss amount, whether based on actual or intended loss, overstated the culpability of our clients. For example, a client was charged with loan fraud. The client had submitted multiple fraudulent loan applications to different banks, but only some of the loans were approved and funded. Prior to *Banks*, the amounts from both the approved and rejected loans were included in the loss calculation, even though the rejected applications were failed attempts to obtain the subsequent successful loans. The client's prospective guideline range was based on both the successful and unsuccessful attempts. This seems excessive and unwarranted – essentially double counting the same wrongful conduct. By another measure, the client whose loss amount reflects both successful and rejected loans is punished equally as the person who successfully obtains the same total amount in loans. After *Banks*, only the successful loans were included in the loss calculation.

In another case involving payroll fraud, a client was charged with possessing and passing multiple fraudulent payroll checks. The total amount of fraudulent payroll checks in the client's possession was over $500,000, but the client only cashed approximately $30,000 worth of the checks. Pre-*Banks*, the loss amount was based on the total amount of fraudulent payroll checks that the client possessed, whether he had cashed them or not. Thus, a defendant who possesses 10 checks, but cashes and receives the proceeds from only 2 of them, is subject to the same loss amount as the defendant who cashes and receives the proceeds of all 10 checks.

And in a Medicare fraud case, a client was charged with billing Medicare for medical lab tests and providing a kickback to a marketing company and the company's doctor, who ordered the

[1] *See* U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 3 (Dec. 26, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

[2] *See* Proposed Amendments at 12.

tests. The lab tests were completed, the results were given to patients and their doctors, and there was no evidence that the tests were done incorrectly or were not medically necessary. The sentencing court calculated the loss amount based on the total amount that Medicare paid for the tests, even though there was no evidence the tests were improper. As the tests were a valid and necessary product that were actually provided, a more appropriate "loss" calculation would be based on the amount of the kickbacks or the amount of profit the defendant received from the offense.

These are just a few examples of how the current loss table, and the definition of loss, overstate the culpability of the defendant.

B. The Data

The actual sentencing practices of courts across the country also demonstrate that guideline ranges calculated under §2B1.1 result in unreasonably high sentences. In fiscal year 2022, only 40.1% of sentences imposed under §2B1.1 were within the guideline range.[3] While 13.5% of the sentences constituted a downward departure under §5K1.1, an extraordinary 41.8% of sentences constituted a downward variance from the guideline range.[4] In addition to the significant percentage of downward variances for §2B1.1 sentences, the extent of downward variances for economic crimes also was significant. For offenses involving fraud, theft, or embezzlement, the average percent decrease in sentence due to a downward variance was 58%, and for offenses involving forgery, counterfeit, or copyrights, the average percent decrease in sentence due to a downward variance was 71.2%.[5]

Older data compilations from the Commission also support the conclusion that sentencing courts find that the guideline range under §2B1.1, particularly the loss table, overstates the seriousness of the offense. In 2003, 84.5% of sentences under §2B1.1 were within the guideline range, but by 2012, only 50.6% of sentences were within the guideline range.[6] Over that same time period, the percentage of sentences that represented government-sponsored below-guideline sentences or downward variances rose.[7] Interestingly, as the percentage of within-guideline sentences went down from 2003-2012, the median loss for §2B1.1 offenders went up.[8] These trends from 2003–2012, and the 2022 snapshot of sentences imposed under §2B1.1, suggest that there are numerous cases in which the range calculated under this guideline and its misplaced reliance on loss amount overstates the seriousness of the offense and the culpability of the defendant. These

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[3] U.S. Sent'g Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* ("2022 Sourcebook") at 159, Table E-7 (2023) available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

[4] 2022 Sourcebook at 159, Table E-7.

[5] 2022 Sourcebook at 101, Table 40.

[6] U.S. Sent'g Comm'n, *Economic Crime Public Data Briefing* at 5, Fig. 1 (Jan. 5, 2019), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf

[7] *Id*.

[8] *Id.* at 7, Fig. 3.

figures warrant an in-depth study of the guideline prior to the promulgation of any amendments to it.

C. Critiques of §2B1.1

A number of courts and commentators have criticized §2B1.1's current approach, particularly its instructions for calculating loss and that number's ultimate influence on the offense level. At least one appellate judge has described the loss guideline as "fundamentally flawed, and those flaws are magnified where . . . the entire loss amount consists of intended loss."[9] Thus, where calculations under §2B1.1 led to patently unreasonable results, a sentencing court explained that it would fashion a sentence that would take the guidelines into account but focus more on the statutory sentencing factors.[10] In 2014, the American Bar Association proposed revising the economic crimes guidelines to better "capture[] the offense characteristics most relevant to sentencing . . . and [] place[] appropriate weight on the considerations of loss, culpability, and victim impact in relation to one another."[11] More recently, commenters have noted that the loss guideline is a "stubborn problem that has been explored by commentators repeatedly over the past thirty years."[12]

One common critique of the loss table and §2B1.1 is that it has become completely divorced from the empirical data regarding national sentencing practices that underlay the original formation of the Sentencing Guidelines.[13] The current guideline is no longer based on an empirical survey of sentences imposed for theft and fraud offenses. Instead, the loss table has become increasingly severe in response to high publicity events such as the 1989 savings and loan fraud crisis;[14] an attempt to equalize drug and fraud crimes by bringing fraud sentences in line with the draconian sentencing scheme in drug cases,[15] and through Congressional interventions like the Sarbanes-Oxley Act of 2003.[16] Each of these interventions brought §2B1.1

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[9] *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring).

[10] *See United States v. Adelson*, 441 F.Supp.2d 506, 512-15 (S.D.N.Y. 2006).

[11] American Bar Ass'n, A Report on Behalf of the ABA Criminal Justice Section, Task Force on the Reform of Federal Sentencing for Economic Crimes, Final Draft ("ABA Economic Crimes Report") at 9 (Nov. 10, 2014), available at: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf

[12] B. Boss & K. Kapp, How the Economic Loss Guideline Lost Its Way, and How to Save It, 18 Ohio St. J. Crim. L. 605 (2021) ("Boss & Kapp"); *see also* J. Felman, Reflection on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline, 27 Fed. Sent. R. 288 (2015); J. Hewitt, Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases, 125 Yale L. J. 1018 (2016).

[13] *See* Boss & Kapp at 613; *see also United States v. Musgrave*, 647 Fed. App'x 529, 530, 538 (6th Cir. 2016) (affirming downward variance for defendant with offense level of 25 and a $1.7 million loss to a sentence of one day of imprisonment, reasoning that "because the loss Guidelines were not developed using an empirical approach based on data about past sentencing practices, it is particularly appropriate for variances.").

[14] *See* Boss & Kapp at 610.

[15] *See id*. at 611 n.29.

[16] *See id*. at 612.

further away from the empirical data, undermining its ability to reflect a rough approximation of a sentence that would fulfill the purposes of sentencing under 18 U.S.C. § 3553(a).[17]

Other critiques of the loss table include its failure to distinguish between members of a conspiracy who receive no gain and those who profit greatly;[18] that under the intended loss calculation defendants whose schemes are "impossible or unlikely to occur" can be sentenced far more harshly than defendants who cause loss to actual victims; and that the loss table treats a defendant who causes diffuse loss to the government as equal to a defendant who causes out-of-pocket losses to individuals.[19]

Because the application of §2B1.1 often results in a sentencing range that overstates the seriousness of the offense and does not accurately reflect the culpability of a defendant, the PAG recommends that the Commission refrain from adopting its proposed amendment to §2B1.1 and instead move forward with an in-depth study of the guideline.

II. The Treatment of Youthful Individuals

The Commission is considering two proposals to address concerns raised by the sentencing of youthful offenders. Part A of the proposal offers three options for amending how criminal history is calculated for offenses committed prior to age 18. Part B amends §5H1.1 to permit a downward departure due to a defendant's youthfulness at the time of an offense.

A. Criminal History

The Commission proposes three different options for calculating criminal history under §4A1.2(d) for offenses committed prior to age 18. Option 1 assigns juvenile offenses 1 point; Option 2 does not score any criminal history points for juvenile adjudications; and Option 3 does not count juvenile adjudications or adult convictions committed by an individual who is less than 18 years old towards the calculation of criminal history points.

The PAG recommends Option 3, which does not consider any offense committed prior to age 18 in determining a defendant's criminal history score. The PAG supports this Option for three reasons: (1) caselaw and scientific evidence recognizing the significant differences between children and adults; (2) the significant variations across the country in how juvenile cases are treated; and (3) the due process concerns related to juvenile adjudications.

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[17] *See United States v. Johnson*, 2018 U.S. Dist. LEXIS 71257 at *11-12 (E.D.N.Y. Apr. 26, 2018) (reasoning that the "loss-enhancement numbers do not result from any reasoned determination of how the punishment can best fit the crime, nor any approximation of the moral seriousness of the crime").

[18] *See United States v. Watt*, 707 F.Supp.2d 149, 155 (D. Mass. 2010) (relying on the Third Circuit for the proposition that, as to peripheral defendants, the loss table can "overstate both the degree of [defendant's] criminality and his need to be corrected" (quoting *United States v. Stuart*, 22 F.3d 76, 82 (3d Cir. 1994)).

[19] *See* Boss & Kapp at 615-17.

1. *Children are not Adults*

Assigning criminal history points when a juvenile is sentenced as an adult ignores the substantial scientific evidence that, regardless of whether the proceeding was "adult" or "juvenile," individuals less than 18 years of age bear lesser culpability for their actions. As the Supreme Court has recognized, "children are constitutionally different from adults for purposes of sentencing."[20] "Because juveniles have diminished culpability and greater prospects for reform, [] 'they are less deserving of the most severe punishments.'"[21] There are

> three significant gaps between juveniles and adults. First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. [] Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings." [] And third, a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] depravity."[22]

These differences are not just common sense but are based on "science and social science as well."[23]

Just as the law on juveniles' lesser culpability has evolved in response to scientific evidence, the guidelines should do the same. Counting juvenile adjudications and adult convictions committed before the age of 18 towards a defendant's criminal history score disregards the science that demonstrates that the human brain is not fully developed until an individual is in their middle to late twenties.[24] Justice Kennedy noted in *Roper* that "any parent knows" that youth development continues beyond a child's 18th birthday.[25] "This understanding is not limited to parents. Car rental companies and insurers, for instance, charge significantly higher rental prices for drivers

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[20] *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

[21] *Id*. (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

[22] *Miller*, 567 U.S. at 471 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005)).

[23] *Id*. (citing *Roper*, 543 U.S. at 569 and identifying studies).

[24] *See* B.J. Casey et al., *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 Ann. Rev. L. & Soc. Sci. 203, 212-215 (2020); *see also* Ctr. for Law, Brain & Behavior, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers (2022), available at: https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence.

[25] *Roper*, 543 U.S. at 569.

under 25. As one scholar observed, '[parents, neuroscientists and care rental companies appear to be on the same track here; it is the criminal justice system that is out of sync.'"[26]

While the Commission's 2017 report on Youthful Offenders reflects the highest recidivism rates for youthful offenders, this does not undermine support for Option 3.[27] To the contrary, longer periods of incarceration reduce opportunities for education and employment. Youthful offenders miss these opportunities at key moments in their education and professional development, and once these opportunities pass them by, it is even more difficult for younger defendants to gain these important skills. This, in turn, results in increased recidivism. The recidivism results from youthful defendants lacking access to education and professional development, not just their youth. Studies by the Department of Justice do not support harsher and longer sentences for younger defendants; they suggest sentences that offer these defendants greater access to education and relevant employment, and life skills. Children do not belong in adult courts, jails and prisons, as this has the unintended consequence of increasing recidivism and results in collateral consequences such as reduced education continuation, housing and employment opportunities, and this in turn, leads to recidivism.[28] Similarly, juveniles who are transferred to adult courts have increased recidivism rates, which are likely caused by "[t]he stigmatization of other negative effects of labeling juveniles as convicted felons; [t]he sense of resentment and injustice juveniles feel about being tried and punished as adults; [t]he learning of criminal mores and behavior while incarcerated with adult offenders; [t]he decreased focus on rehabilitation and family support in the adult system."[29] What these studies demonstrate is that incarcerating youthful offenders and treating them like adult offenders has negative unintended consequences. It is the PAG's position that the sentencing guidelines should not exacerbate these unintended consequences by increasing criminal history based on offenses committed by juveniles.

Juvenile adjudications also are not the same as adult convictions. The goals of juvenile adjudications are different from those of adult courts, and these different goals impact the charging and confinement decisions in juvenile courts. Juvenile courts are designed to assist the

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[26] Francis X. Shen et al., Justice for Emerging Adults After Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older, N.Y.U. L. Rev. 101, 107 (2022) (citing David P. Farrington et al., Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing, 11 Criminology & Pub. Pol'y 729, 733 (2012) and David Pimentel, The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence, 46 Tex. Tech. L. Rev. 71, 100 (2013)).

[27] *See* U.S. Sent'g Comm'n, *Youthful Offenders in the Federal System* ("Youthful Offenders") at 49-50 (May 2017), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

[28] *See* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Treat Children as Children* at 1-3 (2022), available at: https://ojjdp.ojp.gov/about/ojjdp-priorities#treat-children-as-children.

[29] *See* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* at 7 (June 2010); *see also* National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, *Young Offenders: What Happens and What Should Happen* (February 2014).

entire family, not just the juvenile who is the focus of the proceeding. In the PAG's experience, nearly every juvenile case involves family circumstances that impact decisions about whether to convict or adjudicate a case, along with the length and type of sentence imposed. As a result, factors that have nothing to do with the culpability of the juvenile or the seriousness of the offense impact placement decisions. And these, in turn, impact whether the adjudication or conviction is scored for purposes of calculating criminal history under the guidelines.

For example, a juvenile delinquent who is not consistently attending school may be sent to a lock-down facility, to ensure that s/he finishes their formal education. One juvenile court judge who is familiar to a PAG member often says, "I am going to make sure of one thing – that you are going to graduate high school. Do you know how I know that? Because I am going to see to it." PAG members have handled cases where childrens cannot return to their families due to safety reasons, and if no suitable housing (foster care or a treatment bed) is available, by default these children must be housed in a lock-down facility. In Wyoming, the lock-down facilities are required to take juvenile delinquents, whereas the treatment facilities and foster families have no such requirement. Thus, sometimes, the lack of resources available for a less restrictive setting results in a juvenile spending time in a lock-down facility. That "term of imprisonment" may then become the basis for criminal history points in a later federal prosecution.

2. *Nationwide Variations in Juvenile Adjudications*

State court practices vary widely in how juveniles are charged and treated. There are different practices with respect to when individuals under the age of 18 are sentenced as adults. In North Carolina, it was not until the very end of 2019 when the age for adult convictions was raised from 16 to 18 years old. Until then, 16 and 17 year olds received adult convictions as a routine course, despite their youth.[30] In West Virginia, a defendant under 18 years of age who is convicted in adult court can still be sentenced as a juvenile, which is contrary to the practice in New Jersey and North Carolina, where defendants under 18 years of age convicted in adult court are sentenced as adults.[31] Thus, similarly situated defendants may have substantially different

[30] *See The Juvenile Justice Reinvestment Act* as part of the 2017 North Carolina State Budget.

[31] *See, e.g., United States v. Moorer*, 383 F.3d 164, 169 (3d Cir. 2004) (noting that New Jersey law, which does not "permit a judge to impose a juvenile 'sentence' based on an adult conviction for a crime" is "in marked contrast to the West Virginia law . . . which explicitly allows for a defendant under eighteen to be sentenced under juvenile delinquency law even after being convicted under adult jurisdiction"); *United States v. Clark*, 55 Fed. App'x 678, 679 (4th Cir. 2003) (noting that there is a "West Virginia sentencing scheme permit[ing] a defendant under eighteen who was convicted as an adult to be sentenced as a juvenile delinquent," but that "North Carolina has no analogous statutory provision").

criminal history scores, based on different state rules concerning the treatment of juvenile defendants. This results in unwarranted sentencing disparities and, unfairness.[32]

Similarly, juvenile defendants in many state jurisdictions are technically sentenced as adults — triggering criminal history points under Chapter 4 — even though these defendants are treated as juveniles by their state court systems.[33]

3. *Due Process*

While juvenile adjudications for delinquent behavior sometimes allow for more due process considerations than other juvenile court proceedings, that is not always the case and there are major differences compared to proceedings in adult courts. For example, in some states like North Carolina, there is no right to a jury trial for juveniles, which is a hallmark of the adult criminal justice system.[34] Similarly, juveniles in North Carolina do not possess other trial rights, such as bail or speedy trial unless the matter is transferred to the adult court.[35]

Additionally, counsel and even judges in juvenile courts advise juveniles that their juvenile record will not follow them, and that the documents concerning their proceeding will be sealed and their record will not impact them as adults. Unfortunately, this advice is wrong when these individuals are later convicted in federal court. In the PAG's experience, if juvenile records are available, and they often are, these records can be considered in the federal sentencing process. And in the PAG's experience, while it can be difficult, if not impossible, for defense counsel to obtain a client's juvenile records, it appears that probation has some success accessing these records. This can create challenges when defense counsel is trying to competently advise a client about his or her criminal history score and applicable guidelines range, and it can result in a client entering a guilty plea only to learn that the guidelines range is higher due to a juvenile adjudication that defense counsel had not considered.

For all of these reasons, the PAG believes that offenses committed before a defendant is 18 years old should not be considered in the calculation of a defendant's criminal history score, and it recommends that the Commission adopt Option 3.

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[32] A myriad of additional factors exist which cause disparities in juvenile justice, including racial and ethnic considerations. *See, e.g.*, Office of Juvenile Justice and Delinquency Prevention, *Literature Review: Racial and Ethnic Disparity in Juvenile Justice Processing*, available at: https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity; *see also* Office of Juvenile Justice and Delinquency Prevention, *National Racial and Ethnic Disparities Databook,* available at: https://www.ojjdp.gov/ojstatbb/r-ed-databook/.

[33] *See, e.g., United States v. Jones*, 415 F.3d 256, 260, 264 (2d Cir. 2005) (noting that "[y]outhful offender status carries with it certain benefits, such as privacy protections," and "New York [State] Courts do not use youthful offender adjudications as predicates for enhanced sentencing," yet federal courts have "still found it appropriate to consider the adjudications for federal sentencing purposes.").

[34] *See McKiever v. Pennsylvania*, 403 U.S. 528, 545-551 (1971).

[35] *See, e.g.*, N.C.G.S. § 7B-2204 (right to pretrial release & detention). The procedural rights that juveniles have in connection with adjudication proceedings are set forth by statute. *See, e.g.*, N.C.G.S. § 7B-2400-2414 (providing for notice, the right to counsel and confronting witnesses, and discovery).

B. Downward Departure

The Commission seeks comment on whether §5H1.1 should be amended to include broader consideration of youthfulness. As set forth in Part VI of these comments, the PAG suggests that the Commission delete the departure provisions in order to simplify the guidelines and bring them more in line with modern sentencing law and practice. If, however, the Commission decides to retain departures as part of the guidelines, the PAG supports broadening the availability of downward departures due to a defendant's youth for the same reasons discussed above.

Based on the Commission's 2017 study, it appears that courts granted downward departures to youthful offenders at the same rates that it granted them for all other types of offenders.[36] This suggests that courts are not considering the special and unique characteristics of youthful offenders, and that is not surprising. Currently, §5H1.1 as written does not encourage downward departures based on age. It instructs that "[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[37] It goes on to provide the example of a defendant who is "elderly and infirm" as a possible basis for a downward departure.

Given how age is presented in §5H1.1, there is little support for considering the science and development of youthful offenders, particularly because courts are instructed to only consider age if it is "present to an unusual degree and distinguish[es] the case from the typical" guideline case. At the very least, the PAG suggests that the commentary to this guideline include information and citations to the Supreme Court cases that discuss the "constitutionally different" considerations that apply to children and adults, and to allow courts to consider this information when determining the appropriate guidelines range.

III. Acquitted Conduct

The Commission proposes amending the guidelines to address the use of acquitted conduct in determining a sentence, and it presents three options. The PAG describes its concerns about the use of acquitted conduct at sentencing and explains why it supports Option 1 over the other two options proposed.

A. The Use of Acquitted Conduct in Sentencing

The PAG reaffirms its position that acquitted conduct should not be considered when a federal district court is imposing a sentence.[38] The PAG maintains this position for several well-

[36] *See* Youthful Offenders at 37-41.

[37] §5H1.1.

[38] *See* PAG Letter to the Sentencing Commission at 33-36 (Mar. 14, 2023) ("PAG 2023 Letter"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=844.

recognized reasons. The use of acquitted conduct at sentencing "raises important questions that go to the fairness and perceived fairness of the criminal justice system."[39]

Yesterday, the Supreme Court decided *McElrath v. Georgia*, 601 U.S. __, 2024 WL 694921 (2024) which considers what constitutes an acquittal for purposes of the Double Jeopardy Clause. While this is a different context than federal sentencing procedure, *McElrath* is notable for its discussion of the broad protection that an acquittal affords a defendant. *McElrath* explains that an acquittal has been defined as "'any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.'"[40] This definition is broader than that proposed by the Commission and even by the PAG.

In *McElrath*, the defendant was charged by the state of Georgia with committing malice murder, felony murder and aggravated assault in connection with the killing of his mother. At trial, the defendant presented an insanity defense. The jury returned a verdict of not guilty by reason of insanity on the malice murder charge, and guilty but mentally ill on the felony-murder and aggravated assault charges.[41] On appeal, the defendant argued that his conviction on the felony murder count was "repugnant" to the jury's finding that he was not guilty by reason of insanity on the malice murder charge. Under Georgia law, the repugnancy doctrine allows a state court to "set aside a verdict as repugnant when there are 'affirmative findings by the jury that are not legally and logically possible of existing simultaneously.'"[42] The Supreme Court of Georgia agreed, because the verdicts for the malice murder and felony murder counts involved "different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury."[43] Instead of vacating only the felony murder conviction, the Supreme Court vacated the malice murder and felony murder convictions.[44]

The state then proceeded to re-try the defendant for the malice murder charge, and the defendant argued that this was prohibited under the Double Jeopardy Clause. The trial court disagreed, and the defendant appealed. The Supreme Court of Georgia affirmed the trial court's decision, and the defendant then appealed to the U.S. Supreme Court.[45]

The Supreme Court explained that "[a]n acquittal is an acquittal, even 'when a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very same issue of ultimate fact."[46] "Once there has been an acquittal, our cases prohibit *any* speculation about the reasons for a jury's verdict – even when there are

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[39] *McClinton v. United States,* 600 U.S. __, 143 S.Ct. 2400, 2401 (2023) (Sotomayor, J., statement on denial of certiorari) (citation omitted).

[40] *McElrath*, 2024 WL 694921, at *4 (quoting *Evans v. Michigan*, 568 U.S. 313, 318 (2013)).

[41] *See id*. at *3.

[42] *Id*. (quoting *McElrath v. State*, 308 Ga. 104, 112 (2020)).

[43] *Id*. (quoting *McElrath,* 308 Ga. at 112).

[44] *See id*.

[45] *See id*. at *4.

[46] *Id*. at *6 (quoting *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016)).

specific jury findings that provide a factual basis for such speculation – 'because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations.'"[47] "We simply cannot know why the jury in McElrath's case acted as it did, and the Double Jeopardy Clause forbids us to guess. 'To conclude otherwise would impermissibly authorize judges to usurp the jury right.'"[48]

Given the recency of *McElrath*, the PAG has not had the opportunity to fully consider its impact on the issues addressed here, but the PAG submits that if permitting speculation about the grounds for a jury's verdict in the context of the Double Jeopardy Clause results in judges "usurp[ing] the jury right," then sentencing judges also "usurp the jury right" when they consider acquitted conduct in sentencing.

Juries are representatives of the community and act as "a bulwark between the State and the accused."[49] Because an acquittal reflects the jury's - and therefore the community's – rejection of the government's request to punish an individual for an alleged crime, the acquittal is "'accorded special weight.'"[50] But treating an acquittal as a nullity for sentencing purposes gives no special weight to the jury's determination. Instead, this places acquitted conduct in the same category as any other sentencing factor. The use of acquitted conduct at sentencing is thus inconsistent with the accepted view that "[s]o far as the criminal justice system is concerned, the defendant 'has been set free or judicially discharged from an accusation; released from the charge or *suspicion* of guilt.'"[51] And, the use of acquitted conduct at sentencing may dissuade defendants with strong cases from proceeding to trial, raising concerns about procedural fairness.[52] The PAG has previously raised this concern, and in the PAG's experience, this occurs in the federal system with a degree of frequency.[53]

In its Synopsis of Proposed Amendment, the Commission notes that only 0.4 % (286) of all sentenced individuals in fiscal year 2022 were acquitted of at least one offense or found guilty of only a lesser included offense.[54] This statistic could be read to suggest that any proposed amendment regarding acquitted conduct will impact relatively few individuals. The PAG, however, views this differently. PAG members have seen the impact that the use of acquitted conduct at sentencing has on our clients' decisions to go to trial. The use of acquitted conduct in sentencing deters our clients from trying cases and undermines their constitutional right to have their cases decided by a jury.

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[47] *Id*. (quoting *Smith v. United States*, 599 U.S. 236, 252-53 (2023)).

[48] *Id*. (quoting *Smith*, 599 U.S. at 252).

[49] *Id*. (quoting *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012)).

[50] *Id.* at 2402 (quoting *United States v. DiFrancesco,* 449 U.S. 117, 129 (1980)) (distinguishing acquitted conduct from conduct never charged and considered by a jury).

[51] *Id.* (quoting *State v. Marley,* 321 N.C. 415, 424 (1988)).

[52] *Id.* at 2402.

[53] *See* PAG 2023 Letter at 33-36.

[54] *See* Proposed Amendments at 39.

Indeed, the more salient statistic is that in fiscal year 2022 nearly all sentenced individuals, 97.5%, were convicted through a guilty plea.[55] When our clients learn that they can be sentenced for conduct of which they are acquitted, that knowledge often discourages them from testing the government's proof through a public trial. Without access to sworn public testimony and the crucible of cross-examination, it becomes much more difficult to ferret out mistakes, and even identify bad actors. And acquitted conduct sentencing encourages prosecutors to "overcharge," especially if proof beyond a reasonable doubt is lacking as to some counts, but perhaps not all.[56]

For defendants who exercise the right to proceed to trial, the use of acquitted conduct at sentencing may cause the public and the jurors who rendered the not guilty verdict to question whether justice is being done, thereby undermining the legitimacy of the criminal justice system.[57] Indeed, the use of acquitted conduct to substantially increase a defendant's sentence may constitute a Sixth Amendment violation.[58]

A PAG member is currently litigating whether acquitted conduct can be used in determining the sentence for a client who went to trial and was acquitted of one count of conspiracy to defraud the United States and pay and receive healthcare kickbacks, but convicted of three counts of paying and receiving kickbacks and one count of conspiracy to launder monetary instruments.[59] The alleged benefit received from the convicted kickbacks is $64,821.77, resulting in a guidelines sentencing range of 27-33 months. The government, however, has asked the court to sentence the defendant based on $96,071,474.18 in benefits it alleged were received from the entire kickback conspiracy of which the defendant was, of course, acquitted. The use of acquitted conduct in sentencing this defendant leaves him facing a guidelines sentencing range of 188-235 months. This is a clear example of how the use of acquitted conduct at sentencing can lead to incredibly unjust results.

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[55] *See* U.S. Sent'g Comm'n, 2022 Datafile, USSCFY22, Figure 5, *Guilty Pleas and Trials by Type of Crime, Fiscal Year 2022*, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publication/annual-reports-and-sourcebook/2024/figure05.pdf . In comparison, pre-guidelines statistics indicate that in 1970, 15 percent of federal cases went to trial, and trials have been on the decline since then. *See* Hindelang Criminal Justice Research Ctr., Univ. at Albany Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.), available at: https://www.albany.edu/sourcebook/pdf/t5222010.pdf .

[56] "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by Statute, the decision whether or not to prosecutor, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[57] *McClinton,* 143 S.Ct. at 2402-03.

[58] *See, e.g., Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., Thomas, J., & Ginsberg, J., dissenting from denial of certiorari).

[59] During trial, one count of engaging in a monetary transaction in property derived from specified unlawful activity, namely kickbacks, was dismissed with prejudice as a result of the government's failure to prove a monetary transaction with Anti-Kickback Statute proceeds when its expert utilized tracing methodology not permitted by the Fifth Circuit.

For all these reasons, the PAG fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing.

B. The PAG Supports Option 1

Of the three options proposed by the Commission to address the issue of the use of acquitted conduct at sentencing, Option 1 comes the closest to addressing the PAG's concerns and is therefore the option endorsed by the PAG.

Option 2, which would create a downward departure recommendation, does not prevent a sentencing court from calculating guidelines based on acquitted conduct and only suggests a departure in cases where the use of acquitted conduct has a "disproportionate" or "extremely disproportionate" impact on the guideline range. In the PAG's view, under Option 2, use of acquitted conduct would only be discouraged in a limited number of cases. Option 2 does not adequately address the PAG's concerns that acquittals be treated as inviolate; that the use of acquitted conduct at sentencing unfairly discourages our clients from exercising their jury trial rights; and that the public is losing confidence in the fairness of our criminal justice system.

Option 3, like Option 2, does not prevent a sentencing court from calculating the guidelines based on acquitted conduct, and it does not recommend a downward departure for cases where the guideline range is disproportionately impacted by the use of acquitted conduct. Option 3 raises the standard of proof for acquitted conduct from a preponderance of evidence to the clear and convincing evidence standard. If a sentencing judge determines by clear and convincing evidence that conduct occurred, Option 3 would allow that judge to freely use acquitted conduct that a sworn jury has rejected. Again, like Option 2, this proposal fails to adequately address the PAG's concerns. However, given the three options set forth, if the Commission adopts Option 1, the PAG recommends that Option 3 also be adopted to apply whenever a sentencing court considers acquitted conduct to determine the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. This approach serves to reinforce that acquitted conduct requires a different standard of proof and that this evidence must be assessed and considered sparingly, and with added scrutiny, if at all.

C. Issues for Comment

The PAG provides the following comments in response to the Commission's numbered requests.

1. With respect to Option 1, the Commission asks whether it should prohibit the consideration of acquitted conduct for purposes other than determining the guideline range, such as prohibiting the consideration of acquitted conduct in determining the sentence to impose within the guideline range; whether a departure from the guideline range is warranted; or prohibiting the consideration of acquitted conduct for all purposes when imposing a sentence. The PAG's position is that acquitted conduct should not be considered for any purpose in determining a sentence. Only a complete prohibition addresses all of the PAG's concerns detailed above. A complete prohibition allows the jury's verdict to remain inviolate, it allows defendants to exercise their jury trial rights without fear of the government obtaining a "second bite at the apple" after an acquittal, and it maintains the fairness of federal sentencing.

The Commission also asks about the interaction between a complete prohibition on the consideration of acquitted conduct at sentencing and 18 U.S.C. § 3661, which provides that "[n]o 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." The broad language of § 3661 should be viewed within the historical context in which it was written and the legislative history surrounding its passage.

Section 3661 was originally enacted as part of the Organized Crime Control Act of 1970.[60] At that time, individualized sentencing was the norm, sentencing ranges focused on rehabilitative progress, and federal parole still existed. Fifteen percent of federal criminal cases proceeded to trial, and federal dismissal or acquittal rates were 34.8%.[61] Nothing in the legislative history, even in the Title X statutory provisions enacted to enhance penalties based on recidivism or leadership, suggests that acquittals were intended to be included in the "conduct of a person convicted of an offense" for purposes of sentencing. This context, combined with the later impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) on Sixth Amendment jurisprudence, makes it difficult to reconcile a broad reading of § 3661 with allowing a district court judge to consider acquitted conduct at sentencing. "While *Alleyne's*[62] requirement that the jury, not a judge, find facts fixing the permissible sentencing range applies to *statutory* limitations, it is hard to understand why the same principle would not apply to dramatic departures from the Sentencing Guidelines range based on acquitted conduct."[63]

Alternatively, should the Commission feel constrained to avoid a total prohibition on the use of acquitted conduct by the breadth of the decades-old § 3661, pursuant to 28 U.S.C. § 994(w)(3), the Commission may recommend legislation "that the Commission concludes is warranted" based on its analysis of sentencing data provided by the district courts. The PAG suggests that a clarifying amendment of 18 U.S.C. § 3661 to expressly preclude the consideration of acquitted conduct is warranted and urges the Commission to recommend such legislation.

The Commission also seeks comment on whether more expansive prohibitions on the use of acquitted conduct would exceed the Commission's authority under 28 U.S.C. U.S.C. § 994 or other congressional directives. As noted above, the guidelines have long limited the use of the factors contained in Chapter 5, such as age, mental and emotional conditions, or lack of guidance as a youth. There is nothing in 28 U.S.C. § 994 that limits the Commission's authority to discourage the use of disfavored facts. Rather, the Commission's authority under 28 U.S.C. § 994 is couched in expansive terms. For example, the Commission is directed to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in § 3553(a)(2)."[64] When establishing categories of offenses and policy

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[60] *See* 18 U.S.C. § 3577. Section 3661 was later renumbered as part of the Sentencing Reform Act of 1984.

[61] *See* Hindeland Criminal Justice Statistics; *see also* 116 Cong. Rec. 18830-18957 (1970) (remarks by Congressman McClellan in Response to American Civil Liberties Union Charges against S.30, June 9, 1970 Debate).

[62] *See Alleyne v. United States*, 570 U.S. 99, 103 (2013).

[63] *United States v. Bell*, 808 F.3d 926, 931 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*).

[64] 28 U.S.C. § 994(a)(2).

statements governing the imposition of particular sentences, the Commission "shall consider," among other matters, any "circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;" "the community view of the gravity of the offense;" and "the public concern generated by the offense."[65] Also, when establishing categories of defendants and policy statements regarding the imposition of various sentences, the Commission can consider the relevance of factors that include the defendant's role in the offense and criminal history.[66] All of these provisions authorize the Commission to define the parameters of the factors that a sentencing court can consider, and the PAG submits that limiting the consideration of acquitted conduct is no different.

Finally, when determining the appropriateness of incremental penalties, the Commission is directed to promulgate guidelines based on convictions, not convictions *and* acquitted conduct.[67] This appears to preclude the use of acquitted conduct. "It is difficult to square this 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."[68] In the PAG's reading of 28 U.S.C. § 994, the Commission has the authority to limit the use of acquitted conduct in sentencing.

The Commission requests comment on whether it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps. The PAG believes that a policy statement, in addition to Options 1 and 3, would be entirely appropriate. For all of the reasons described above, the PAG recommends a broad policy statement against the use of acquitted conduct at any stage of the sentencing process. At a minimum, the PAG recommends that the policy statement address the one area where the use of acquitted conduct is still possible under Option 1: when determining the sentence to impose within the guideline range or whether a departure from the guideline range is warranted.

2. The Commission seeks comment on how to define acquitted conduct. The PAG urges the Commission to adopt the more precise and broader definition of acquitted conduct used in the Prohibiting Punishment of Acquitted Conduct Act of 2023.[69] This bill defines acquitted conduct as:

> (1) an act –
>
> (A) for which a person was criminally charged and adjudicated not guilty after trial in a Federal, State, or Tribal court; or
>
> (B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication hearing; or

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[65] 28 U.S.C. §§ 994(c)(2), (4) & (5).

[66] *See* 28 U.S.C. §§ 994(d)(9) & (10).

[67] *See* 28 U.S.C. § 994 (l)(1).

[68] *See Watts*, 519 U.S. at 168-69 (Stevens, J., dissenting).

[69] *See* Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (2023).

> (2) any act underlying a criminal charge or juvenile information dismissed –
>
> (A) in a Federal court upon a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure; or
>
> (B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.[70]

This proposed definition addresses the PAG's concerns regarding the use of acquitted conduct in several ways. First, the proposed definition is easy to apply to a broad array of conduct, however uniquely defined by different jurisdictions across the country. Second, even though Congress did not enact this legislation in 2023, a prohibition against punishment for acquitted conduct has enjoyed broad bipartisan support for several years. And finally, this proposed definition removes ambiguity under the Double Jeopardy Clause as it includes both underlying acts as well as criminally charged acts and it provides a uniform definition across multiple jurisdictions.

3. The Commission asks for comment about its proposed language in Option 1 that excludes certain conduct from the definition of acquitted conduct. The proposed definition would exclude "conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt."[71] As the PAG explained in its comment on the Commission's proposal regarding acquitted conduct last year, this issue of "overlapping conduct" is one that

> as a practical matter, [] seems like an unworkable task for a sentencing court to undertake. The PAG's position is that a bright-line rule precluding the use of acquitted or uncharged conduct in determining a defendant's sentence will address this concern and eliminate the need for time-consuming mini-trials at sentencing to determine the significance, if any, of "overlapping" conduct.[72]

The PAG notes that if the Commission were to define acquitted conduct as the PAG recommends, consistent with the proposed 2023 legislation discussed above, then the consideration of overlapping conduct would rarely, if ever, arise. And while the various hypothetical situations that the Commission posed last year are thought-provoking and raise interesting concerns, the reality in PAG members' experience is that it is difficult, if not impossible, for the PAG to identify cases involving overlapping conduct. The PAG welcomes the opportunity to consider this issue and discuss it further during the upcoming March hearings.

4. The Commission seeks comment about potential amendments to address acquittals for reasons unrelated to the substantive evidence. The PAG maintains that none of the options should be revised to exclude acquittals based on reasons unrelated to substantive evidence. Exclusion of such acquittals from the definition of acquitted conduct suggests that procedures designed to safeguard the fairness of criminal proceedings are mere "technicalities."

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[70] *See id*. at Sec. 2, available at: https://www.congress.gov/bill/118th-congress/senate-bill/2788/text?s=1&r=1&q=%7B%22search%22%3A%22S.2788%22%7D.

[71] *See* Proposed Amendment at 42.

[72] *See* PAG 2023 Letter at 35.

For example, proper venue is twice enshrined in the Constitution,[73] and was first listed in our nation's Declaration of Independence. "Proper venue in criminal proceedings was a matter of concern to the Nation's founders."[74] This was for good reason. Proper venue protects the due process rights of defendants from litigating in a distant forum.[75] It allows local communities to prosecute acts occurring in their jurisdictions, thereby strengthening their oversight role as jurors,[76] and proper venue ensures that cases are tried where the evidence is most easily accessible.[77] Moreover, differing cultural norms in our geographically vast country encourages civic participation by juries; avoids the perception or practice of forum shopping; and reaffirms that our criminal justice system is fair and accessible. Venue is not a technicality, nor is it any lesser a constitutional protection than the standard of proof beyond a reasonable doubt.

Similarly, the statute of limitations bolsters due process rights designed "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[78] Statutes of limitations enhance predictability and a point certain beyond which a defendant's fair trial rights will be prejudiced. Excluding acquittals based on stale claims undercuts the legislative policy judgments and due process considerations the statutes of limitations were designed to reinforce.

The PAG sees no principled basis by which "non-substantive" bases for an acquittal should be excluded from limiting or prohibiting the use of acquitted conduct in sentencing.

IV. Circuit Conflicts

The Commission proposes resolving two circuit conflicts regarding: (1) the meaning of "altered or obliterated serial number" in §2K2.1(b)(4)(B)(i); and (2) whether a conviction for 18 U.S.C. § 922(g)(1) can be grouped with a drug trafficking count when a defendant also is convicted of violating 18 U.S.C. § 924(c) based on the drug trafficking count.

A. "Altered or Obliterated Serial Number" in §2K2.1(b)(4)(B)(i)

A defendant with a conviction for a firearms offense faces a 4-level enhancement "[i]f . . . any firearm had an altered or obliterated serial number."[79] There is a circuit split as to whether this

[73] Article III, § 2, cl. 3 "Trial of all Crimes…shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const., amend. VI.

[74] *United States v. Cabrales*, 524 U.S. 1, 6 (1998).

[75] *See United States v. Cores*, 356 U.S. 405, 407 (1958).

[76] *See United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)

[77] *See Travis v. United States*, 364 U.S. 631, 640 (1961)(quoting *Cores*, 356 U.S. at 407) (Harlan, J., dissenting).

[78] *Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

[79] §2K2.1(b)(4)(B)(i).

enhancement applies where a serial number is legible, even if it is scratched or defaced, or, whether the enhancement applies only in cases where the serial number cannot be discerned.[80]

The Commission offers two proposals for resolving this conflict. Option 1 requires that a serial number be "rendered illegible or unrecognizable to the naked eye" in order for the enhancement to apply. Option 2 applies the enhancement even where the serial number remains legible. The PAG recommends that the Commission adopt Option 1 because it better balances the purpose of this enhancement with its strict liability application.

While Option 1 interprets the phrase "altered or obliterated" narrowly, the PAG submits that this is appropriate because this is a strict liability enhancement. "[I]t applies 'regardless of whether the defendant knew or had reason to believe that the firearm . . . had an altered or obliterated serial number.'"[81] "It does not require any showing that the defendant was the one who damaged the serial number."[82]

Applying this provision when a serial number is illegible ensures that it does not sweep too broadly. For example, under Option 2, this enhancement could be applied where the slightest scratch results in a defendant receiving a 4 level increase, even where the serial number can be deciphered. That creates an absurd result, particularly if the defendant was not the person who scratched or defaced the firearm. If a serial number cannot be deciphered, there is arguably a purpose in more severely punishing a defendant for possessing a firearm that is more difficult to trace. But that rationale does not apply where the serial number is decipherable and can be traced. There is no reason to more severely punish that defendant, and this approach better serves the purpose of this enhancement.

Section 2K2.1(b)(4)(B)(i) "is intended to 'discourag[e] the use of untraceable weaponry,' and this purpose is advanced by 'punishing possession of weapons that *appear* more difficult to trace, [which] necessarily deters traffic in weapons that are *impossible* to trace.'"[83]

> On the street, where these guns often trade and where microscopy is rarely available, one cannot readily distinguish between a serial number that merely *looks* untraceable and one that actually *is*. At that level it is appearances that count: A gun possessor is likely to be able to determine only whether or not his firearm *appears* more difficult, or impossible to trace.[84]

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[80] *Compare United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009)(finding that this enhancement applies even if "damage to a serial number [] did not render it unreadable" and affirming application of enhancement where serial number was legible); *United States v. Harris*, 720 F.3d 499, 501 (4th Cir. 2013) (affirming application of the enhancement where the serial number "had been gouged and scratched, rendering it less legible, but arguably not illegible"); *United States v. Millender*, 791 Fed. App'x 782, 783-84 (11th Cir. 2019) (affirming application of the enhancement where "the serial number was severely scratched but legible") *with United States v. Sands*, 948 F.3d 709, 715 (6th Cir. 2020) ("a serial number that is visible to the naked eye is not 'altered or obliterated'" for purposes of this enhancement); *United States v. St. Hilaire*, 960 F.3d 61, 66 (2d Cir. 2020) (same).

[81] *Sands*, 948 F.3d at 713 (quoting §2K2.1 cmt. n.8(B)) (additional citation omitted).

[82] *Id*.

[83] *Id*. at 714 (quoting *United States v. Carter*, 421 F.3d 909, 915 (9th Cir. 2005)).

[84] *Sands*, 948 F.3d at 717 (quoting *Carter*, 421 F.3d at 914-915).

"Any person with basic vision and reading ability would be able to tell immediately whether a serial number is legible. Thus, individuals may be discouraged from acquiring weapons that fall within the ambit of §2K2.1(b)(4)(B), with serial numbers they cannot read."[85]

Option 1 "draws a clear line that should lessen confusion and inconsistency in the guideline's application, while at the same time leaving the district courts with appropriate discretion to conduct necessary factfinding at sentencing."[86] This approach:

> best comports with the ordinary meaning of "altered"; it is readily applied in the field and in the courtroom; it facilitates identification of a particular weapon; it makes more efficient the larger project of removing stolen guns from circulation; it operates against mutilation that impedes identification as well as mutilation that frustrates it; and it discourages the use of untraceable weapons without penalizing accidental damage or half-hearted efforts.[87]

For these reasons, the PAG recommends that the Commission adopt Option 1.

B. Grouping of Firearms and Drug Trafficking Offenses

Three appellate courts have found that a drug trafficking count should be grouped with a felon in possession count when a defendant also is convicted of violating 18 U.S.C. § 924(c) based on the drug trafficking charge.[88] In contrast, the Court of Appeals for the Seventh Circuit has held that drug trafficking and firearms counts should not be grouped when there also is a conviction for 18 U.S.C. § 924(c).[89] The Commission proposes to resolve this circuit split by endorsing the grouping of drug trafficking and firearms counts, even when a defendant is convicted of 18 U.S.C. § 924(c). The Commission's proposal amends the Commentary to §2K2.4 to clarify that a felon in possession count and a drug trafficking count underlying a conviction under 18 U.S.C. §924(c) should be grouped under §3D1.2.

Consistent with its previous position on this issue the PAG supports the Commission's approach and recommends that the Commentary to §2K2.4 be amended as the Commission proposes.[90] This is consistent with the purpose of the grouping rules, which are designed "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct. . . . Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines."[91]

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[85] *Sands*, 948 F.3d at 717.

[86] *Sands*, 948 F.3d at 717.

[87] *St. Hilaire,* 960 F.3d at 66.

[88] *See United States v. Bell*, 477 F.3d 607 (8th Cir. 2007); *United States v. Gibbs*, 395 Fed. App'x 248 (6th Cir. 2010); *United States v. King*, 201 Fed. App'x 715 (11th Cir. 2006).

[89] *See United States v. Sinclair*, 770 F.3d 1148 (7th Cir. 2014).

[90] *See* Letter from PAG to U.S. Sent'g Comm'n at 22-24 (Aug. 10, 2018), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/PAG.pdf.

[91] U.S.S.G. Ch. 3, pt. D, introductory cmt.

In contrast to the PAG's previous approach of amending the commentary to §3D1.2, the PAG believes that amending the commentary to §2K2.4 more directly addresses the concern raised in *Sinclair*, which focuses on the language of the commentary to §2K2.4. That commentary instructs that specific offense characteristics for possessing, brandishing, using or discharging a firearm should not be applied to the guidelines for an underlying offense.

"When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," the counts should be grouped.[92] Under the drug trafficking guideline, possessing a dangerous weapon, including a firearm, is a specific offense characteristic that results in a 2 level enhancement.[93] Under the firearms guideline, using or possessing a firearm in connection with another felony offense is a specific offense characteristic that results in a 4 level enhancement.[94] "[F]irearm and drug trafficking offenses are frequently interrelated and result in reciprocal offense characteristic enhancements. These counts therefore are grouped together pursuant to §3D1.2, often without note."[95]

If drug trafficking and firearms counts are not grouped, it results in a higher offense level because the combined offense level is calculated by imposing an increase according to the table in §3D1.4. Since drug trafficking and firearms offenses are often charged together precisely because these offenses are closely related, not grouping these counts together "will mean a higher offense level which will often lead to a longer sentence."[96] This is contrary to the intent and purpose of the grouping rules. "Convictions on multiple counts should not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines."[97] Convictions for drug trafficking, felon in possession and using or possessing a firearm in furtherance of drug trafficking are separate offenses, but "they do not 'represent additional conduct that is not otherwise accounted for by the guidelines.'"[98] "If anything, the policy behind grouping applies with even more force to defendants [with these three convictions], who are already being sentenced to a mandatory 60 months for the § 924(c) count."[99]

> If a defendant is being charged with drug trafficking and felon-in-possession offenses, then almost always the government can add a § 924(c) count for possessing a firearm in furtherance of the drug offense. Under the panel's decision [in *Sinclair*], the defendant now faces a higher

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[92] §3D1.2(c).

[93] *See* §2D1.1(b)(1).

[94] *See* §2K2.1(b)(6)(B).

[95] *Bell*, 477 F.3d 607, 615 (8th Cir. 2007) (citing cases, including an unpublished decision from the 7th Circuit that endorses grouping, *United States v. Versey*, 16 Fed. App'x 500, 502 (7th Cir. 2001)).

[96] *Sinclair*, 770 F.3d at 1159 (Williams, J. & Posner, J., dissenting from decision not to hear case *en banc*).

[97] *Id*. at 1160.

[98] *Id*. (quoting U.S.S.G. Ch. 3, pt. D, introductory cmt.).

[99] *Id*.

> sentence for substantially the same conduct, not just once (for the § 924(c) count), but twice (with no grouping).[100]

Finally, as the dissenting judges in *Sinclair* point out, "[n]either the government nor the panel's opinion points to any cases where a court disallowed grouping of these types of counts because a § 924(c) count was also charged."[101]

The panel opinion in *Sinclair* is an outlier, and the PAG urges the Commission to clarify the grouping rules by adopting the proposed amendment to the commentary under §2K2.4.

V. Miscellaneous Amendments

The Commission is proposing amendments related to six miscellaneous guideline issues. The PAG offers comments on two issues: (1) application of the base offense levels in §2D1.1(a)(1)-(4); and (2) the scope of the definition of "sex offense" in the newly promulgated §4C1.1(b)(2).

A. The Base Offense Levels in §2D1.1(a)(1)-(4)

The Commission addresses the issue of when the enhanced base offense levels at §§2D1.1(a)(1)-(4) should apply, and offers two options. The first option proposes amending §§2D1.1(a)(1)-(4) to apply these offense levels when a defendant is convicted under 21 U.S.C. §§ 841 or 960, and is subject to a statutorily enhanced sentence for the offense of conviction because the specific statutory elements are established. Option 2 proposes amending §§2D1.1(a)(1)-(4) to apply when a defendant is convicted under 21 U.S.C. §§ 841 or 960, and the offense "involved" the statutory requirements. Both options clarify that where the application of an offense level requires that the defendant also have one or more prior convictions, that those convictions be established by the filing of an information under 21 U.S.C. § 851.[102]

The PAG understands that this proposed amendment addresses an issue raised by the Federal Defenders, in light of the First Step Act.

> While Congress swapped out "felony drug offense" from the mandatory minimum penalties in 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), 960(B)(1) and 960(b)(2) [which reflect the most serious offenses], it failed to do the same in the remainder of these statutes, including in §§ 841(b)(1)(C) and 960(b)(3). There is no rational explanation for this omission, and its consequences are severe: it requires a lesser showing to trigger mandatory life under §§ 841(b)(1)(C) and 960(b)(3) than it does to trigger mandatory life under the more serious [subsections]. This anomaly means that a person with a less serious criminal history, who traffics in a lower quantity of drugs, would be

[100] *Sinclair*, 770 F.3d at 1160.

[101] *Id*. at 1160-61.

[102] *See, e.g.*, §§2D1.1(a)(1)(A) & (B) & §2D1.1(a)(3).

> subject to a mandatory life penalty, but if that same person was convicted of selling more drugs, the mandatory life penalty would not be triggered.[103]

In effect, §2D1.1(a)(1)(B) could be "interpreted to recommend a guideline sentence of life in cases where the statutory minimum sentence is not life, but twenty years."[104] As the Defenders explain, the base offense levels in §§2D1.1(a)(1)-(4) "should recommend a life sentence only for an individual convicted of distribution resulting in death or serious-bodily injury, where the government filed a § 851 information, and the court sustained it."[105] In practice, "courts have long applied those elevated base offense levels regardless of whether the offense of conviction established the death- or serious-bodily-injury resulting element, and even where the government declined to seek the statutorily specified § 851 enhancement."[106]

The PAG generally agrees with the Defenders' analysis and supports Option 1 because it requires the government to prove that the statutory elements for the enhanced penalty are met. Option 2 would allow the increased base offense to be applied based on relevant conduct, when the government establishes that an offense involved the statutory factors. Given the significant increase that results from these higher offense levels, the PAG agrees that these enhanced sentences should only be imposed in those limited cases where there is sufficient proof that the statutory elements for enhancement are met.

While the PAG supports Option 1, it has questions about relying on the filing of § 851 informations, and how that will impact the small group of defendants subject to these enhanced penalties. The PAG is interested in data reflecting differences in sentences for defendants who are subject to these enhanced base offense levels based on the filing of an § 851. The PAG remains particularly concerned about increases in the application of the § 851 enhancement in light of the Commission's 2018 findings that § 851 enhancements are applied "inconsistently, with wide geographic variations in the filing, withdrawal, and ultimate application of the 851 enhancements for eligible drug trafficking offenders."[107] This is compounded by the PAG's further concern that the enhanced base offense levels in §§2D1.1(a)(1)-(4) open the door to unwarranted disparity due to localized prosecutorial decisions. As reflected in the data that the Commission has collected and analyzed, in fiscal year 2016, the average sentence for a defendant with a filed § 851 was, on average, more than five times longer than when an § 851 was not

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[103] *See* Statement of M. Caruso on First Step Act – Drug Offenses and Counterfeit Pills 13-14 (Mar. 7, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=485.

[104] *See* Letter from H. Williams to Hon. Reeves at 14-15 (Aug. 1, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=64.

[105] *Id*. at 15.

[106] *Id*.

[107] U.S. Sent'g Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* at 6, 21-23 (July 2018), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf

filed.[108] For this reason, while the PAG supports Option 1, we also recommend that the Commission study how if at all this change to the guidelines affects charging decisions by prosecutors in each district. This is particularly important given that, despite these higher sentences, defendants subject to a higher base offense level under §2D1.1 recidivate at lower rates than defendants with lower base offense levels.[109]

B. The Definition of Sex Offense in §4C1.1(b)(2)

The Department of Justice raises a concern that the newly adopted §4C1.1 contains an overly restrictive definition of "sex offense," because it is limited to sex offenses against minors.[110] In its current form, §4C1.1 could result in a Zero-Point Offender being eligible for a 2-level reduction if his or her instant offense is a sex offense against an adult. The Commission proposes two different options to address this concern. Option 1 revises the current definition of "sex offense" to cover sexual abuse offenses against wards and individuals in federal custody under 18 U.S.C. §§ 2243(b) & (c). Option 2 expands the definition of "sex offense" to cover all offenses described in the listed provisions, regardless of the age of the victim.[111] The PAG recommends that the Commission take no action at this time, and in the alternative, the PAG prefers Option 1.

1. *No Action*

Section 4C1.1 has only been in effect since November 1, 2023. It is unclear at this time whether this guideline, as drafted, fails to adequately address the interests it was intended to promote. Before expanding the definition of sex offense under this provision, the PAG would like to see data about the defendants whose instant offense is a sex offense against an adult, and who remain eligible for the 2-level reduction. Given the extensive criteria that must be met before a defendant is eligible for the §4C1.1 reduction, it seems likely that defendants convicted of significant sex offenses would be excluded based on other criteria, such as the use of violence or credible threats of violence;[112] serious bodily injury;[113] the possession of a firearm or other dangerous weapon;[114] or vulnerable victim.[115] Accordingly, the PAG suggests that the Commission take no action at this time, and that it revisit this issue once it has more data on the application of this adjustment.

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[108] *Id.* at 30.

[109] U.S. Sent'g Comm'n, *Recidivism of Federal Drug Trafficking Offenders Released in 2012* at 33 (Jan. 2022), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220112_Recidivism-Drugs.pdf.

[110] *See* Proposed Amendment at 85.

[111] *Id.*

[112] *See* §4C1.1(a)(3).

[113] *See* §4C1.1(a)(4).

[114] *See* §4C1.1(a)(7).

[115] *See* §4C1.1(a)(9).

2. *The PAG Prefers Option 1*

Option 1 is consistent with recent concerns that were addressed by the Commission in the last amendment cycle, and it is consistent with other disqualifying conditions within §4C1.1(a). Unlike Option 2, Option 1 will not disqualify defendants convicted of low-level sex offenses against adults from the Zero-Point Offender Adjustment.

In the last amendment cycle, the government expressed concerns that crimes against wards and inmates were not being sanctioned sufficiently under the guidelines.[116] The victims of these crimes are, by definition, inherently vulnerable. The Commission agreed and adopted the government's recommendation to increase the base offense level by 4 levels for offenses related to §2A3.3. Section 4C1.1 already incorporates concerns regarding vulnerable victims within its eligibility criteria. For instance, §4C1.1(a)(9) disqualifies defendants who receive an adjustment under §3A1.1 (Hate Crime or Vulnerable Victim) from receiving the benefit of the Zero-Point Offender Adjustment. Thus, including another offense, 18 U.S.C. §§ 2243(b) & (c), that involves offenses against vulnerable victims in the list of disqualifying conditions is consistent with this approach.

Additionally, Option 1 provides defendants with more due process than some other eligibility disqualifiers. To be ineligible for the 2-level reduction under Option 1, the defendant must be convicted of violating 18 U.S.C. §§ 2243(b) or (c). In contrast, a defendant may be disqualified based on finding by a mere preponderance of the evidence that his or her crime involved a vulnerable victim under §4C1.1(a)(9).

The proposal in Option 2 – to make all defendants convicted of sex offenses ineligible for the Zero-Point Offender Adjustment – is too broad in scope and would result in defendants who have been convicted of low-level crimes from being disqualified. The intention behind the Zero-Point Offender Adjustment is to recognize those rare circumstances when a defendant has no prior criminal history. In a sense, it is the reward for having lived an otherwise law-abiding life, and it reflects that defendants with zero criminal history points have lower rates of recidivism.

Categorically excluding all the Chapter 109A, 110, and 117 offenses, and those convicted for violating 18 U.S.C. § 1591, would mean that defendants convicted of relatively low-level offenses would be automatically denied access to the 2-level reduction. This would exclude defendants convicted of relatively minor offenses. For instance, some defendants convicted of violating 18 U.S.C. § 2244 (Abusive Sexual Contact) face a base offense level of 12, and some defendants convicted of violating 18 U.S.C. §§ 2421 or 2421A (Transportation for Prostitution or Promotion of Prostitution) face a base offense level of 14. These low base offense levels reflect the Commission's determination that these offenses are not as serious or do not cause as much harm as other offenses. Yet, under Option 2, defendants convicted of these less serious sex

[116] *See* Letter from Dep't of Justice to U.S. Sent'g Comm'n at 17-22 (Mar. 14, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=387.

offenses would be denied any opportunity to obtain the downward adjustment extended to other defendants charged with more serious, non-sex offenses.

Finally, Option 2 may not be necessary to make defendants convicted of particularly heinous sex offenses against adults ineligible for the §4C1.1 Adjustment. As noted above, defendants convicted of serious sex offenses already may be excluded from the adjustment because they used violence or credible threats of violence during the commission of the crime; caused serious bodily injury; or committed the crime against a vulnerable victim.[117] These adjustments are frequently attributed to defendants who commit the most serious sex offenses against adults, and, thus, would preclude these defendants from being eligible for the Zero-Point Offender Adjustment. Categorically excluding defendants who commit all sex offenses is not necessary to exclude those defendants who commit the most serious sex offenses against adults.

VI. Simplification of the Three-Step Process

As a part of its policy priority to simplify the guidelines, the Commission proposes multiple amendments to the guidelines to remove references to the "three-step process" and reclassify various departure grounds that exist throughout the guidelines as factors that may be relevant to the § 3553(a) analysis. The Commission has also published six issues for comment related to this proposal.

The PAG does not comment here item by item on each proposed change to the guidelines but instead provides overarching comment on the Commission's proposal as described in the Synopsis of Proposed Amendment. Before responding to the specific proposals, the PAG wishes to reiterate its support for the Commission's decision to prioritize simplification efforts, a policy priority that is both welcome and much needed. Sentencing guidelines tailored to fit "every conceivable wrinkle of each case" are impossible, unworkable, and unjust.[118] For more than thirty years, stakeholders have urged that the guidelines be "more, not less, generic," and that the Commission avoid the urge to reflexively amend the guidelines in order to capture new offenses or offender details in the absence of a demonstrated empirical need.[119] The PAG has long supported efforts to simplify the guidelines by removing and/or ameliorating the effects of

[117] *See* §§4C1.1(a)(3), (4) & (9).

[118] *See* U.S.S.G. Ch. 1, Pt. A, subpart 1.

[119] *See, e.g.*, Statement of Mary Lou Soller on behalf of the American Bar Association Concerning Sentencing Guideline Amendments at 11 (March 14, 1995) (noting the "impressive consensus . . . between judges, practitioners, and current Sentencing Commissioners on the need to simplify the Guidelines," and urging Commission to avoid the temptation "to construct new guidelines, or to concoct new specific offense characteristics, to address . . . specific criminal activity" when the guidelines already "produce appropriately stiff punishment"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/19950314/Testimony-Pt.3.pdf.

guideline provisions that add to the phenomenon of "factor creep" and sentencing recommendations that too often skew too high.[120]

The PAG also supports the Commission's efforts to find ways that the guidelines can better reflect modern sentencing practice. In the experience of PAG members, the three-step process complicates the sentencing analysis unnecessarily, in large part because many of the guideline departure provisions conflict with sentencing courts' statutory obligations. This includes, in particular, the cabined-in departure policies reflected in Chapter 5, Part H that run counter to courts' statutory obligation to consider the full panoply of defendant- and case-specific factors and impose a sentence sufficient but not greater than necessary to satisfy the purposes of punishment. This is an area ripe for simplification, and the PAG commends the Commission's interest in revisiting its departure policies.

Notwithstanding these areas of commonality, the PAG does not support the Commission's proposal to simplify the three-step process by reclassifying departure provisions as factors that may be relevant to statutory sentencing factors at various points in the guideline analysis. Far from simplifying the process of sentencing, the proposal confuses it by conflating the guideline calculation with the separate and distinct § 3553(a) analysis required to be performed in each case as a matter of law. Moreover, the proposal ignores overwhelming empirical data that the guideline's departure provisions are not ordinarily found to be relevant in individual cases. The PAG believes that any effort to identify and list only certain factors that "may be relevant" to the § 3553(a) analysis would likely overstep the Commission's own statutory authority, and it inherently risks elevating consideration of the identified factors over the infinite variety of other factors to be considered – thereby potentially bringing the guidelines into unnecessary conflict with sentencing courts' statutory duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[121]

As set forth below, the PAG agrees that the Commission should delete Part A of Chapter 1, and partly agrees with the proposed revisions to §1B1.1(b). Instead of the proposal to "re-classify" the guideline's departure provisions, however, the PAG recommends that the Commission simply delete all departure provisions in Chapters Two, Three, Four, and Five as well as Chapter Five's Specific Offender Characteristics. The PAG recommends that the Commission not adopt the proposed revisions to Chapter Six of the guidelines. If the Commission intends to list factors

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[120] *See, e.g.*, Letter of PAG Chair at 9 (March 14, 2007) (urging the Commission to avoid "blindly recommending increases that may well be unnecessary and unjustified"); 16 (opposing proposed specific offense characteristic for facts "that are not directly associated with a higher level of culpability or harm"); Letter of PAG Chair at 12-13 (March 14, 2007) (advocating for application note that "eliminates the need for additional listings in the Drug Quantity and Drug Equivalency Tables" and "advances the aim of simplification"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt16.pdf; U.S.S.C., Letter of PAG Chair at Attachment pp. 3 (March 24, 1997) (opposing proposed amendment concerning a special skills enhancement "in the spirit of 'simplification' . . . unless evidence is presented which overwhelmingly demands special treatment"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/199703/199703_PCpt7.pdf.

[121] *Concepcion v. United States*, 597 U.S. 481, 492 (2022) (citations omitted).

that "may be relevant" to the § 3553(a) analysis in the Guidelines Manual, the PAG suggests that the Commission do no more than report the factors that have been relied on by courts as reflected in sentencing data.

A. The Commission's Proposal

1. *Proposed Amendments to Chapter One*

The Commission's proposal would amend Chapter One in the following ways. First, it would delete the "Original Introduction to the Guidelines Manual" currently contained in Chapter One, Part A. The PAG supports this proposal.

Next, it would revise the application instructions in §1B1.1 to reflect the simplification of the "three step" process into two steps. The PAG supports the goal of eliminating the "three-step" process and most of the proposed changes to §1B1.1, with the following exceptions. The PAG does not recommend adding proposed §1B1.1(a)(9), which would instruct courts to "[a]pply, as appropriate, Part K of Chapter Five," because in the PAG's view, Chapter Five, Part K should simply be deleted from the guidelines as more fully discussed below.

Further, the PAG recommends that the Commission consider making the following changes to the proposed language in §1B1.1(b):

> STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a) ~~AND RELATED GUIDANCE~~ — The court shall then consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) ~~and the guidance provided in Chapter Six~~ to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a).

Additionally, the PAG suggests that the Commission omit the last sentence of the proposed amendment to the Commentary to §1B1.1 that reads "and also instructs courts to consider guidance provided by the Commission in Chapter Six." These changes are necessary because, as discussed below, the PAG recommends that the Commission not adopt proposed Chapter Six.

2. *Proposed Amendments to the Remainder of the Guidelines*

Beyond the proposed changes to Chapter One, the Commission proposes to further simplify the three-step process by: (1) converting the departure provisions set forth in specific guidelines in Chapters Two and Three into "Additional Offense Specific Considerations;" (2) converting the departure provisions set forth in Chapter Four into "Additional Considerations;" and (3) converting Chapter Five, Part H's "Specific Offender Characteristics" and Part K's "Departures" into "Factors Relating to Individual Circumstances" and "Factors Relating to the Nature and Circumstances of the Offense," respectively, both of which would appear in a newly organized Chapter Six. Each of these proposed changes appears to reclassify the relevant departure grounds as considerations that "may be relevant to the court's determination under 18 U.S.C. § 3553(a)."

The PAG does not support this approach. The policies reflected in the Sentencing Guideline's departure provisions have been developed under myriad circumstances, and often for very different purposes than the required considerations set forth in § 3553(a).[122] Perhaps because of their disjointed provenance, those provisions are not neutral and instead skew heavily toward consideration of aggravating circumstances. By our count, there are approximately 182 departure provisions set forth in the first five chapters of the guidelines.[123] Of these, 120 – fully two-thirds – are upward departure provisions. Only approximately 16% are downward departure provisions; the remaining 17% authorize both upward and downward departures or provide that downward departures on that ground are not ordinarily relevant and may be permitted only under certain circumstances.[124]

In marked contrast to the Manual's heavy emphasis on upward departures, courts do not find any reason to depart or vary upward in the vast majority of cases. The PAG has reviewed the statistics related to departures and variances for the past five years for which data are available. During that time, upward departures as a percentage of total cases sentenced have ranged from 0.4% to 0.6%. Upward variances as a percentage of the total cases sentenced have ranged from 1.8% to 2.3%. In no year did the percentage of defendants receiving an upward adjustment in the form of either a departure or a variance exceed 2.9% of total sentences. By contrast, during the past five years, between 46.2% and 55.2% of defendants received some sort of downward departure or variance. Even when departures pursuant to §5K1.1 and §5K3.1 and other government-sponsored departures and variances are excluded, between 19.9% and 23% of defendants – more than 1 in 5 – received a non-government-sponsored departure.

Clearly, the vast majority of federal judges believe the guidelines to be too harsh without reference to the upward departure options; upward departures are vanishingly rare and applied in fewer than half a percent of all cases sentenced. Yet fully two-thirds of the departure provisions

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[122] The statutory authorization for departures appeared in the now-excised 18 U.S.C. § 3553(b)(1), and their original purpose was to provide a carefully circumscribed pathway for judges to impose sentences outside of the guidelines "in specific, limited cases." *See United States v. Booker*, 543 U.S. 220, 234 (2005) (discussing departure authority under 18 U.S.C. § 3553(b)(1)).

[123] We say approximately because counting departure provisions is necessarily somewhat inexact as some departure provisions contain subparts. The current version of the sentencing guidelines contain sentencing provisions authorizing departures in Chapters Two, Three, Four, and Five. The vast majority of those departure provisions – approximately 117 – are found in Chapter Two of the guidelines, most set forth in Application Notes to individual guideline sections with a few others in the Background or Introductory Comments. There are an additional 10 departure provisions in Chapter Three and 12 in Chapter Four. An additional 43 specific departure provisions are found in Chapter Five. Where a departure provision contains subparts that each set out a separate departure condition, we have counted those separately. Where a departure provision provides for various factors within a single part, we have counted that as one provision.

[124] §5H1.4 provides that alcohol or drug dependence or abuse and gambling addiction are not appropriate bases for departure, but that extraordinary physical impairment may be a reason to depart downward. Physical condition or appearance may be a basis for departure if present to an extraordinary degree.

in the Guidelines Manual provide for upward departures. For this reason alone, the PAG cannot endorse the current proposal; there is no empirical reason for the guidelines to call out these types of considerations – and not others – as potentially relevant to the § 3553(a) analysis when they have not been found relevant in the vast majority of sentencings.

Moreover, "[t]here is a long and durable tradition that sentencing judges enjoy discretion in the sort of information they may consider" at sentencing, and "[t]he only limitations on a court's discretion to consider any relevant materials at . . . sentencing are those set forth by Congress in a statute or by the Constitution."[125] Any attempt to list some of the infinite possibilities of factors that may bear on the § 3553(a) analysis inherently risks elevating the listed factors above others. It is not at all clear how the Commission is legally authorized to weigh in on what may (or may not) constitute a relevant sentencing consideration under § 3553(a) – but even if it were authorized to do so, as a matter of policy, the PAG submits that the Commission should steer clear of offering guidance to courts that could be viewed as elevating some statutory factors over others. If the Commission feels strongly that the Guidelines Manual should list some of the factors that "may be relevant" to the § 3553(a) analysis, the PAG proposes that it do no more than report the factors that have in fact been relied on by courts as reflected in sentencing data. There appears to be no justification for listing factors that data tells us are <u>not</u> relied on by courts.

In sum, the PAG respectfully submits that simply converting departure provisions into variance provisions does not simplify the process, particularly when the vast majority of the departure provisions are not used and are not relevant to the process. If the Commission implements this one-for-one conversion, it would miss a prime opportunity to streamline the guidelines. An empirical approach that takes into account actual sentencing practice across the country is consonant with the Commission's mandate. Any other approach risks undermining the legitimacy of the process.

B. <u>The PAG's Proposal</u>

Rather than adopting the Commission's proposed approach, the PAG recommends that the Commission take the following steps:

(1) Delete Part A of Chapter One;

(2) Amend §1B1.1 as set forth in this letter;

(3) Delete all departure provisions in Chapters Two, Three, Four, and Five; and

(4) Conduct an empirical evaluation of the reasons sentencing courts have given for departures and variances in the years since *Booker* to identify other guideline provisions that correlate to such decisions and could simply be deleted.

Such an approach would serve the salutary purpose of streamlining and simplifying the guidelines, reflect actual sentencing practice, and permit the Commission to continue to revise

[125] *Concepcion*, 597 U.S. at 491, 494 (2022) (citations and internal punctuation omitted).

the guidelines to reflect empirical data. If the Commission decides to go further and list some of the factors that may be relevant to the § 3553(a) analysis, the PAG strongly recommends that such a listing be based in empirical data and include only factors that courts have actually used to depart or vary at sentencing.

VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding these proposed amendments. Our PAG colleagues look forward to providing testimony on several of these amendments during the Commission's upcoming

hearing, and the PAG welcomes further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (USSC) regarding the proposed amendments issued on December 26, 2023.

Proposed Amendment No. 1: Rule for Calculating Loss

POAG members were unanimously in favor of the proposed amendment to create notes to the loss table at USSG §2B1.1(b)(1), which moves the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm" from the commentary to the guideline. While POAG also recommends the Commission conduct a comprehensive examination of USSG §2B1.1 for streamlining and simplification purposes, POAG believes that the changes proposed in this amendment should not wait until a comprehensive examination occurs.

The proposed amendment would promote consistent loss calculations across circuits and avoid sentencing disparities caused simply by varying interpretations of the validity and enforceability of the guideline commentary, particularly regarding actual loss versus intended loss. In fiscal year 2022, nearly 20 percent of all defendants sentenced under USSG §2B1.1 were sentenced using intended loss. Ignoring intended loss when determining the guideline range would fail to account for the overall seriousness of the offense and the intended harm, and incorrectly distinguishing defendants who succeeded in their crime from those who engaged in the exact same conduct but were ultimately unsuccessful for reasons unrelated to their criminal intent. A comparison of

guideline computations for an average fraud case involving actual and intended loss helps to illustrate this issue. For example, consider a case in which a defendant fraudulently received $300,000 in pandemic-related unemployment benefits, which would result in a 12-level increase based upon actual loss. Compare this scenario with a defendant who engaged in the exact same conduct and took all of the steps required to commit the offense, such as obtaining the personal identifying information of approximately 20 individuals, submitting applications in the names of those individuals, and setting up various bank accounts for payments to be received. However, because some of the banks suspected the fraud and returned those benefit payments before the defendant could access them, the actual loss was only $100,000. Failing to include intended loss would result in an 8-level increase based only upon actual loss as opposed to a 12-level increase based upon intended loss. In both cases, the criminal conduct is the same, the intended harm is the same, the risk to recidivate is the same, so the determination of the sentencing guideline range should also be the same. Such an amendment would resolve this issue and be in alignment with Congress's original intent that the guidelines provide for reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

During the discussion regarding this amendment, POAG members noted that challenges to the commentary of the guidelines occur frequently and are not limited to the definition of loss in USSG §2B1.1. Further, concerns were raised that an unintended impact of moving the definition of loss from the commentary to the guideline would be to seemingly weaken the remaining commentary of USSG §2B1.1 and the overall commentary of the guidelines. For example, POAG believes that challenges to loss calculations will continue unless all rules under Application Note 3 are moved into the main body of the guideline. However, by drawing these terms into the main body of the guideline, much of the remaining commentary may be able to be brought in as clarifying any perceived ambiguities. POAG recommends the Commission continue to examine the commentary to the guidelines and proactively address those being challenged as expanding/broadening the guideline by moving such commentary into the main body of the guideline.

Proposed Amendment No. 2: Youthful Individuals

Part A: POAG appreciates the Commission's efforts to examine the juvenile court systems and sentencing of youthful offenders. POAG wrote extensively regarding the application of criminal history scoring as it relates to juvenile offenders during July 2017, February 2017, and July 2023, which are linked and incorporated by reference.

As it was discussed both within the proposed amendment and as part of POAG's prior written submissions, there is a wide variation in how jurisdictions handle the prosecution and ultimate sentences of these types of cases. These differences may start with an age standard for who is a juvenile offender. In the prosecution of these cases, the offense charged for a juvenile offender may differ from what the charge would be in one jurisdiction versus another. POAG notes that, particularly with juvenile offenses, there are significant variations in how each state handles the prosecution and the type of sentence imposed, including even a variation in the age standard for who is a juvenile offender.

Another ongoing and prominent concern is the inability to obtain supporting documentation of the conviction. Probation officers across the nation expressed varying practices among their districts. A very small minority of districts reported they have access to juvenile record systems, while the majority of districts, even in the age of digitized records, are still faced with difficulty in obtaining the necessary documents in order to properly score the adjudication. The only consistency related to juvenile records reported by probation officers was that there is a consistent pattern of varying levels of access to records between counties, jurisdictions, states, and even judicial officials. Further, in some instances, the defendant's Records of Arrests and Prosecutions (RAP sheet) does not reflect juvenile history and local reports also do not contain juvenile history information. In other districts, the records may be sealed or destroyed or require additional processes, such as a signed release of information or a subpoena, to obtain the necessary information. Further, probation officers may only learn about the juvenile history during the presentence interview, when the defendant discusses social history and mentions residing at a community placement facility or being under some term of supervision as a juvenile. Other ways probation officers may learn about defendants' juvenile history is by examining prior adult criminal records that reflect involvement in the juvenile system.

This challenge leads to a disparity in how a juvenile offender's criminal history is captured and eventually scored. POAG recognizes though, that when juvenile records are obtained, those records provide valuable information that may go beyond the defendant's criminal history. For instance, the records may provide more insight into the defendant's history and characteristics and provide details regarding the defendant's upbringing, educational history, substance abuse history, and mental health history. POAG is concerned that excluding juvenile history information may result in a greater difficulty in obtaining beneficial documents from custodians of the records, especially if these prior convictions are deemed less relevant if they are no longer scorable offenses.

POAG also expressed concern that the guidelines do not provide guidance for what meets the definition of "a juvenile sentence to confinement," in USSG §4A1.2(d)(2)(A). What is considered "confinement" is inconsistent among districts and differs from the meaning of "confinement" in adult cases. For example, in the Fourth Circuit, a suspended sentence conditioned on commitment to a youthful offender center constituted confinement. *See U.S. v. Adams*, 988 F.2d 493 (4th Cir. 1993). In the Sixth and Eighth Circuits, a juvenile sentence is a "sentence to confinement" if the juvenile was not free to leave. *See U.S. v. Hanley*, 906 F.2d 1116 (6th Cir. 1990) and *U.S. v. Stewart*, 643 F.3d 259 (8th Cir. 2011). In the Ninth Circuit, the appropriate inquiry "is not whether juvenile hall is equivalent to prison." *See U.S. v. Williams*, 891 F.2d 212 (9th Cir. 1989). Further, in the Tenth Circuit, custody to the Department of Human Services, which is primarily a secure facility, and a sentence to a federal institution for drug treatment were considered "confinement." *See U.S. v. Wilson*, 41 F.3d 1403 (10th Cir. 1994); *U.S. v. Vanderlaan*, 921 F.2d 257 (10th Cir. 1990).

The issue of confinement provides a second layer of complexity in the scoring of juvenile adjudications. The above case law summary illustrates the confinement issue, but before the case law can even be applied, the first step is determining if the defendant has a prior juvenile conviction and then determine if the records are available to even discern if the defendant was placed in a facility. Second, there are numerous types of juvenile placements in every jurisdiction. The case

law cannot be applied until information regarding each facility and its level of security has been obtained and assessed. Juvenile placements vary in their level of security, but they also vary in purpose. POAG also recognized that procedures and decisions regarding placement in rehabilitation programs, supervision, and confinement vary among jurisdictions. Juvenile offenders present with issues that are not common when compared to adult offenders. Their issues at that time in their life may very well be related to the product of the environment of where they are raised, whether or not it is a safe place, and whether it fosters education and rehabilitation. At times, juvenile offenders are placed in facilities in order to protect the public, but at other times the placement can be to protect the juvenile at a time in their life when they need the structure and stability of a residential facility. As such, the purpose of some of these facilities may be more focused on rehabilitation rather than punishment. Regardless, each and every placement needs assessment regarding its level of confinement in order to determine the scoring of that prior conviction.

Moreover, probation officers experience difficulty obtaining information from state correctional departments and similar facilities to determine when a defendant is last released from "confinement." Criminal record queries and court documents generally do not include information on entry and exit dates, so determining the period of time a defendant was under a term of confinement is not easily obtained or always formally documented when compared to adult institutional placements. POAG unanimously agreed that eliminating the term "juvenile sentence to confinement," as well as focusing on the date a juvenile sentence was imposed rather than when the defendant was last released from confinement, will create more consistency with guideline application.

Further, POAG observes that the data suggests the weight of juvenile adjudications is already limited and impacts less than 2% of cases sentenced. For instance, during fiscal year 2022, there were 60,878 sentenced individuals. Specifically, 40,234 of those individuals received criminal history points, and of those, 940 individuals received at least one juvenile adjudication point. Notwithstanding that statistical observation, POAG maintains the issue of juvenile history scoring remains important in relation to the impacted cases. Further, while POAG members also shared a common concern that recidivism considerations were important, they are more concerning in instances where the conduct is assaultive or violent. The USSC public data document reflects that a significant portion of the scorable juvenile offenses were for larceny, property, public order, and fraud, namely nonviolent offenses (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf). The seriousness of the prior convictions are already likely considerations the Court balances in determining the sentence that should be imposed, regardless if the prior conviction was assessed with criminal history points. As such, POAG recommends that the process of scoring juvenile adjudications not be made unduly complicated by scoring only certain types of juvenile offenses, specifically those that are deemed more serious. POAG believes that certain prior offenses are serious enough that jurisdiction may be transferred to adult court.

With regard to the options available under Part A, POAG was unable to reach a consensus with respect to the proposed amendment which addresses juvenile sentences and sentences for offenses committed prior to age eighteen for purposes of Chapter Four, Part A (Criminal History). POAG was divided between supporting Option 1, which would result in all scored juvenile adjudications

receiving one point, and Option 2, which would exclude all juvenile sentences. POAG was unanimously opposed to Option 3, which would exclude all offenses committed prior to age 18, even if the defendant was convicted as an adult.

Those who advocate for Option 2, which excludes all juvenile sentences from garnering criminal history points, note that this option helps resolve most of the identified concerns, including the disparity in obtaining records, the disparity regarding how states handle the prosecution of juvenile offenders, and application issues related to the term "confinement." For instance, a defendant may have received juvenile adjudications in one county where records are easily available, but a defendant in a neighboring county who received the same juvenile adjudication may not have available records. When relying on the records to determine the criminal history score, this invites some disparity into the process. Those in favor of Option 2 believe that by adopting this option, it would allow for more uniform accountability as it relates to juvenile offenses.

Similarly, the POAG members who support Option 2 express that there are various factors that influence the transfer of a case from juvenile court to adult court. The decision to prosecute an individual in adult court who commits a crime prior to age 18 typically rests on the seriousness of the crime. Those in favor of this option believe that a level of accountability would still be considered for the serious offenses that are ultimately prosecuted as adult convictions.

Those opposed to Option 2 noted their concern that excluding all juvenile sentences does not hold defendants accountable for past criminal behavior, which is important to understanding the risk of recidivism and distinguishing defendants who have prior juvenile convictions from those who did not sustain any juvenile convictions. While the Court could depart or vary upward based on inadequacy of criminal history, in practice, above range sentences are rarely imposed, but they may become more common in the event this amendment is adopted. POAG did agree that additional departure language was likely unnecessary, as the existing language in USSG §4A1.3 provides an applicable departure structure for inadequacy of criminal history. POAG was also concerned with limiting considerations of such departures to certain offenses, noting the significant difficulties the system has already encountered in defining what offenses amount to "crimes of violence" and "controlled substance offense."

Those in favor of Option 1, which would score all juvenile adjudications with one point, note that this option reduces the impact of juvenile adjudications but also holds the defendant accountable for their recent criminal conduct. POAG observed that Option 1 limits the sentences to those adjudications imposed within five years and does not expand the time period to defendants released within five years of the commencement of the instant offense. Option 1 also resolves issues regarding defining "confinement," as detailed above. Those in favor of Option 1 note that the inclusion of juvenile adjudications imposed within five years of the commencement of the instant offense creates some structure within the guidelines rather than leaving it to a within guideline range consideration, departure, or variance. Those opposed to Option 1 note that this option still does not resolve the disparity in obtaining records and concerns regarding how differently states handle the prosecution and ultimate sentences. One suggestion made during the discussion of this issue was to place a cap on the number of points that a defendant could receive from juvenile offenses; similar and in conjunction with the criminal history point maximum of four points that can be received from USSG 4A1.1(c).

With regard to Option 3, where offenses committed prior to age 18 do not receive points, POAG reached a general consensus that offenses committed under the age of 18 should still be considered in criminal history scoring if the defendant was charged and convicted as an adult. POAG recognizes that the decision to prosecute juveniles as adults varies by jurisdiction, which leads to disparity with regard to the applicable scoring criminal history points. However, POAG discussed that Option 3 does not appear to capture the seriousness of the defendant's prior conduct because it is likely that a youthful individual faces charges in an adult court due to the seriousness of the charge. Option 3 could create further disparity because those with more serious juvenile offenses are not held accountable for aggravating criminal behavior. For instance, if a defendant commits a murder at age 17, and is charged as an adult, the defendant would not be assessed criminal history points. However, a defendant who commits a drug possession offense at age 17 and charged in juvenile court would also not be assessed criminal history points. Under Option 3, these two offenses would be viewed similarly and would not garner criminal history points. The defendant with a more aggravating criminal history would not be held responsible for their criminal past under the guidelines if Option 3 was adopted. This would lead to a lack of uniformity, as courts would need to make a determination if the defendant's criminal past warrants a within guideline range sentence, departure, or variance.

POAG also highlights that the proposed amendment may impact a defendant's credit and/or placement in the Federal Bureau of Prisons (BOP). While the guidelines only consider the defendant's Criminal History Category for advisory sentencing range purposes, the BOP considers the sentenced individuals' criminal history points when making placement and credit determinations. Another potential implication related to both Options 2 and 3 is that defendants with prior criminal records could become eligible for the zero-point offender reduction under USSG §4C1.1.

Part B: The Commission also seeks comment on the proposal to amend §5H1.1 (Age (Policy Statement)) as it concerns youthful individuals. POAG is in favor of the changes proposed by the Commission as it relates to this departure, except for the latter portion of the amendment to this section. Specifically, POAG is concerned with including the proposed language, which reads as follows: "[….] In determining whether a departure based on youth is warranted and the extent of such departure, the court shall consider the following: (1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision-making, and resistance to peer pressure, is generally not developed until the mid-20s; and (2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals."

POAG believes that the guidelines may not be the most appropriate place to include such specificity about research and statistics, especially given that scientific studies and research are analyzed on an ongoing basis. Also, for the sake of consistency, no other section in the guidelines mentions specific research studies to support a departure from the guidelines. POAG acknowledges, however, that certain changes to the guidelines were likely impacted by, among other things, research, recidivism rates, new and/or updated laws, and directives. Therefore, while POAG appreciates the Commission's focus on the impact of youthful individuals and §5H1.1 (Age (Policy Statement)), POAG believes that the language and proposed changes that precedes the above-referenced section properly captures the significant message that a departure may be

considered during the sentencing of youthful individuals. This would include varied sentencing options and punishment other than imprisonment, which may be appropriate for certain youthful individuals. Therefore, POAG respectfully does not believe that the above cited section should be included as part of the amendments to the guidelines.

Proposed Amendment No. 3: Acquitted Conduct

POAG remains unanimously opposed to the adoption of any proposed amendment to create an acquitted conduct exception to using relevant conduct to determine the sentencing guideline range or to determine the ultimate sentence imposed. As such, POAG incorporates its prior testimony and linked written submission (Probation Officer's Advisory Group March 13, 2023) as part of the response for the instant amendment cycle.

Following POAG's 2023 submission and testimony on this issue, the Supreme Court denied cert in *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) and cited that the Sentencing Commission would potentially continue to assess the use of acquitted conduct at sentencing. Consequently, the issue of acquitted conduct has been identified as a proposed amendment as part of this subsequent amendment cycle. While POAG remains unanimously opposed to any of the proposed options to amend how the sentencing guidelines lawfully rely on acquitted conduct as part of relevant conduct, POAG seeks to fulfill our role as an advisory group to the Sentencing Commission. Therefore, POAG provides the following analysis of all three options and makes the recommendation that Option 2 would be preferred of the options presented.

Option 1 would amend USSG §1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range. This option closely tracks the proposed amendment identified during the previous amendment cycle. POAG observes that Option 1 is the only option that would fully resolve the various interested parties and stakeholders concerns in considering acquitted conduct, as Options 2 and 3 allow for the consideration of acquitted conduct, albeit through different procedural mechanisms. Though, Option 1 introduces a host of additional problems, many of which we initially covered in our response during last year's amendment cycle.

POAG's position regarding acquitted conduct is best described as being in alignment with Justice Alito's concurring denial of *certiorari* in *McClinton,* wherein Justice Alito cites the ruling in *United States v. Watts*, 117 S. Ct. 633 (1997) and indicates "It cannot be inferred that the facts needed to convict were not shown by even a preponderance of the evidence, and that is why, it has been thought, acquitted conduct may be considered at sentencing." Justice Alito further notes that "If holding that the Constitution prohibits the consideration of acquitted conduct at sentencing would require us to overrule *Watts*, we would also have to assess whether the resulting rule would be workable." The bulk of POAG's prior submission on this issue related to issues of workability, the impact on victims, and the likelihood that exclusions of acquitted conduct will lead to further exclusions from relevant conduct consideration. Justice Alito provided compelling hypothetical situations in which it would be important to consider acquitted conduct for the purposes of sentencing, much like the several hypotheticals POAG identified in its prior submission. *McClinton*, at 2403-4. However, if the amendment to preclude the use of acquitted conduct were adopted, those hypotheticals would present as actual issues in actual cases that would need

litigation. As POAG indicated in its prior submission, should the Commission adopt this proposed amendment, POAG believes additional application instructions are essential given the manner in which such an amendment alters the long-standing foundational concept of relevant conduct.

Option 1 of the proposed amendment also brackets language that would exclude from the definition of "acquitted conduct" conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. POAG does not believe the proposal adequately addresses the issue and such an admission in a case may be uncommon and would not resolve the numerous other application issues previously identified.

Option 2 would amend the Commentary to §1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction. Option 2 highlights the Court's authority it already has to impose a sentence below the guideline range by way of a variance if acquitted conduct was used in determining the guideline range, but formalizes the criteria within the Guidelines Manual as a departure. POAG preferred Option 2 as it provides the Court with the discretion to determine if and to what extent the sentence should reflect acquitted conduct in rendering a just outcome. As POAG noted in its previous submission, departures are not subject to the same level of application criteria and appellant review that is present when applying a specific offense characteristic. The parties in a criminal case likely have varying opinions of departures in that they provide flexibility in application, but that same flexibility is present upon appellate review, making it less likely that any such departure would be subject to remand.

With Option 2, POAG believes defining acquitted conduct as conduct "*constituting an element of* a charge of which the defendant has been acquitted…," would necessitate a complex element analysis that is inconsistent with the spirit of addressing acquitted conduct through a departure rather than a mechanical guideline application. Therefore, POAG recommends adopting the definition that relies upon conduct "underlying" such charges. While it is broader than the element option, it is less mechanical and provides the most flexibility in approaching what is an imperfect situation. The "constituting an element of" definition seems more suited to Options 1 or 3 in its application. In those options, the need for a more mechanical and rigid definition is better suited to the specificity required for determining base offense levels and specific offense characteristics.

POAG also recommends eliminating the bracketed language that limits the potential departure grounds to cases in which there is an "extremely" or "disproportionate" impact, as both of those options are uniquely vague to the extent that it may lead to disparity that the Sentencing Commission is routinely seeking to diminish. Instead, POAG recommends a more easily measured assessment of when such a departure may apply and recommends a departure may apply in any case in which consideration of acquitted conduct had *an impact* in determining the guideline range.

Those who were not in favor of Option 2 cited the application issues related to overlapping relevant conduct and other workability issues identified in POAG's prior submission would remain. Specifically, the presentence report would need to identify what conduct constituted conduct

"underlying" an acquitted charge and then identify how it impacted the guideline range before determining if a departure may apply.

Option 3 would amend §6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors. It provides that a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving such disputes. However, it further provides that acquitted conduct should not be considered unless it is established by clear and convincing evidence.

POAG received feedback that district and circuit representatives were overwhelmingly not in favor of Option 3 out of concern that it introduces a new evidentiary standard to the guideline analysis, adding another layer of complexity to an already rather intricate process. This option essentially involves re-litigation of disputed facts under the standard of clear and convincing evidence, which is lower than the beyond a reasonable doubt standard applicable at trial. However, this is not significantly different than the present process in that there is a re-litigation of disputed facts under the lower standard of preponderance of the evidence.

Those who favor Option 3 believe it closely tracks POAG's prior submission and current position that acquitted conduct is lawfully considered in determining the guideline range. With Option 3, there would be no significant changes to the presentence report and there would not be a need to parse out what conduct constitutes acquitted conduct, thereby resolving the workability issues POAG previously identified and were highlighted by Justice Alito in *McClinton*. Option 3 also builds upon our existing trust in the judiciary's ability to balance the evidentiary issues presented. Judges as a matter of practice routinely ascribe the appropriate standard at each stage in the process and are particularly attune to the weight of the evidence when assessing cases involving acquitted conduct. In fact, the procedures within Option 3 are likely already at play in the courtroom, as the evidence presented may already meet both the preponderance and the clear and convincing standard at sentencing, depending on the facts of the case.

POAG's other concern with Option 3 is that probation officers, who need to know what information they can use when they start the presentence report, are not experts in the mental construct of balancing the preponderance and the clear and convincing standards. Therefore, if the Sentencing Commission adopts Option 3, POAG recommends specific instructions directing that the presentence report be prepared based upon the preponderance of evidence standard, but that if there is an objection to acquitted conduct being included as relevant conduct, the Court applies the clear and convincing standard when ruling on that objection after hearing the evidence presented. However, even with that suggestion, probation officers voiced concern that it would become the expectation that they assess the clear and convincing standard when reviewing the evidence to include in the presentence report, regardless of whether it was specified that the standard only applied when the Court made a finding at sentencing on the disputed issue.

The Commission also seeks comment on whether any or all of the options presented should be revised to specifically address acquittals based on reasons unrelated to the substantive evidence, such as jurisdiction, venue, or statute of limitations. Barring acquitted conduct from consideration may produce the unintended consequence of excluding factors from consideration in cases in which there is ample evidence of the conduct itself, but the defendant is acquitted based on issues

pertaining to jurisdiction or statute of limitations, or cases in which a defendant is acquitted due to a state nexus element, while the underlying conduct (for instance of possessing a firearm) is well-established by the evidence. POAG believes it would be difficult, in some cases, to discern the reasons for acquittal, particularly in jury trials, where the Court may not be privy to the basis for such acquittal, and even more so in state, local, and tribal acquittals, should the proposed amendments be expanded to include them. While acquitted conduct is the result of a prosecutor's inability to persuade a jury, a case that is moved for dismissal by the prosecutor or uncharged is, perhaps, the result of the prosecutor not being convinced that his or her argument would or should prevail.

Another issue for comment pertains to expanding the definition of acquitted conduct to include acquittals from state, local, and tribal jurisdictions. POAG cautions against this, as discerning the specific conduct "underlying" or "constituting an element of" a state, local, or tribal offense would be far more difficult and involve particularly complex analysis of a wide variety of offenses and may require reliance upon records that are unavailable or unclear. However, POAG also recognizes the difficulty courts may have reconciling consideration of conduct associated with acquittals from other jurisdictions with excluding or otherwise accounting for the impact of conduct associated with federal court acquittals. State acquitted conduct and federal acquitted conduct is a distinction without a difference. If it is deemed unfair to use acquitted federal conduct, would it not also be unfair to use state acquitted conduct? Notwithstanding that observation, POAG does not support consideration of expanding the definition of acquitted conduct to include state conduct. POAG continues to maintain that the use of acquitted conduct is procedurally allowed and properly vetted information that is used to determine a sentence. Therefore, POAG would propose limiting any such changes to acquitted conduct to federal counts.

And finally, the Commission is seeking comment as to whether the Commission should prohibit a court from considering acquitted conduct in determining the sentence to impose within the guideline range or prohibit the consideration of acquitted conduct for all purposes when imposing a sentence. POAG believes that it is within the Commission's purview to recommend, rather than prohibit, that acquitted conduct not be used in determining the sentence, which is essentially the approach applicable with Option 2. However, POAG believes prohibiting consideration of acquitted conduct would run afoul of 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the use of information concerning the background, character, and conduct" of a defendant.

Proposed Amendment No. 4: Circuit Conflicts

Part A: Part A would amend §2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the four-level increase pursuant to §2K2.1(b)(4)(B)(i) for a firearm that "had an altered or obliterated serial number." POAG suggests the Commission adopt Option 2 to include a definition of "altered or obliterated serial number" that adopts the approach similar to the Fourth, Fifth, Ninth, and Eleventh Circuits that "[ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information less accessible, even if such information remains legible." POAG discussed that such an amendment would reflect the practice already in place in

most of the districts and circuits. Additionally, POAG notes this definition is more closely aligned with the definition of "altered" in that it doesn't need to be completely obliterated, just "less accessible." This is a strict liability enhancement that focuses more on the criminal intent associated with defacing a serial number used to track a firearm and less on the extent of the defacing of the serial number. Further, this amendment would also serve to punish attempts the same as inchoate offenses, which is in alignment with numerous other guideline provisions. Lastly, POAG suggests replacing "ordinarily" with "includes but is not limited to" for additional clarity. POAG is concerned that use of the term "ordinarily" may be interpreted by circuits to be too narrow. Replacing "ordinarily" with "includes but is not limited to" broadens the definition and seems to meet the intent of the Commission, while making the list of examples non-exhaustive.

Part B: Part B addresses a circuit conflict regarding whether §3D1.2(c) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count. POAG would support the Commission in following the Sixth, Eighth, and Eleventh Circuits' approach that such counts are grouped pursuant to USSG §3D1.2(c). Specifically, POAG supports the use of the proposed USSG §2K2.4, comment. (n.4(A)), language as contemplated by the Commission to provide clear guidance regarding guideline application for these types of offenses. POAG would additionally suggest the Commission include an application note at §3D1.2 that clarifies that, if such specific offense characteristic was not applied due to the enhancement being precluded from application under USSG §2K2.4, comment. (n.4(A)), the counts should still be grouped under §3D1.2(c). This would reinforce the grouping rules by referencing them in two distinct sections of the guidelines.

Proposed Amendment No. 5: Miscellaneous

Part A: The Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021 increased the maximum term of imprisonment and subsequent felony offense classification for offenses under 18 U.S.C. § 1170. Subsection (a) of this statute prohibits knowingly selling, purchasing, using for profit, or transporting for sale or profit, the human remains of a Native American without the right of possession to those remains, while subsection (b) pertains to Native American cultural items. The increased penalties under 18 U.S.C. § 1170 are reflective of the dishonorable conduct underlying such offenses and POAG recommends USSG §2B1.5 likewise be amended to account for this aggravating conduct.

The base offense level for 18 U.S.C. § 1170 offenses is eight pursuant to USSG §2B1.5(a) and there is a two-level specific offense characteristic under USSG §2B1.5(b)(3) if the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural. POAG recommends that USSG §2B1.5(b)(3) be amended to reflect that, under subsection (A), if the offense involved human remains or if the defendant is convicted under 18 U.S.C. § 1170(a), the offense level should be increased by six levels. This would result in a minimum guideline range of 15 to 21 months in Zone D, absent any other Chapter Two or Chapter Three adjustments. Such an amendment would appropriately distinguish criminal conduct involving human remains from

offenses involving other cultural artifacts, establish a guideline range that is reflective of felony conduct, and serve to better deter such criminal behavior.

Part B: The Commission, in this part, seeks to respond to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for fiscal year 2019, and the concerns raised by the Department of Justice and the Disruptive Technology Strike Force. The focus of these changes to the guidelines are on expanding the use of the higher base offense level on a broader class of controls related to national security. POAG observes that this change would allow for the appropriate inclusion of the full spectrum of national security controls. POAG is unanimously in support of the amendment and the adoption of the bracketed language "(including controls on emerging and foundational technologies)" within the amendment. The inclusion of the parenthetical would allow for the consideration and inclusion of burgeoning technologies that fall within the same class of technologies that are covered by the national security controls. Cutting edge technology can often include areas of national security concern before an official designation could occur, and POAG believes the inclusion of this parenthetical would address the gap between technological development and designation of national security controls.

Part C: The commission is looking to address the concerns raised by the Department of Justice in relation to enhanced penalties under 31 U.S.C. § 5322 and covered by USSG §2S1.1. POAG unanimously agreed with this amendment. The amendment would provide language that allows for that guideline to more closely track the higher statutory penalty under 31 U.S.C. § 5322(b) and other similar enhanced statutory penalties.

Part D: For the reasons articulated within the synopsis of the proposed amendment, POAG concurs that Appendix A and the Commentary to USSG §2R1.1 should be amended to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a). It is POAG's understanding that, with this proposed change, Appendix A would no longer reference a corresponding guideline for offenses under 15 U.S.C. § 3(b) and, therefore, USSG §2X1.1 (Attempt, Solicitation, or Conspiracy) would apply.

Part E: The proposed amendment to USSG §2D1.1(a)(1)-(4) is intended to resolve questions regarding how the base offense level is intended to function, specifically whether the defendant should receive the base offense level if the enhanced penalty provisions of 21 U.S.C. §§ 841 or 960 apply or whether the base offense level should apply to a defendant regardless of whether the defendant was in fact convicted under the enhanced penalty provision. In both of the options proposed, the Commission has included a clause within USSG §2D1.1(a)(1)(A) and (B) triggered by the filing of a notice of enhanced penalties based on prior convictions under 21 U.S.C. § 851.

POAG overwhelmingly supports the adoption of the Option 2 amendment. POAG has observed that the current language of "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance," which would change to "subject to a statutorily enhanced sentence under 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance" under Option 1, has caused some rather erroneous results that don't fully incorporate the criminal conduct it is intended to capture. For instance, defendants who have distributed drugs that have caused death or serious bodily injury are frequently only accountable for a very small quantity of drugs. Additionally, in many instances

and for a variety of reasons, the prosecution does not want them to be statutorily bound to a higher sentence, but they still want them held accountable for the death or serious bodily injury that they have caused. If the defendant is charged with an offense that involves death or serious bodily injury and has a correspondingly higher statutory minimum, then the Judge is bound to a higher sentence and much of the mitigating factors are outside the ability to have an impact on the sentence. If, however, the defendant is not charged with the death or serious bodily injury component, then the guidelines remain based on quantity (frequently only the extremely small quantity that is connected with the death or serious bodily injury) without any specific offense characteristic or guideline method of capturing the harm the defendant's conduct has had on others. The difference can be as profound as the difference between a total offense level in the mid to low 30s and a total offense level that is in the mid to low teens, resulting in a difference in many years between these guideline ranges. While Judges can vary up or down in instances where they are not bound by a statutory maximum or minimum, they frequently and appropriately rely on the guidelines to provide a semblance of an appropriate outcome based on the various aggravating and mitigating factors. Without the guidance of that calculation, the outcomes in these cases can be quite disparate from each other. When the outcome of the base offense level is based directly on the statutory penalty without a relevant conduct method of capturing the significant aggravating factor that produced that higher statutory penalty, it will inevitably cause an odd outcome in the guideline range. Under the current method and the proposed Option 1, there is no method to capture the causation of death or serious bodily injury through relevant conduct. By allowing for relevant conduct to be the basis for the base offense level, USSG §2D1.1(a) will function better at capturing actual harms and mesh more consistently with the standards used in other guideline considerations. In most instances, the determination about whether a cause of death was related to the substance the defendant was distributing is as easy a determination as any other guideline consideration. When it is unclear whether the substance the defendant distributed was the "but for" cause of death, the base offense level would not be increased. While it would be a more frequent application under a relevant conduct approach, it would at least provide a method for capturing the harm caused by the defendant, even if there are other mitigating factors that later reduce the sentence.

While USSG §1B1.2(a) provides for a work around on this issue, it is complicated to execute, infrequently used, and often it seems a bit misunderstood by practitioners. The more methods that operate to add and then remove accountability for something, the more likely these methods will create disparities as different circuits interpret these areas of give and take in different ways. If the accountability for causing serious bodily injury or death is made a relevant conduct consideration, the degree of accountability can also then be mitigated within the normal sentencing paradigm.

POAG unanimously supports the inclusion of the 21 U.S.C. § 851 filing and enhancement as a metric under USSG §2D1.1(a)(1)(A) and (B). The current language of "one or more prior convictions for a similar offense" caused some confusion in its application. The proposed amendment clarifies the intent of how this standard should be achieved. POAG discussed that 851 filings are sometimes used as leverage in plea negotiations, which is a function that will occur with or without this amendment. However, POAG also observed that this amendment could potentially incentivize the filling of the 851 enhancements given that they would become imperative to the guideline application.

Part F: The 2023 Criminal History Amendment in Brief identified that the newly established provisions pertaining to "zero point offenders" under USSG §4C1.1 were intended to be a "targeted decrease" and that the "eligibility criteria is finely tailored—excluding offenders from eligibility based upon offense seriousness and aggravating factors." This is evidenced by the fact that several of the disqualifying criteria under USSG §4C1.1 seek to exclude the types of offenses and offense characteristics that present identifiable harm to victims, from offenses involving the use of threats or violence to offenses causing death or serious bodily injury. As presently written, USSG §4C1.1 disqualifies serious sex offense convictions, such as those charged under Chapters 109A, 110, and 117 of Title 18, but only if the offense involved a minor victim. Such an exception to these statutory provisions treats offenders who commit these types of serious sex offenses against adult victims the same as offenders who committed offenses that did not involve an identifiable harm to a victim. For these reasons, POAG recommends the Commission adopt Option 2, expanding the definition of "sex offense" at USSG §4C1.1(b)(2) to cover all offenses described in the listed provisions and without the limiting criteria that the offense involved a minor victim. Option 2 includes offenses under 18 U.S.C. § 2243, as set forth in Chapter 109A, therefore Option 1 is effectively incorporated within Option 2, thereby including 18 U.S.C. §2243(b) and (c) offenses as disqualifying criteria under USSG §4C1.1.

Proposed Amendment No. 6:

Technical and Conforming Changes to USSG §4C1.1

For the reasons articulated within the synopsis of the proposed amendment, POAG concurs with the proposed amendment to divide subsection USSG §4C1.1(a)(10) into two separate provisions, thereby amending the format to clarify the original intent that a defendant is ineligible for the adjustment if the defendant meets either of the listed disqualifying conditions.

Proposed Amendment No. 7: Simplification of the Three-Step Process

POAG overwhelmingly supports the proposed amendment for simplifying the three-step sentencing process. POAG does not believe this change will have an impact on the ultimate sentence imposed, rather this change will merely simplify the record and the factors that form the basis for a sentence outside the advisory guideline range. Many officers throughout the country have remarked the proposed amendment essentially captures the current sentencing practice, as very few departures are used, with the exception for certain ones, primarily USSG §§5K1.1 and 5K3.1, and to a lesser extent USSG §§4A1.3, 5K2.20, and 5K2.23. Though these would no longer be departures, the basis for these reductions would remain intact under the proposed methodology. It is further noted that, subsequent to the *Booker* decision, the Seventh Circuit has issued opinions which have both stated and reiterated that, in a post-*Booker* world, departures are "obsolete" and "beside the point" (see *U.S. v. Arnaout*, 431 F.3d 994 (7th Cir. 2005) and *U.S. v. Walker,* 447 F.3d 399 (7th Cir. 2006)). Across the country, the trend is to see the sentence imposed based on the sentencing principles outlined in 18 U.S.C. § 3553(a), oftentimes even for circumstances which are also potential grounds for departure. However, POAG observes a collateral procedural impact of this amendment is that, with departures, the Court provides notice if it intends to depart, but no such notice is required for a variance. According to *Irizarry v. U.S.,* 128 S. Ct. 2198, 2202 (2008),

the Court also reasoned that Fed. R. Crim. P. 32(h) "does not apply to 18 U.S.C. § 3553 variances by its terms" because the word "departure" is a "term of art under the guidelines and refers only to non-guidelines sentences imposed under the framework set out in the guidelines." This confirms that the United States Supreme Court held that no advance notice of a variance is required. While there would still remain references to departures in the Federal Rule of Criminal Procedure, those rules would remain in existence, dormant, as sentencing practices continue to move in a different direction.

POAG observes that the proposed simplification appears consistent with the authority and instructions outlined in 28 U.S.C. §§ 994 and 995. The lower sentence based on substantial assistance required by 28 U.S.C. §994(n) would still be reflected in the amended USSG §5K1.1.

POAG observes that the parties (and occasionally Judges) at sentencing hearings often use language suggesting departures and variances are interchangeable, which could then impact the accuracy of the information captured on the Statement of Reasons. The simplification will help alleviate this potential issue, particularly as the Statement of Reasons would subsequently require amending. Members of POAG have remarked that, while we are largely in favor of the change, we recognize it will likely result in the need for a mindset change and the implementation of a revised Statement of Reasons.

The Statement of Reasons has historically been utilized, in part, for data collection and assessment of the factors the Court considered in imposing a sentence under 18 U.S.C. § 3553(a). POAG does not envision this will change with the removal of departures and anticipates the Court will continue to provide a sufficient amount of detail regarding the factors considered in determining the sentence that should be imposed. The Commission is a data driven agency and will be able to continue to assess the factors considered at sentencing as it continues to refine the process of sentencing. However, POAG presumes there are varied practices and amount of detail across districts. Further, there may be various approaches to the details included on the Statement of Reasons, especially regarding whether aggravating factors are noted in cases of an upward variance, whether mitigating factors are noted in cases of a downward variance, or if both aggravating and mitigating factors should be noted regardless if the sentence was an upward or downward variance as they inform how the Court arrived at the ultimate sentence. The Commission may wish to consider guidance on how these various factors should be reported. Specifically, if it is the Commission's intention that all factors considered, whether mitigating or aggravating, be included on the Statement of Reasons, they should find a way to articulate that intention into the guidelines.

One issue that POAG has identified with the proposed amendment is the creation of the new Chapter 6, which would affect the chapter number of the subsequent chapters. POAG believes that by changing to Chapter 6, the ripple effects of the altering the citation of guidelines would create an added and unnecessary difficulty in caselaw research. The shifting of previous citations may become confusing and tedious, and ultimately is an unnecessary change. POAG believes including the proposed Chapter 6 at the end of Chapter 5 (i.e. USSG §5J) would be more user-friendly. It was noted this process will not change the entire system of the guidelines, only the process by which a custodial or probationary sentence is formed. Additionally, POAG advises that the

Commission include their intended method for citing Additional Offense Specific Considerations and Additional Considerations with the other citations included at the beginning of the manual.

POAG supports reclassifying departures as "Additional Offense Specific Considerations" in the appropriate guideline sections. It is notable that some "Additional Offense Specific Considerations" sections appear more thorough and user-friendly than others (notably the one following USSG §2D1.1 that features several sub-headers is very used friendly). There are also some instances in which the presentation of the information appears inconsistent. POAG has included the below list of the guideline sections in which these sub-headers are not present, and we encourage the Commission to generate appropriate sub-headers that que the reader about what type of Additional Offense Specific Consideration is being described.

Additional Offense Specific Consideration and Additional Consideration sections that lack the sub-headers:

USSG §2B1.1;

USSG §2B1.6;

USSG §2B5.3;

USSG §2D1.11;

USSG §2D1.12;

USSG §2E3.1;

USSG §2G2.2;

USSG §2H3.1;

USSG §2J1.2;

USSG §2K1.3;

USSG §2K2.2;

USSG §2L1.1;

USSG §2L1.2;

USSG §2L2.1;

USSG §2N3.1;

USSG §2Q1.2;

USSG §2Q1.3;

USSG §2Q1.4;

USSG §2X7.2;

USSG §3C1.2;

USSG §3D1.4; and

USSG §7B1.4 (proposed to be amended to USSG §8B1.4)

It was also suggested that the new proposed USSG §6A1.3(a)(1) may need some adjustments. At the end of the proposed USSG §6A1.3(a)(1) it states, "Such factors may be identified in specific Chapter Two guidelines as 'Additional Considerations.'" POAG suggests that "Additional Considerations" be corrected to "Additional Offense Specific Considerations" and that this clause be further expanded to include "Additional Considerations" that occur in Chapter Three, Four, and Seven (now Eight). With that in mind, it may be that the sub-header for §6A1.3(a)(1), "OTHER OFFENSE SPECIFIC CONDUCT OVER-OR UNDER-REPRESENTING SERIOUS OF OFFENSE," would need to be broadened to include "Additional Considerations" and edited to be "SERIOUSNESS" rather than "SERIOUS." POAG also noticed a linguistic error in the Additional Offense Specific Considerations of USSG §2B1.6, where the term "may be relevant" appears both in the introductory language in part 1 and then again in the sub language at 1(A). While POAG observed that there was some repetitiveness between Chapter 2 "Additional Offense Specific Considerations" and items listed in Chapter 6, POAG understands that reiteration can sometimes accentuate the intent of the Commission.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
February 2024

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

February 20, 2024

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

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on December 14, 2023, and published in the Federal Register on December 26, 2023. See 88 Fed. Reg. 89142 (December 26, 2023); see also 28 U.S.C. § 994(o).

1. Proposed Amendment No. 1—Rule for Calculating Loss

In *Stinson v. United States*, 508 U.S. 36, 38 (1993), the Supreme Court held that commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." In *Kisor v. Wilkie*, 588 U.S. __,139 S. Ct. 2400, 2415 (2019), the Court limited deference to agency interpretations of its regulations to those situations where the regulation is "genuinely ambiguous." Applying *Kisor*, the Third Circuit in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022) held that Application Note 3(A) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference.

TIAG endorses the approach currently in use in the Third Circuit following *Banks* and believes that loss amounts under §2B1.1 should be limited to actual loss rather than "intended loss." The conflation of "actual loss" and

"intended loss" obscures the differences in the amount of social harm caused by offenses that results in actual economic loss to a party and those where loss is "impossible or unlikely to occur." USSG §2B1.1 application n. 3(a)(ii). Moreover, in our collective experience with fraud cases involving tribal communities, we have found "intended loss" is frequently difficult or impossible to calculate and attempts to do so result in unnecessarily or unfairly punitive Guidelines calculations. TIAG believes that relying on actual loss would increase the reliability of the Guidelines calculation as a proxy for culpability, and we therefore endorse restricting loss amounts to "actual loss." We also urge that the Commission adopt this proposed amendment in this amendment cycle.

2. Proposed Amendment No. 2—Youthful Offenders

In Part A of the proposed amendments with respect to juvenile sentences, the Commission seeks comment on how the guidelines should treat offenses committed prior to age eighteen and sets forth three alternatives. Essentially, Option 1 would amend §4A1.2(d)(2)(A) to exclude juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences that involve imprisonment of 60 or more days. This would result in most juvenile sentences receiving at most one criminal history point.

Option 2 would exclude all juvenile sentences from being considered in the calculation of the criminal history score. It also includes bracketed language that such sentences may be considered for purposes of upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Option 3 would amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. It also included bracketed language that such sentences may be considered for purposes of upward departure under §4A1.3.

In Part B of the proposed amendments, the Commission proposes an amendment that amends the first sentence of §5H1.1 to provide: "Age may be relevant in determining whether a downward departure is warranted." It also adds language specifically providing for a downward departure for cases involving a youthful offender and sets forth considerations for the court in determining whether a departure based on youth is warranted.

A majority of TIAG recommends that the Commission adopt Option 3 of Part A of the Proposed Amendment. One member dissented and recommended that no changes be made to the current counting of juvenile offenses. TIAG unanimously supports adoption of Part B of the Proposed Amendment.

TIAG identified certain consistent concerns with how juvenile adjudications are, or are not, accounted for in criminal history calculations. While TIAG members ultimately came to different conclusions about what policy these concerns support, they had consensus that several considerations must be accounted for.

First, TIAG recognizes the increasing consensus that youthful offenders are simply different from adults due to their brain development and socialization. Research has made clear that brain development continues into the mid-twenties. The Supreme Court has recognized this reality and that it must be considered in the realm of criminal sentencing. *Roper v. Simmons*, 542 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010). Juveniles are more likely to succumb to peer pressure, engage in risky or impulsive behavior, and have emotional responses that are disproportionate to the stimulus. Coalition for Juvenile Justice, (2006) "*Applying Research to Practice Brief: What Are the Implications of Adolescent Brain Development for Juvenile Justice?*"(2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf. Additionally, youthful offenders have simply had less social engagement and development than adults. There is a greater potential for change and rehabilitation by virtue of that youth. TIAG uniformly believes that these realities must be accounted for in sentencing youthful offenders.

The juvenile justice system has very different purposes and structures for disposition and sentencing than that for adult offenders. Most juvenile justice systems focus on rehabilitation rather than other sentencing purposes. As a result, how and why juveniles enter the system, are evaluated within that system, and their eventual dispositions have entirely different motivations and purposes than adult sentences. In this respect, juvenile adjudications are simply different than adult sentences.

Likewise, in some instances juvenile dispositions may be structured to achieve purposes other than punishment. Juvenile custodial dispositions may be imposed because they provide an avenue to significant treatment, educational, or other rehabilitative resources. Several TIAG members shared

personal observations of custodial dispositions being imposed on juvenile offenders because it provided the only or most effective avenue to obtain services for those offenders. As a result, juvenile dispositions may, on their face, overstate both the criminal culpability of the offender and the level of punishment intended by the sentencing court.

TIAG members recognize that there certainly are instances of severe and sometimes recurrent criminal conduct by youthful offenders. As a result, there are instances in which leniency may not be warranted, just as with any group. A minority of TIAG expressed concern that changing the current criminal history calculation rules for juveniles would fail to account for these instances.

To a significant degree the question became what the default approach to juvenile offenses should be. TIAG members all acknowledged that departure and variance provide avenues to account for atypical circumstances, regardless of which default is chosen. TIAG members observed both willingness and reluctance to use those tools running in both directions. Concern with the reliability of those tools overcoming the default in atypical circumstances largely drove the final position of TIAG members.

A majority of TIAG believes that Option 3 of Part A provides the best baseline in light of all of these considerations. Given the predominant difference between juvenile adjudications and adult convictions, the majority concluded that excluding them from calculations entirely is the appropriate baseline. The majority group concluded that the default should be the exclusion of juvenile adjudications because of its better alignment with the nature of juvenile cases and that any anchoring effect of the default should be in favor of not including juvenile conduct. Several members of the majority also see Option 2 as a good option, but less so than Option 3.

One member of TIAG dissented from this position. That member believed that the current rules should not be changed based primarily on instances of severe and extensive juvenile conduct, particularly violent offenses, that have recently increased in their state.

TIAG agreed that Part B of the proposed amendment should be adopted. The ad hoc TIAG group encouraged revisions to this section in 2016. The current TIAG membership continues this position and supports the amendment.

3. Proposed Amendment No. 3—Acquitted Conduct

While acquitted conduct is not specifically addressed in the *Guidelines Manual*, except for a reference in the parenthetical summary of the holding in *United States v. Watts*, 519 U.S. 148 (1997), consistent with the decision in *Watts*, acquitted conduct is permitted to be considered by the sentencing court as relevant conduct under USSG § 1.B1.3 in conjunction with §§ 1B1.4 and 6A1.3.

TIAG is generally opposed to the use of acquitted conduct in sentencing as its use is a source of surprise and great confusion and concern among Native American defendants and their families. It has long been recognized that a criminal defendant's guaranty of a right to a jury trial exists "in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (citing *Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [Jury] Clause was clearly intended to protect the accused from oppression by the Government. . .")). This authority residing in the jury extends so far that the federal courts recognize the de facto power of jury nullification even though it is in contravention of the jury's sworn duty. *See Sparf v. United States*, 156 U.S. 51, 64 (1895) (citing *State v. Brailsford*, 3 U.S. 1, 4 (1794), which noted that while the jury had the power to decide both question of fact and law, questions of law were more properly in the domain of the court).

Even though TIAG opposes the use of acquitted conduct, it takes no position on the proposed amendments and instead urges the United States Sentencing Commission to prohibit the use of acquitted conduct in the calculation of the sentencing guidelines range in any manner. It is the opinion of TIAG that each of the proposed amendments creates its own concerns that could be best avoided by leaving the issues raised by *United States v. Watts* and 18 U.S.C. § 3553 to the sentencing court's consideration under § 3553. If a sentencing court is convinced that acquitted conduct must necessarily be considered in order to craft a sentence that is "sufficient, but not greater than necessary" with the sentencing purposes of 18 U.S.C. § 3553(a), then it is more appropriate for acquitted conduct to be considered under § 3553(a)(1) as the nature and circumstances of the offense or the history and characteristics of the defendant than within the formal calculation under the sentencing guidelines.

4. Proposed Amendment No. 4—Circuit Conflicts

In Part A, the commission offers two options to address a circuit conflict on whether a serial number must be illegible to apply the increase in §2K2.1(b)(4)(B)(i).

A substantial majority of TIAG favors Option 1, which would define "altered or obliterated serial number" to mean a serial number that has been deliberately "rendered illegible or unrecognizable to the unaided eye." The majority believes that Option 1 serves the policy purposes behind the prohibition on possession of such weapons without risking undue punishment of individuals who, because of their personal characteristics and life circumstances, may be less likely to be the first owner of a gun or to have purchased their lawfully owned gun directly from a federal firearms licensee. The majority further favors Option 1 as the clearer and more easily administrable option.

Even courts that have adopted the definition "obliterated or altered" that the majority of TIAG disfavors have recognized that the policy goal of §2K2.1(b)(4)(B)(i) is to "discourag[e] the use of untraceable weaponry." *United States v. Carter*, 421 F.3d 909, 914 (9th Cir. 2005); *see also United States v. Perez*, 585 F.3d 880, 884–85 (5th Cir. 2009) (quoting *Carter* favorably). But a gun whose serial number is legible to the naked eye is not "untraceable" in any common sense of the word, nor would any ordinary person purchasing such a weapon or examining its serial number view it as such.

The TIAG majority is concerned that Option 2 risks unfairly and disproportionately burdening Native Americans. For many Native Americans who live in rural areas, gun ownership is a necessary part of life. Guns are used for hunting and for protecting livestock from predators. Native Americans own guns for other purposes, as well. Native Americans serve in the military at a higher rate than any other demographic group, and Native American veterans, like other veterans, often continue to own firearms after their separation from the military.

At the same time, guns are expensive, and there are few, if any, federal firearm licensees on rural reservations. As a result, many of the lawfully owned guns on these reservations are older. Guns may be shared among family members, inherited, received as gifts, or purchased second-hand. Individuals

who receive guns in this manner may not know the history or the provenance of the gun, and the gun may have characteristics—including a marked or scratched serial number—that the present owner did not contribute to and potentially knows nothing about. The TIAG majority is concerned that a rule that allows sentences to be enhanced where serial numbers are fully legible, though they may be marked, scratched, or partially defaced, risks punishing people for simply owning old guns, or for purchasing guns second-hand.

Option 1 is also more administrable than Option 2. It creates a bright line rule that will reliably yield results about which there will be little dispute. All that is required of a sentencing judge under Option 1 is to determine whether the weapon possesses a serial number that can be read by the naked eye. This is a relatively simple task easily accomplished by anyone with ordinary vision.

By contrast, Option 2's definition of "altered or obliterated," which turns on whether information is "less accessible," raises significant questions regarding how much less accessible the information must be, how accessible it was in the first place, and how fairly to compare the two. This is particularly true in the case of older guns, where various parts of the gun may have worn down over time simply due to age and the effects of repeated handling. In such cases, it may be genuinely unclear how "accessible" the information was prior to whatever attempted defacement may have occurred.

The cases cited by the Commission to show the existence of a circuit split only highlight how unclear and susceptible to different interpretations the language of Option 2 is. As the Commission notes, the language of Option 2 comes directly from the Ninth Circuit's decision in *United States v. Carter*, 421 F.3d 909, 916 (9th Cir. 2005). However, both the Sixth and the Fifth Circuits—which the Commission identifies as being on opposite sides of the "split"—claim that they are adopting the Ninth Circuit standard in arriving at their very different conclusions. *See United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020) ("To summarize, we adopt the Ninth Circuit's framework in *Carter* and conclude that under USSG §2K2.1(b)(4)(B), 'a firearm's serial number is "altered or obliterated" when it is materially changed in a way that makes accurate information less accessible."); *United States v. Perez*, 585 F.3d 880, 885 (5th Cir. 2009) ("We agree with the Ninth Circuit's reasoning and holding in *Carter*.") That two different circuit courts that each claim to be adopting the

framework of Option 2 in fact end up creating a "circuit split" only highlights the problems with the administrability of Option 2.

A comparison of the cases cited by the Commission in identifying the "circuit split" reveals Option 1 would largely accomplish the same goals as Option 2 but with substantially less confusion and ambiguity. The Ninth Circuit's decision in *Carter* involved a serial number that was undetectable to the naked eye and only "discernable with the use of microscopy." *Carter*, 421 F.3d at 910. But such a weapon would also receive an enhancement under Option 1. In *United States v. Harris*, 720 F.3d 499, 501 (4th Cir. 2013), the record showed that the district judge had personally examined the firearm and attempted to write down the serial number that he was seeing but was unsuccessful and made errors in some of the digits because of the scrapes and gouges that had been applied. This, too, would qualify for an enhancement under Option 1.

Only the Fifth Circuit in *United States v. Perez*, 585 F.3d 880 (5th Cir. 2009) and the Eleventh Circuit in the unpublished case, *United States v. Millender*, 791 Fed. App'x 782 (11th Cir. 2019), appear to have upheld enhancements in cases where a serial number was scratched but still legible to the naked eye without the assistance of specialized equipment. As noted above, it is not necessary that §2K2.1(b)(4)(B) reach such cases to fully accomplish the policy goals underlying the prohibition on altered or obliterated serial numbers.

A minority of TIAG believes otherwise and supports Option Two. Option Two's definition of "altered or obliterated serial number" is consistent with the ordinary meaning of the phrase "altered or obliterated," as used in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k). If the Commission interprets both "altered or obliterated" to mean the same thing, as contemplated in Option One, then one of the two words would be superfluous and have no meaning.

Additionally, the minority notes that the enhancement for gun offenses charged is almost invariably applied to gun offenses committed in furtherance of firearm or drug trafficking or dangerous crimes intended to evade accountability and thwart law enforcement. To be sure, the enhancement would not apply to Native Americans who inherit or purchase old guns second-hand and utilize such guns consistent with their cultures and federal laws. The

minority, therefore, disagrees with the majority's concerns about the disproportionate impact on Native Americans if the Commission adopts Option Two.

In Part B, the commission seeks to resolve §3D1.2(c), which permits grouping of firearms counts under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 934(c) based on the drug trafficking count. The majority of circuits allow such counts to be grouped but the Seventh Circuit in *United States v. Sinclair*, 770 F.3d 1148 (7th Cir. 2014) reached the opposite conclusion holding that there was no basis for grouping felon-in-possession and drug trafficking counts since grouping rules are to be applied only after the offense level for each count has been determined and "by virtue of §2K2.4 [the counts] did not operate as specific offense characteristics of each other and the enhancements in §§2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply." Id. at 1157-58. The proposed amendment follows the majority view over the Seventh Circuit view. TIAG unanimously supports the proposed amendment to Part B believing that it resolves the circuit conflict in a manner that more accurately reflects the intent and spirit of the guidelines.

5. Proposed Amendment No. 5—Miscellaneous

TIAG has no view on most of the proposed Miscellaneous Amendments. It does, however, wish to comment on Parts A and F of the proposed Miscellaneous Amendments. Part A is proposed in response to the recent enactment of the Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021. Part F responds to concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero Point Offenders).

STOP ACT

TIAG generally supports the Commission's plan to implement the STOP Act. For hundreds of years, tribal communities have seen their cultural heritage stolen and exported for sale overseas, thereby depriving communities of their history and disrupting their sacred cultural traditions. The STOP Act aims to curb this illicit trafficking in indigenous cultural heritage, and TIAG agrees that U.S.S.G. §2B1.5 is the generally appropriate Guideline for STOP Act violations.

TIAG is, however, concerned that §2B1.5 may be unduly punitive as regards a narrow subset of potential STOP Act violations, specifically violations involving instances where an Indian person transports an item out of the United States for purposes other than alienation to a non-community member. TIAG supports either (1) lowering of the base offense level for such violations from 8 to 2, or (2) creation of a specific offense characteristic providing for a 6-level downward adjustment for offenses that meet this description.

As the Commission is aware, the historical geographic boundaries of tribal communities are not contiguous with the geographic boundaries of the United States. Some tribes, such as the Tohono O'odham Nation in Southern Arizona and the Akwesasne Mohawk in upstate New York, have present-day territories that span international borders. Many other tribes, including the Lipan Apache, Kickapoo Tribe, the Cocopah of the Colorado River Delta, Pascua Yaqui, Kumeyaay, Blackfeet, Ojibwe, and Ysleta del Sur Pueblo, maintain significant cultural and historic ties to communities and geographic sites on the other side of the United States border. For some tribal members, maintaining these ties necessarily involves crossing borders to participate in cultural events and ceremonies.

Members of tribal communities who live along a border have sometimes come into conflict with federal law enforcement patrolling the border. These federal officials, generally tasked with preventing illegal movement of people and goods across the border, have at times acted without sufficient sensitivity to the treaty and other rights of tribal members to move freely around their historic lands. While patrolling the border, law enforcement agents have on occasion seized cultural and ceremonial objects. Once seized, these objects have not always been handled in culturally sensitive ways.

TIAG hopes that the Department of Justice will not use the STOP Act to prosecute individual Native Americans crossing the border with objects of cultural patrimony for ceremonial or cultural use, but the express language of the STOP Act does not appear to foreclose such prosecutions.

TIAG believes that given the stated objectives of the STOP Act and different interests implicated when Indian people transport cultural artifacts across international boundaries, the Commission should adopt a lower base offense level for such offenses, or, in the alternative, create a new offense-

specific criteria that recognizes the reduced culpability of these offenses. Such an amendment will ensure that Indian people charged with violations of the STOP Act are not treated the same as non-Native people seeking to illicitly profit from a tribe's cultural patrimony.

Definition of Sex Offense as used for certain "zero point" offenders

The United States Sentencing Commission's recent addition of the Chapter Four guideline §4C1.1 adds an adjustment for certain "zero-point" offenders by providing for a decrease of 2 levels from the determined offense level under Chapters Two and Three so long as the offender does not fall within a specifically delineated exclusion. The exclusionary category at issue in Part F relates to the definition of "sex offense." As currently written, the exclusion only applies to sex offenses related to and involving minor victims.

Given that a significant percentage and number of sex offenses are prosecuted in Indian Country, this newly introduced guideline is of interest to TIAG and Native Americans residing in Indian Country. The adoption of Chapter Four guideline adjustments holds potential implications for sentencing outcomes in cases involving zero-point offenders, particularly those charged with sex offenses in Indian Country. The majority of TIAG favors Option 1, advocating for the limited, yet expanded, definition of "sex offenses" to encompass offenses involving wards and individuals in federal custody in addition to offenses involving minor victims, but not extending to all sex offenses. The support of this option indicates a recognition of the need for broader inclusivity within the definition to ensure comprehensive coverage of the relevant offenders that the Commission initially intended to be reached by this exclusion.

A minority of TIAG favors Option 2. The majority is less supportive of Option 2 because they are concerned about the possibility of broad overreach. The apprehension arises from the concern that an overly broad definition could potentially exclude those who should benefit from the policy behind the decrease at its inception. TIAG's cautious approach underscores the importance of balancing inclusivity with precision in legal definitions, particularly concerning sensitive case types such as sex offenses.

The TIAG minority supports Option Two because it captures the realities of sexual assault. Not all sexual assaults are committed with violence and

perpetrators of sexual assault, whether committed against adults or minors, should not receive the benefit of the reduction, which Option Two addresses.

6. Proposed Amendment No. 7—Simplification of the Three-Step Process

Consistent with its identification of a policy priority for "exploration of ways to simplify the guidelines," the Commission has proposed an Amendment that would revisit the three-step process for sentencing calculation that has existed since *United States v. Booker*, 543 U.S. 220 (2005). The familiar three-step process requires the sentencing court to (1) calculate the appropriate guideline range and determine the sentencing options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) consider the Commissions statements and guidance related to departures and specific personal characteristics that might warrant consideration in imposing a sentence; and (3) consider the applicable factors found in 18 U.S.C. § 3553(a).

In recognition of the decline of the use of guideline-based departures under step two of the three-step process in favor of variances under step three by sentencing courts post-*Booker*, the Commission seeks comment on its proposal to eliminate all provisions of Chapter Five, Part H and most of the provisions of Chapter 5, Part K and create a New Chapter Six that generally lists the previous departure conditions that are currently considered for guideline calculations and instructs the sentencing court to consider them in its 18 U.S.C. § 3553(a) analysis.

TIAG believes that there are many reasons why departures have fallen into less favor with many sentencing courts. Among them are the more stringent standard of review (de novo as a question of law) to guidelines determinations as opposed to the standard of review applied to a consideration of the sentencing factors found in 18 U.S.C. § 3553(a)(abuse of discretion). In addition, the requirement that the court give notice that it is contemplating a departure as found in Rule 32(h), Fed. R. Crim. P., whereas no such obligation is found in imposing a variance under 18 U.S.C. § 3553(a), likely plays at least some role.

TIAG finds the simplification of the three-step process an intriguing proposal but unanimously believes that the change is so substantial that more time is necessary to study the proposal than is possible in this amendment

cycle. At the outset, TIAG believes that whether the references to departures, which are found in at least two places in the statutes related to sentencing (28 U.S.C. § 994 and the duties of the Chief Judge related to statements of reasons for the sentence and 18 U.S.C. § Section 3553(b)(2)(ii)(I) relating to sentences in crimes involving child crimes and sexual offenses), might impose some limitation on the proposed amendments is an issue that is worthy of some study.

In addition to the general size of and number of amendments, TIAG is concerned that departures it has previously suggested and supported in the past, particularly §§ 4A1.2 and 4A1.3 related to tribal history as a basis or consideration for a departure based on Inadequacy of Criminal History Category and §5H1.1 Age, which allows youth to be considered, are not inadvertently impacted by amendment.

It is the position of TIAG that the proposal is worthy of serious consideration, but it requests that the Commission consider extending the time to study the proposal in detail. If this is done, TIAG would intend to appoint a subcommittee of its members to study the impact of the proposal in Indian Country and would be in a much better position to provide the Commission with meaningful comment.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working with you during the remainder of this amendment cycle and in continuing our collaboration in the future.

Sincerely yours,

Ralph R. Erickson, Chair

United States Sentencing Commission

Public Comment

Written Testimony

Victims Advisory Group

February 2024

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 22, 2024

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Members of the Commission:

Introduction

The Victims Advisory Group ("VAG") appreciates the opportunity to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from throughout the nation. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars. During the VAG's consideration of the proposals, two overriding themes emerged. First, the Guidelines must reflect the bedrock principle of our sentencing system of individualized sentencing which accurately captures for both offenders and victim survivors the nature of the offense, the character of the offender, and the scope of the harm caused. Second, the Commission cannot exceed its authority to disrupt settled Supreme Court precedent or Congressional enactments. When either of these maxims is violated, which is the case with many of these proposals, victim survivors' legal rights are compromised and they suffer further harm.

1. Rules for Calculating Loss

The Commission is seeking comment on its proposed amendment to § 2B1.1 (Theft, Property, Destruction, and Fraud), including whether the proposed amendment should be adopted during this amendment cycle or deferred until a future amendment cycle that may include a more comprehensive review of § 2B1.1. It appears that the amendment as proposed does not change the intent of Section 2B1.1, but rather ensures that it is applied consistently across the circuits.

To the extent the proposed changes are intended to address an outlier position taken by the Third Circuit in U.S. v. Banks, 55 F4th 246 (2022) and do not change the definitions of any of the relevant terms with regard to the method in which loss calculations should be made, the VAG supports this amendment. Furthermore, from a victim perspective, a victim feels the loss threatened or intended in an acute way. The harm experienced is driven by the intended culpability of the offender and not the serendipitous result.

Given the straightforward and important nature of this proposed amendment (to ensure consistency across the circuits) the VAG sees no reason to delay its adoption. The amendment is basically a "correction" and there is nothing about adopting this amendment now that would preclude further review of this section in the future.

2. Youthful Offenders

The VAG strenuously and unequivocally opposes the proposed amendments regarding youthful offenders and submits that they should be rejected in their entirety.[1] As drafted, the proposed amendments would specifically forbid or severely limit a judge from taking into account at the sentencing of a convicted offender his prior criminal or relevant juvenile record, regardless of the nature or severity of the crimes or the defendant's role in them simply because those crimes were committed when the defendant was under 18 years old. As an initial matter,

[1]For reasons unclear to the VAG, the Commission, has employed the term "youthful individuals" without definition. The individuals at issue are by definition offenders, as they have been convicted of federal crimes. Specifically, in the context of Part A, they have also been convicted or adjudicated of serious offenses as juveniles. Consequently, both the law and the Commission have correctly referred to this cohort as "youthful offenders," a term dating back to 1885, defined by Black's Law Dictionary as "a person in late adolescence or early adulthood who has been convicted of a crime." *Youthful Offender*, Black's Law Dictionary (11th ed. 2019). Notably, in prior instances when the Commission addressed this matter in 2017 and 2023, it used the term, "Youthful Offender." In its September announcement of policy priorities, it used the appropriate term "Youthful Offenders." Since "Youthful Individual" lacks completeness and obscures the reality that the individual before the court for sentencing is not only a defendant, but also an offender, the VAG will utilize the more accurate and appropriate term.

the VAG believes that these proposed amendments are contrary to well-established law regarding the purpose and manner of sentencing in the federal system and thus exceed the authority of the Commission. The consequences of passing such amendments would be completely inapposite to the purposes of sentencing. As drafted, the proposed amendments unnecessarily preclude judges from fulfilling their duty to justly sentence individual defendants, re-victimize victims of crime and/or their family members, and create new risk in the community that others will be victimized, because a likely consequence of these amendments will be increased criminal activity by offenders whose prior juvenile criminal behavior was not properly considered at the time of sentencing. Thus, they do not accomplish the goals stated by the Commission.

As a threshold matter, the VAG recognizes some of the concerns of the Commission and supports many aspects of criminal justice reform – particularly those which address racial disparities in the criminal justice system. Furthermore, many of the people we represent were victimized as children. Consequently, we recognize the effects of trauma on children and can see the need for some changes to aspects of our criminal justice system. This may include addressing how juvenile offenders are treated in the juvenile rehabilitation system as well as expungement of juvenile records of victims of sex trafficking for crimes committed as a direct result of their exploitation.[2] However, these misguided proposals do not address the causes of the aforementioned problems. Instead, these problems should be addressed by the relevant part of the criminal justice system, not by the Sentencing Guidelines at the time of sentencing for a new offense and at the expense of victims.

A. Purpose of Sentencing – Individualized Sentencing Is Compromised By These Proposals

The purpose of sentencing generally, and the Guidelines specifically, are clear. Sentences should "reflect the **seriousness of the offense**,[] **promote respect for the law**, []**provide just punishment** for the offense; afford adequate **deterrence to criminal conduct**; **protect the public from further crimes of the defendant**; and provide the defendant with needed educational or vocational training, medical care, **or other correctional treatment** in the most

[2] *Workable Solutions for Criminal Record Relief: Recommendations for Prosecutors Serving Victims of Human Trafficking*, American Bar Association (2019), https://www.ojp.gov/ncjrs/virtual-library/abstracts/workable-solutions-criminal-record-relief-recommendations.

effective manner."[3] To that end, the Commission has stated the statutory mission of the Guidelines is to further the "basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[4]

Central to achieving this mission is the concept of individualized sentencing. Each defendant should be sentenced as an individual with a full opportunity for the sentencing court to consider the full history of the defendant including the characteristics and impact of not only his current criminal activity for which he is being sentenced, but the prior criminal activity – both mitigating and aggravating. The Supreme Court has been quite clear on this point, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to 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."[5] Indeed the Court has "emphasized that '[h]ighly relevant--if not essential--to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." [6]

Given that it is *essential* in determining the appropriate sentence that a court be fully informed about a defendant's life and characteristics, the proposal to artificially eliminate from the sentencing court's consideration a full and complete picture of an offender's prior criminal history can only be described as antithetical and one sided. Such a position flies in the face of nearly a century old understanding of the value of learning about the personal characteristics of an offender. "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[7] That bedrock of criminal sentencing is reflected in 18 U.S.C. 3661 which commands that "No limitation shall be placed on the information concerning the background, character, and conduct

[3] 18 U.S.C. § 3553(a)(2) (emphasis added).
[4] United States Sentencing Commission, *Guidelines Manual*, §1A.1.2 (Nov. 2023).
[5] Pepper v. United States, 562 U.S. 476, 488 (2011) (*quoting* Koon v. United States, 518 U.S. 81, 113 (1996)).
[6] Pepper, 562 U.S. at 488 (internal citation omitted).
[7] Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

of a person convicted of an offense which a court of the United States may receive and consider for the purpose of sentencing."[8]

Prior criminal histories when committed before the age of 18 have been utilized by several courts and found to be extremely useful information.[9] Indeed, the Probation Officers Advisory Group ("POAG") noted that there is a general consensus "that juvenile offenders should be held accountable for past convictions. Accounting for past criminal history is important, especially if the defendant has violent or repeat offenses."[10] Therefore, as threshold matter these proposals are far too broad and antithetical to the purposes of sentencing.

B. Part A – Computing Criminal History for Offense Committed Prior to Age 18

(1) <u>These Proposals Violate Individualized Sentencing and Create Inaccurate and Biased Sentences</u>

These proposed amendments in Part A are antithetical to this well-established process for individualized and fair sentencing because they seek to *remove or severely limit* from a judge's analysis prior adjudications and convictions of the offender. It is important to be clear what this would actually look like in court to a victim – or anyone else. These amendments implicate adult federl offenders who have a history of criminal activity either within the last 5 years, or a conviction that resulted in incarceration within the last 15 years. Given the graduated punishment system of the juvenile justice system, that would mean that these offenders most likely have a history of attempted rehabilitation, an escalation of crime resulting in increasingly secure confinement, ultimately leading to a federal conviction. As noted by some members of the POAG in August,

> [H]istorically juvenile offenders receive graduated sanctions where they are often offered initial leniency from the juvenile courts and more serious sanctions were only imposed upon new, repeated or more serious behaviors. Given this pattern, the scoring of juvenile adjudications within five years would continue to identify those juveniles who have committed recent and more serious, or escalating behaviors. To not score or account for

[8] 18 U.S.C. § 3661.

[9] E.g., <u>*United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013)</u>(upholding the use of the defendant's juvenile adjudication as a predicate offense for Armed Career Criminal Act (ACCA) and citing to over 20 state statutes allowing consideration of juvenile records in adult sentencing); <u>*United States v. Barber*, 200 F.3d 908 (6th Cir. 2000)</u>; <u>*United States v. Brenes*, 98-1736, 2000 U.S. App. LEXIS 31505 (2d Cir. Dec. 7, 2000)</u>.

[10] Probation Officers Advisory Group, Public Comment to Sentencing Commission Proposed Priorities (August 1, 2023) at 6.

> the adjudications would be to essentially 'turning a blind eye" or treating juvenile offenders equal to those individuals with no juvenile past, thus promoting disparity."[11]

Yet, the proposals would limit significantly or not allow a judge to consider prior rehabilitative efforts or confinement sentences in assessing whether rehabilitation or some other sentence is appropriate. The proposals take general knowledge concerning juveniles – that their brains are not fully developed – to dilute or eliminate specific knowledge about the now adult offender, i.e. his previous experience with law enforcement, criminal activity, and prior efforts to curtail his criminal activity. Such a proposal is an affront to individualized sentencing.

Not only does it thwart individualized sentencing, but it does so in an unbalanced and biased direction. First, it precludes from sentencing consideration of only information that may increase his sentence, not information from a defendant's history that may decrease his sentence. A defendant is still allowed, as he should be, to bring forth evidence from his background such as childhood trauma, negative influences on him that may contribute to his criminal acts, positive past achievements, or any historical circumstances that will mitigate his criminal sentence. Under this proposal, a judge can consider such evidence from a defendant even before turning the age of 18, but never be informed of the numerous crimes previously committed by an offender and the several efforts to rehabilitate or deter further criminal activity. Such a proposed system does not achieve the full sentencing envisioned by the Court or Congress. Rather, it creates an artificial, indeed inaccurate picture of the defendant's history and characteristics, thus thwarting an accurate and individualized sentence.

Secondly, this is not a neutral inaccuracy. It is unfairly imbalanced in its inaccuracy in a way that favors only offenders. Up until now the Commission valued accurate individualized sentencing and recognized the importance of not grouping defendants who actually have distinctly different criminal histories. Just last year, the Commission was greatly concerned with accurate criminal histories. So concerned it created an entirely new category of offenders, Zero - Point Offenders. Driving this radical change in the Guidelines was the Commission's concern that Criminal History Category (CHC) I grouped together offenders with truly no criminal

[11] Id. at 5. See also, e.g., *United States v. Winfrey*, 23 F.4th 1085, 1087 (8th Cir. 2022) (rejecting the claim that an ACCA enhancement based on crimes committed as a juvenile was unconstitutional and noting ACC recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct.).

histories and offenders who actually had criminal histories but were not counted.[12] The Commission found that this failure to distinguish between offenders more granularly was unfair, particularly because the recidivism rates of Zero-Point Offenders was lower than that for other offenders. Consequently, for purposes of *accuracy* and fairness the Commission created an entirely new category of offenders.

This proposal does the **exact opposite**. Here, rather than distinguishing among offenders who truly have no relevant criminal history prior to 18 years of age from offenders who have lengthy criminal histories, the Commission proposes to put them together by either giving them all no criminal history points or just one point regardless of the distinctions among defendants. Not only that, it seeks to do this although, by its own research, these offenders have **a higher rate of recidivism** than other offenders**.**[13] By approving this amendment, the Commission suggests that it is concerned about distinguishing among offenders only when it is to the defendant's advantage. Even more perplexing is, according to the Commission's own data under Option 2 62% of these offenders would have a lower Criminal History Category ("CHC"), some more than two levels and one quarter of whom would then have zero points – when they actually have criminal (and often lengthy) records. When it is not to defendant's advantage, the Commission seeks to artificially create a misleading criminal history. In short, last year's amendments are inapposite to these and both cannot be true.

(2) The Proposals Create A Disproportionate Benefit to Offenders and Grave Harm to Victim Survivors of Their Crimes

The second basis for the VAG's opposition to the proposed amendments affecting juvenile offenders is that these proposals disproportionately benefit truly dangerous offenders and risk further harm to truly vulnerable victims.

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[12] USSC, *Proposed Amendments* at 178-179 (Dec. 2023).

[13] It should be noted that waivers of children into adult courts "have dropped more than 50% in the last fifteen years." Jonathan W. Caudill & Chad R. Trulson, *The hazards of premature release: Recidivism outcomes of blended-sentenced juvenile homicide offenders*, 46 J. Crim. Just. 219 (2016). Consequently, serious and violent offenders are found in the juvenile system with increasing frequency. "As a natural consequence of blended sentencing laws, state juvenile justice systems are now retaining serious and violent offenders who might have otherwise been removed from the juvenile justice system." Id.

a. Offenders

The concern of this unfairness is further compounded by the very people impacted by these amendments. The VAG is aware of brain research regarding juvenile offenders. As a group the VAG accepts some of this research as a helpful generalization of people under 18 years of age. However, as the Commission notes, another important reality of this offender group is that it has the highest level of recidivism. The Guidelines themselves note that "a defendant with a record of prior criminal behavior is more culpable that a first offender thus deserving of greater punishment."[14]

"It's not uncommon for rearrest rates for youth returning from confinement to be as high as 75 percent within three years of release, and arrest rates for higher-risk youth placed on probation in the community are often not much better."[15] Not only are the rearrest rates substantially higher than any other age group, but the crimes are not minor. One international meta-analysis noted that the rate of violent recidivism was higher in studies with longer follow-up periods.[16]

The Commission's own data confirms this reality. This data only covered three years after release and research indicates longer periods of study reflect even higher recidivism rates. However, even with this short time frame, 72.1% of offenders with at least 2 points under Option 1 were rearrested. Although the Commission only highlighted certain "crimes of violence" if one includes in this list crimes against victims (crimes of violence and burglary, drug trafficking, weapons, and other sex offenses), 50% of these new crimes directly harm victims. [17]

These statistics comport with the experience of many members of the VAG who represent crime victims across the country and note collectively that some of the most violent

[14] USSG, Chapter 4, Part A, Introductory Comments).

[15]Elizabeth Seigle, et al., *Core Principles of Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile System* at 1 (2020), https://csgjusticecenter.org/wp-content/uploads/2020/01/Juvenile-Justice-White-Paper-with-Appendices-.pdf; *see also* Office of Juvenile Justice and Delinquency Prevention, *Juvenile Reentry* at 1 (2017), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/aftercare.pdf (A review of "state studies have shown that rearrests rates for youth within 1 year of release average 55 percent, while reincarceration and reconfinement rates during the same timeframe average 24 percent") (internal citation omitted).

[16] Hanneke E. Creemers, et al., *Ramping Up Detention of Young Serious Offenders: A Safer Future?*, 24 Trauma, Violence, & Abuse 2863, 2863 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10486148/pdf/10.1177_15248380221119514.pdf

[17] USSC, Supplemental Recidivism Data (February 2024), available at https://www.ussc.gov/education/videos/2024-youthful-individuals-data-briefing

cases on which they have worked on behalf of victims of crime involved juvenile offenders.[18] They also comport with POAG's observation that "our system is seeing more violent and repeat young offenders than in the past."[19] This anecdotal experience is borne out by the statistics. The Department of Justice reported in 2023 that murders committed by juveniles acting alone increased by 30% and when acting with other juveniles by 65%.[20] Similarly, the Office of Justice Programs ("OJP") found youth ages 12-17 responsible for 146,000 serious violent crimes in 2019 and "juveniles involved in homicides increased 27% between 2013 and 2019."[21] Another OJP study found that juveniles make up more than one quarter of sex offenders and commit more than one third of sex offenses against minors.[22] Washington, D.C. demonstrates the sad increase in violent victimization committed by juvenile offenders overall. In 2023 alone, violent crime increased 39% and juvenile arrests increased 17% in the first 6 months.[23]

The Guidelines already accommodate for youthful offenders with less serious criminal histories by excluding from considerations older or minor offenses.[24] They also distinguish between offenders with an older or less serious juvenile offenses from offenders with more recent or very serious offenses.[25] Therefore, this proposed amendment benefits the most violent of youthful offenders who are now currently engaged in the federal system as adults. Consequently, the VAG cannot support these amendments.

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[18] See, infra pages 13-14 describing typical cases handled by members of the VAG.
[19] Probation Officers Advisory Group, Public Comment to Sentencing Commission Proposed Priorities (August 1, 2023) at 5.
[20] Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Offending by Juveniles* (last updated 2023).
[21] Id.
[22] David Finkelhor, et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP at 3 (2009), https://www.ojp.gov/pdffiles1/ojjdp/227763.pdf.
[23] DC Metropolitan Police Department, *District Crime Data at a Glance* (2023), https://mpdc.dc.gov/page/district-crime-data-glance; DC Metropolitan Police Department, *Bi-Annual Report on Juvenile Arrests, Jan-June 2023* (2023) https://mpdc.dc.gov/node/1677791; *see also* David Lippman, *Data show surge of juvenile arrests ahead of DC curfew crackdown*, WUSA9 (Sept. 1, 2023, 11:20 PM) https://www.wusa9.com/article/news/verify/verify-data-shows-surge-juvenile-arrests-dc-curfew/65-99d67463-65ac-4eac-b6e1-20818182f8e9 (reporting an approximate 47% increase in juveniles arrested for violent crime between 2021 and 2023).
[24] E.g. § 4A1.2(c), (d).
[25] Id.

b. Vulnerable Victims

One of the justifications for exploring this radical change to generalized sentencing is the demographics of offenders.[26] However, those same concerns exist for the victims of juvenile offenders, a group not referenced in the Commission's data. While studies of crime victims of juvenile offenders are not plentiful, some studies indicate this same demographic is put at risk by these offenders. A review of homicides by juveniles reported that 86% of these victims were male and 55% of them black.[27] "The overwhelming majority (88%) of homicide victims of juveniles were killed with a firearm," and since 2013 juveniles who committed a homicide with a firearm increased 68% through 2019.[28] Similarly, a measurable portion of the victims of juvenile sexual offenders are also minors.[29] Gun deaths among children increased 30% between 2019 and 2021, with 60% of those due to homicide.[30] The New York Times recently analyzed the data from the Gun Violence Archive and reported that "[a] person younger than 18 shot and killed another child somewhere in the United States once per day on average last year."[31]

Effects of exposure to the violence caused by teens and youth are profound. Youth who must live with violence in their communities perpetrated by other youth are more likely to experience anxiety, depression, substance abuse, difficulty in education, and become involved in violence.[32] In short, the very group the Commission is concerned with are the very people victimized by the cohort who will benefit from this sweeping proposal.

A closer examination of the crimes involving victims committed by offenders affected by this proposal indicates a profound impact on victims. Of the potentially 3,112 who would

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[26] USSG, *Proposed Amendments* at 14 (Feb. 2023).
[27] National Center for Juvenile Justice, *Youth and the Juvenile Justice System: 2022 National Report* at 65-66.
[28] Id at 68.
[29] David Finkelhor, et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP at 3 (2009), https://www.ojp.gov/pdffiles1/ojjdp/227763.pdf. (finding one-third of sex offenses against minors are committed by offenders under 18 years of age).
[30] John Gramlich, *Gun Deaths Among Children and Teens Rose 50% in Two Years*, Pew Research Center (April 6, 2023), available at https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years/
[31] Tim Arango and Robert Gebeloff, *Young Victims, Young Suspects: The Kansas City Shooting and Gun Violence*, The New York Times (February 16, 2014), available at https://www.nytimes.com/2024/02/16/us/kc-super-bowl-shooting-gun-violence.html.
[32] Eileen Ahlin and Maria Antunes, *Addressing Youth, Violence and Victimization From an Environmental Perspective*, Office of Justice Programs (March 2020) at 8-10.

benefit from these proposals, the vast majority, over 2000 of them, seem to have received an adult sentence greater than 13 months, thus they are among the more serious offenders.[33] Looking at each cohort, the bulk of the crimes committed seem to implicate victims. Reviewing just the offenders impacted by Option One, of the youthful offenders with one point 23.6% assaulted another, 7.8% robbed another, 4.7% committed another crime of violence, 16.4% burglarized a home.[34] For those with two points, the level of violence and crimes involving victims increases with robberies increasing threefold to 21.2%, 26.5% assaulting victims, 5.8% engaging in drug trafficking, and 22.9% using a firearm.[35] As is expected, this cohort of One-Point and Two-Point offenders find themselves in federal court with crimes affecting victims as their instant offense with 30.1% of One-Point offenders convicted of drug trafficking and 26% convicted of firearms offenses, and 38.3% of the two point offenders also committing firearm offenses.[36] Therefore, the picture that emerges from this cohort of One and Two Point offenders are individuals who have committed hundreds of crimes affecting victims and then continued and escalated their crimes.[37]

The numbers become even more stark for victims of crimes when one reviews the findings for Option 3 which would encompass nearly 8% of all offenders with criminal history points. Offenses committed by this cohort include the robbery of victims (23.9%), assault of victims (20%), burglary of victims (16.8%), drug trafficking (7.2%), weapons offenses (14.9%) and even murder of victims (3.7%).[38] These defendants become involved in federal court due to very dangerous crimes including firearms violations (38.3%) and drug trafficking (28.1%) as their instant offense.[39] 81.9% of these individuals do not have minor criminal histories but are in CHC III or above with 22.1% offending so severely that they reside in CHC VI.[40] Not only do

[33] USSG, *Public Data Presentation: Proposed Amendments on Youthful Individuals* (Jan. 2024).
[34] Additionally, 13.7% engaged in drug trafficking or another drug crime not including possession. *Id.* at 9.
[35] *Id*.
[36] *Id* at 11. Additionally, these offenders are not before the court with solely these juvenile adjudications and convictions. 86% of two-point offenders and 58% of one-point offenders have criminal history categories of III or higher. *Id*.
[37] Option 2 promises an even more violent outcome with 27% of those defendants assaulting another, 14.9% robbing another, 17% burglarizing another's home, and 18.5% engaging in a firearms offense. Notably, if adopted over one quarter of these offenders will have their CHC change to be considered Zero-Point Offenders, although they have prior significant criminal history. *Id.*
[38] *Id.* at 27.
[39] *Id*.
[40] Of the 3112 people affected, only 562 are in CHC I or II. *Id.*

those with the most significant criminal histories benefit from this proposal, but under Option 3, 68.2% of individuals with points for offenses occurring prior to 18 and over 80% of those with CHC IV and 89.2% of those with CHS V will decrease on level.[41] A distressing change occurs among the 2123 of the 3112 offenders having their CHC decrease when most of them are in the higher CHC categories. Due to their multiple offenses 16% will artificially become zero point offenders.[42] At a time when juvenile crime is increasing both in number and severity of violence, the idea that the courts should not consider the full criminal history of a juvenile offender is misplaced, to say the least.

The practical effects of these amendments are demonstrated by two examples of cases handled by members of the VAG. In the first example, the night before her eighteenth birthday in June 2020, a young woman, having just graduated high school, was shot in the head three times by her sixteen year old boyfriend. The offender invited his girlfriend for a nighttime walk in the woods behind his house. She did not know that he earlier directed a fourteen year old juvenile to wait with a handgun in the woods. The offender retrieved the gun from the fourteen-year-old and shot his girlfriend. The boyfriend and the fourteen-year-old left the girl in the woods to die and she was found by a passerby the next morning. The sixteen-year-old was tried as an adult and convicted of First-Degree Murder. Being under the age of eighteen, he could not be sentenced to life without the possibility of parole, so will be eligible for parole. At his sentencing hearing, he violently attacked the deputies providing courtroom security, with friends from the gallery trying to assist him, causing the courthouse to be locked down. Security was provided to the victim's family to safely return to their parked cars. The fourteen year old was processed as a juvenile, adjudicated for Conspiracy to Commit Murder, and placed on probation.

In a separate case, two juvenile brothers, aged fourteen and sixteen years old, harassed a sixty-year-old man at the County fair because the man refused to give the brothers money when they approached him. The brothers and their friends trailed the man and his niece through the crowd, cursing, heckling and threatening them. When the man stopped and faced the sixteen-year-old, the sixteen-year-old put up his fists while his fourteen-year-old brother blindsided the man with a running punch to the head, knocking the man down, fracturing his skull. The sixteen-

[41] *Id*. at 31.
[42] *Id*.

year-old then spit on the unconscious man. The man never regained consciousness from the brain injury and was days later declared brain dead, requiring his family to decide whether to take him off life support. None of his family, including his then nearly ninety ~~90~~ -year-old parents, recovered from the shock and loss. The fourteen-year-old was adjudicated as a juvenile for Manslaughter, detained for a short while and then placed on probation. The sixteen-year-old was adjudicated as a juvenile for misdemeanor Assault Second Degree and placed on probation.

Under Proposed Option 1, all the adjudicated juveniles at most would receive one point, depending on the five-year time frame between prior disposition and date of current offense. Under Proposed Option 2, all the adjudicated juveniles would receive no points. Under Proposed Option 3, neither the adjudicated juveniles nor the sixteen-year-old convicted as an adult for First Degree Murder would receive a point.

(3) Specific Impact on Victims is Grossly Out of Balance in its Inaccuracy of Sentencing

The Commission states that it "seeks to strike the right balance between various considerations related to the sentencing of youthful individuals including difficulties in obtaining supporting documentation…, recent brain development research, demographic disparities, higher arrest rates for younger individuals, and protection of the public."[43] Notably absent from this list are the interests of victims at sentencing.

Such a radical and imbalanced change in the Guidelines negatively affects two groups of victims. First, it revictimizes the victims in the instant case. These are victims who find themselves in federal court having been victimized by an offender with a lengthy criminal record which includes at least juvenile confinement and likely adult sentencing. By definition such a defendant has already been afforded juvenile penalties, but their criminal activity increased to the point where they have been convicted for a federal crime within 5 years of his juvenile confinement or 15 years of an adult conviction. At this point in the proceeding the victim has already been traumatized once by the criminal act and likely a second time going through a trial.

Now at sentencing, the victim has rights under the law because of the Crime Victims' Rights Act. Notably, victims have a right to participate in sentencing procedures, including to

[43] USSG, *Proposed Amendments* at 14 (Feb. 2023).

reasonably be heard and the fundamental right to be "treated with fairness and with respect."[44] Victims, like defendants, also have a right to a just sentence that adequately considers the "history and characteristics" of the defendant, promotes respect for the law, provides a just punishment, and adequately deters criminal conduct.[45] These rights would be denied to victims if the proposed amendments are passed.

As drafted the amendments would not treat victims with fairness and respect because the sentences given to defendants would intentionally ignore some of the most important information a court can consider about a defendant at the time of sentencing. Forcing sentencing judges to sentence defendants while precluding the them from considering the full "history and characteristics" of defendants is not fair or just for victim survivors. How can a judge impose a just punishment without a full picture of the defendant? They cannot. How can a judge consider what deterrence is adequate without reviewing what opportunities the defendant has previously had – whether rehabilitative or punitive? They cannot. How can a judge evaluate what treatment the defendant might need that will be most effective without reviewing what if any rehabilitation and treatment an offender has already had or not had? They cannot. As a result, any sentence will be fictional and misleading, ignoring the full picture of the defendant who harmed the victim and permanently altered the course of her life.

It is essential to see the very practical effects of these proposals at a sentencing hearing. It is not just that they preclude consideration of an aggravated criminal history of the offender, but these proposals do not limit the defendant in any way from presenting mitigating claims that stem from the same time period in their life. Defendants will still be permitted to present any information from their childhood or their emerging adult years which will paint them in a positive light worthy of mitigation. This might include childhood trauma, good works, social achievement, character witnesses, etc. Yet, the government, and by extension the victim, will be unable to present actual findings of responsibility and/or guilt of violent crimes committed by the offender during that same time period. Not only would such a sentencing system be allowing an *incomplete* picture of the defendant, it would be advancing a *false* picture of the offender. And a crime victim who has gone through a trial in which the rules of evidence preclude a presentation

[44] 18 U.S.C. § 3771(a).
[45] 18 USC § 3553(a).

of the full picture of the crime, now at a sentencing which is supposed to be individualized and honest, will receive a false sentence that does not reflect the severity of the crime committed or the defendant's culpability for that crime.

A second set of victims will also be disproportionately affected. With recidivism rates as high as 70% for youthful offenders, by falsely sentencing this cohort of offenders to lesser sentences, a court will be creating a new group of victims. The statistics demonstrate that this cohort not only recidivates at a higher rate than older offenders, but the violence they use increases.[46] A judge is required to consider the need "to protect the public from further crimes of the defendant"[47] and a victim has the right to be "protected from the defendant."[48] Not only will such a proposal retraumatize victims in the instant case, but will also lead to the unnecessary victimization of others by tying a judge's hands at sentencing and forcing him to sentence a defendant without a full picture of his history, thus failing to protect the public.

Repeat juvenile crime victimizes not only individual people but *entire communities* as well. These are communities to which a judge is required to consider their protection.[49] For example, the community of Gilbert, Arizona was tormented by a group of young adults and juveniles who engaged in a series of beatings, intimidation, and robberies in an escalating manner which resulted in several individual victims and one youth being beaten to death. The community expressed fear and outrage at these violent events.[50] The tragic shooting in Kansas City, Missouri during the Superbowl parade have brought into the national spotlight the youth violence plaguing that community.[51] Similarly, Washington D.C. residents have openly discussed an increased fear of carjacking and other forms of violent crime being committed by youthful offenders.[52] When a defendant is escalating his criminal activity and the court cannot take that escalation into consideration by reviewing the prior criminal activity of youthful

[46] It should be noted that these figures are considered by many authorities as likely underestimating the recidivism rates because many crimes are not reported.
[47] 18 U.S.C. § 3553(a).
[48] 18 U.S.C. § 3771.
[49] 18 U.S.C. §§3553(a), 3771.
[50] *See, e.g.*, *Here's a timeline of everything involving Preston Lord, Gilbert Goons, East Valley youth violence*, KTAR News (Feb. 8, 2024 10:11 AM).
[51] *E.g.,* Ryan Hennessy, *Shooting at Union Station becomes latest evidence youth violence is not unknown to Kansas City*, KCTV5 (Feb.15, 2024 8:17 PM).
[52] *E.g.*, Adam Longo & Matt Pusatory, *Southeast D.C. residents share carjacking concerns with leaders*, WUSA 9 (Jan. 31, 2024, 9:03 AM).

offenders, it compromises public safety and traumatizes entire communities. These proposals do just that.

(4) The Goals of the Commission Are Addressed by the Current Guidelines More Precisely Than the Proposals Which Themselves Will Cause Disparate Sentences.

The VAG also opposes these proposals because they preclude judges from being able to perform their duties. The VAG recognizes some of the concerns raised by the Commission regarding juvenile adjudications possibly having a disparate impact on a sentence.[53] As stated above, these proposals create their own disparate sentences by sentencing a defendant with no significant juvenile history the same as an offender with a lengthy criminal history. Furthermore, the law, the Guidelines, and the Commission's own data demonstrate that courts already must and do take this concern into consideration and these proposals are unnecessary to accomplish the Commission's goals but instead further aggravate disparities.

The law is clear that judges are trusted to weigh factors appropriately and to engage in just sentences.[54] The Guidelines themselves also afford judges the ability to lower a sentence based on the offender's age and if the criminal history substantially over-represents the seriousness of the defendant's criminal history or the defendant's age distinguishes his case from a typical one.[55] Furthermore, the Commission's own data demonstrates that currently the majority of offenders with one or two points are sentenced below the Guideline range.[56]

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[53] The Commission has also identified a possible disparity of sentence issue. The VAG recognizes that some offenses may be treated as adult cases in some states and juvenile offenses in others, triggering a 15 year lookback. This kind of inconsistency is not dissimilar to other variations among states regarding sentencing norms and degrees of crimes. A more appropriate approach to this problem may be to review the 15 year lookback as suggested by POAG in 2017. *See* Probation Officers Advisory Group Public Comment on Proposed Amendments (July 31, 2017) at 6.

[54] *See, e.g.*, United States v. Chavez-Meza, 854 F.3d 655, 659 (10th Cir. 2017), *aff'd*, 138 S.Ct. 1959 (2018) ("absent some indication in the record suggesting otherwise, that trial judges are presumed to know the law and apply it in making their decisions"); United States v. Lymon, 905 F.3d 1149, 1155 (10th Cir. 2018) (*quoting* Chavez-Meza).

[55] USSG §§4A1.3, 5H1.1. Indeed, the Guidelines as written are balanced in that they allow for a judge to increase or decrease a sentence based on the criminal history not accurately reflecting the gravity of the offender's criminal actions or over representing them. §4A1.3. These proposals seek to allow a departure *only in one direction*: down. This provides a benefit to the offenders but precluding a benefit to victim survivors of the offender's previous or instant criminal activity.

[56] USSG, *Public Data Presentation: Proposed Amendments on Youthful Individuals* at 13, 30 (Jan. 2024) (noting that under Option 1, 58.3 % of one-point offenders and 50.5% of two-point offenders are sentenced below the Guideline range and under Option 3, 50.2% of offenders with one point for an offense over 18 are sentenced below the Guideline range.

These laws and statistics reflect that the Guidelines already allow courts to appropriately consider an offender's youth at sentencing to make appropriate allowances for it based on the facts. As some members of the POAG have previously noted, the current scheme "accounts for only those juveniles who have a higher likelihood of recidivism and future criminal behavior based on their criminal past."[57] While the goals of the Commission are valued, the present sentencing structures already address these concerns adequately. To go further is to take a measure that thwarts the goals of sentencing as a whole.

While the VAG vehemently opposes all three options for all the aforementioned reasons, should the Commission ignore the positions of victims on this issue, the VAG would prefer Option 1. Said option runs afoul of the purposes of sentencing and revictimizes victims the least of the three options.

C. Part B - Sentencing of Youthful Individuals

While there was some discussion among the VAG about various nuances of the Part A proposal, the VAG unanimously finds the proposal in Part B to be nothing less than shocking in its breadth and lack of basis. Part B seeks to provide a pathway for decreasing sentences of all defendants based on "youthfulness" while at the same time removing limiting language in current Guidelines. This sweeping proposal would affect 15.4% of all defendants sentenced 2018-2021.[58] The VAG opposes this proposal because of its breadth, that it lacks any meaningful guardrails which will lead to disparate sentences, fails to meet the stated goals of the Commission, and is unprecedented in its thwarting of truly individualized sentencing.

(1) The Proposal is Far Too Broad Both in the Number of Offenders and the Gravity of Their Crimes

A word must be said about the breadth of this proposal. First, the Commission candidly notes that it cannot say how many people will be affected by this proposal.[59] That is of concern. Second, the Commission released some data on people it now refers to "youthful individuals," shockingly including offenders under 25 years of age. This breadth of people encompassed by this term is without basis. First, it encompasses 15.4% of all those sentenced. Second, is far too

[57] Probation Officers Advisory Group Public Comment on Proposed Amendments (Fe. 21, 2017) at 5.
[58] USSC Data Presentation Proposed Amendments on Youthful Individuals (January 2024).
[59] USSC Data Presentation Proposed Amendments on Youthful Individuals (January 2024).

broad to be a category of people – as a class – who are assumed to be less culpable as individuals. By way of comparison, 22,390 federal employees are 24 years old or younger.[60] The minimum age to become a police officer is 18 – 21 years of age.[61] The average age of a starting medical student is 24 years old.[62] Yet, the VAG is unaware of policies which would seek lesser punishments for a federal employee who engages in workplace harassment, a police officer who uses excessive force on an arrestee, or a medical student who commits an error while on rotation. So, to suggest such sweeping generalization for the same age group of offenders is misplaced.

Although the Commission cannot say how many people will be affected, it is apparent it will benefit a large number of offenders who have committed crimes involving victims: 15.4% of all sentenced individuals, 25.4% of whom committed drug trafficking offenses, 15.2% who committed firearms offenses, and who as group committed nearly double the amount of violent offenses than those who are older (13% as compared to 8.5%).[63] Therefore, this amendment will benefit offenders who are significantly involved in drug trafficking, firearms, and crimes of violence.

Of paramount concern to the VAG is the lack of limits to this text. As stated supra, the term youthful offender has been defined in the law as an offender under the age of 18.[64] This provision discusses downward departures for a new and undefined category of "youthful individuals." It does not define that term. It offers no limits as to who is "youthful." Thus, allowing a judge to depart based on his own concept of "youthfulness."

The Court has long warned of the dangers of vagueness and noted a principal danger of unbridled terms is exactly what the Commission claims it is trying to end: "arbitrary and discriminatory enforcement."[65] The proposal as written would allow a judge to decide who is

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[60] Office of Personnel Management, Fulltime Permanent Age Distributions, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/full-time-permanent-age-distributions/

[61] Madalyn K. Wasikzud, *Developing Police*, 70 Buf. L. Rev 271, 301-302 (2022).

[62] Brendan Murphy, *Going Directly from College to Medical School: What it Takes*, American Medical Association (August 15, 2019).

[63] *Id.*

[64] See supra n. 1. The Commission has only once before referenced youthful offenders as offenders – notably not individuals – as offenders whose crime occurred before age 25. See Youthful Offenders in the Federal System (May 2017).

[65] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

"youthful" stretching any brain research far beyond its intended use. One judge could conclude a thirty-year-old is "youthful," another a 25-year-old is "youthful," and another may find no one is "youthful." This is exactly the kind of arbitrariness the Sentencing Reform Act was designed to prevent. As such, this proposed amendment allowing such subjectivity and generalizations is axiomatic to the goal of both individualized sentencing and uniformity of sentencing.

The fear that judges will act arbitrarily with such a blank check is not speculative. A district court judge who did not understand the harms of child sexual abuse material did just that.[66] In *United States v. Reingold*, the District Court was sentencing a 20-year-old defendant after pleading guilty for distribution of child sexual abuse material. The defendant admitted to using the online name "Boysuck0416" to download "'a ton' of child pornography" including videos, to distributing child pornography to several others, and to previously sexually assaulting numerous minors including multiple and increasingly penetrative sexual assaults on his own 8 year old half-sister over a three year period.[67] The PSR recommended a period of imprisonment of 168-210 months and the offense carried a mandatory minimum sentence of five years' incarceration. Yet, the District Court decided the offender was "immature" and, relying on generalized brain research, attempted to sentence the defendant to 30 months incarceration and recaption the case as a juvenile matter. Fortunately, the Court of Appeals rejected such an improper use of *Graham v. Florida*[68] and *Miller v. Alabama*[69] and their reference to brain development, condemning the District Court's "effort to blur the distinction between juvenile and adult offenders…."[70] The Court of Appeals found this use of "immaturity" an improper "subjective criterion."[71]

The proposed amendment suffers from the same fatal flaw that has been rejected by circuit courts. While the *Reingold* Circuit Court found that immaturity is relevant to sentencing it "is appropriately considered by a judge in making a *case specific* choice of sentence" not a

[66] *United States v. Reingold*, 731 F.3d 204 (2013).
[67] *Id*. at 207-208.
[68] 560 U.S. 48 (2010).
[69] 567 U.S. 460 (2012).
[70] *Rheingold*, 731 F.3d at 215.
[71] *Id*. at 215.

blanket one.[72] Here, the Commission is advocating the very same type of blanket rule that the courts have rejected. [73]

This amendment will open up an avenue allowing every offender to seek to avoid a just sentence based not on their individual characteristic but on a vague concept of "youth." Such is untenable. Criminal defendants over 18 years of age are responsible for their actions. Under the current Guidelines, and consistent with the purposes of sentencing, a defendant can argue that his particular age distinguishes his case. Such is appropriate to advance individual sentencing. To literally allow any defendant to argue "youthfulness" invites great variances in sentencing disproportionately affecting those without means to establish such a vague claim and allowing unguided courts with unbridled arbitrary discretion.

(2) The Proposal Thwarts Individualized Sentencing

The second reason the VAG opposes this proposal is it thwarts this section of the Guidelines designed to advance individualized sentencing, not impede it. Section 5H1.1 is located in the section of the Guidelines labeled *Specific* Offender Characteristics (emphasis added). It is in response to the Congressional order that the Commission consider whether age "matters with respect to **a** defendant."[74] It further notes the Supreme Court's emphasis to "individualize sentences where necessary."[75] Yet, the proposed amendment does not apply individually or neutrally. It (a) only directs courts to depart *downward* and (b) directs courts to consider *generalized* studies to depart only downward in an *individual* case. The VAG is unaware of other instances where the Guidelines suggest a *generalized study* should be the basis for an *individual departure* and that such a departure can only go *downward*.

Such a pounding of a square peg into a round hole has no place in the Guidelines. For example, many victims of crime experience trauma as a result of their victimization.[76] Yet, the

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[72] *Id*. at 215 (emphasis added).

[73] *Id.; E.g.*, United States v. Cobler, 748 F.3d 570, 581 (4th Cir. 2014) ("To the extent that this 28–year–old defendant argues that his developmental immaturity categorically requires that he be treated more leniently as a juvenile, we reject that argument at the outset given the complete lack of evidence in the record regarding any national consensus about how immature adults should be sentenced for child pornography crimes.").

[74] USSG, Part H at 458 (citing 28 U.S.C. §994(e)).

[75] USSG, Part H at 466 (citing United States v. Booker, 543 U.S. 220, 264-265 (2005)).

[76] *E.g.*, James Hill, Victims' Response to Trauma and Implications for Interventions: A Selected Review and Synthesis of the Literature, Canadian Department of Justice (Nov. 2003).

Guidelines would never contemplate that blanket general fact to justify an increase in a sentence of an individual defendant. Rather, an extreme trauma experienced by a victim may be appropriate to consider, but that individual experience of that particular victim would need to be established for the court to consider it. Additionally, as the Commission notes, the research is unquestionable that youthful offenders *in general* recidivate at higher rates, in shorter time periods, to more violent crime. Yet, that *generalization* alone should not be sufficient to establish a higher sentence for an *individual* defendant. Rather, it should be established that there is a likelihood of an individual defendant to reoffend. The same should be true in this instance. It is inappropriate to point to a generalized information as a basis to depart in a sentence of an individual offender –in any direction and, certainly, not in only one direction.

Under the current Guidelines a defendant is free to use his age to argue that in his specific case that his age should be particularly noted to make his case unusual. That accomplishes the goals of the Commission. To add language that only allows a departure in one direction – downward – based not on individual characteristics but on general information is unjust and antithetical to sentencing.

(3) The Proposal Fails to Serve the Commission's Stated Goals

In putting forth these proposals, the Commission states it is trying to balance difficulties in obtaining documentation for juveniles and assessing confinement, recent brain development research, demographic disparities, higher arrest rates for younger offenders, and protection for the public.[77] These may be valid goals. But these after the fact proposals do not properly address the underlying issues laid out by the Commission and instead achieve blanket downward departures for defendants often at the expense of victims of crime and public safety. The difficulties in obtaining documentation and assessing confinement are administrative problems. That is not to say they are minor or unimportant. We all benefit from accurate sentencing and these problems should be solved. But they should be solved with administrative solutions, not substantive changes to the Guidelines as proposed here. Sentencing courts will always struggle with adequate documentation and disputes about prior events. Judges are equipped to address them within their discretion and pre-sentence reports will not include information that is

[77] USSG, *Proposed Amendments* at 14 (Feb. 2023).

unreliable. Similarly, brain development studies are a factual reality for general observations about the average juvenile, but they are not specific information regarding specific defendants and, as such, their role should be limited and should not automatically be the basis for downward departures any more than high recidivism rates among juvenile offenders should be the basis of an automatic upward departure. Far from helping demographic disparities in sentencing, Part A will disproportionately affect victims of crime who are often the victims of these offenders and Part B is so vague that it will encourage arbitrary enforcement which leads to disproportionate outcomes. Finally, under no measure do these proposals increase protection of the public. Rather, they decrease it by causing inaccurate and false sentences that fail to consider what the Commission has described as "an important specific offender characteristic…the defendant's criminal history."[78]

3. Acquitted Conduct

Before the Commission are three proposed amendments related to bar or limiting sentencing courts from considering conduct related to acquitted counts as relevant conduct when sentencing a defendant for convicted conduct. Any amendment that so limits the court would contradict law and, therefore, be outside the authority of the Commission. Even if the amendments were not inconsistent with law, they should not pass while the matter is pending before Congress. Rather than viewing this as a policy question, the VAG asks the Commission to review the legality of their proposals. Here, rule of law requires that the amendments be denied. If Congress acts and changes the law, the Commission would serve its purpose by then passing the Guidelines to provide the framework for the consistent application of that new law. Similarly, if the Supreme Court rejects its precedent and holds that the legal framework of judicial discretion violates the Constitution, that caselaw would be grounds for the Commission's action. Short of an act of Congress or the Supreme Court, no change should be made.

Specifically, the questions being considered by the Commission are:

- If the Commission proceeds with an amendment, should it prohibit consideration of acquitted conduct in determining the guideline range, as it did in the January 2023 published amendment? Should the Commission prohibit consideration of acquitted conduct under the Guidelines even more broadly than the December 2022 proposed amendment?

[78] USSG, Part H at 458.

- Alternatively, should the Commission promulgate a downward departure provision within §1B1.3? If the Commission were to adopt this approach, should it instead create a new departure provision in Chapter 5? Should it limit the consideration of acquitted conduct in some other way?

- How should the Commission define "acquitted conduct"?

- Are there other issues the Commission should consider, in addition to those raised during the previous amendment cycle?

As we did in 2022, the VAG opposes a bar or heightened standard of proof on a sentencing court's consideration of conduct related to an acquitted count as being inconsistent with federal law and Supreme Court precedent. This Commission cannot pass Option 1 or Option 3 for this reason. The VAG also opposes the proposal that there be a downward departure to the offense level assigned to relevant conduct that is acquitted while the matter is pending before Congress. The Commission should not adopt Option 2 where our lawmakers, most directly representing the people, are poised to either pass this law, prohibiting the consideration of acquitted conduct at sentencing, or to reject the change.[79]

A. This Commission Will Exceed Its Authority If It Bars Judicial Consideration Of Acquitted Conduct.

The Proposed Amendment Option 1 would amend §1B1.3 to add a new subsection (c) providing that "acquitted conduct" is not relevant conduct for purposes of determining the guideline range. Option 3 would amend §6A1.3 to add a new subsection (c) adding a heightened standard of proof, clear and convincing, for conduct related to an acquitted count. Both of these proposed amendments are inconsistent with law. This Commission is limited by law to create Guidelines and policy statements that are "consistent with all pertinent provisions of any Federal statute."[80] Federal statutes require judges to conduct robust fact-finding sentencing hearings when sentencing a defendant. This Commission must not overstep and ignore the law.

Federal sentencing does not require a judge to take a myopic view of the crime. The judge is not called to mechanically employ the Guideline's sentencing chart based on the crime alone.

[79] To be clear the VAG understands and agrees that a defendant cannot be sentenced for an acquitted count as though he were convicted of it. The VAG simply supports the Supreme Court and Congress's position that a sentencing judge may consider the conduct underlying acquitted counts if proved by a preponderance of the evidence in fashioning a defendant's sentence.

[80] 28 U.S.C. § 994(a).

Instead, the sentencing process requires judges to gather two pools of information. First, the nature and circumstances of the offense – then, meaningfully, the history and characteristics of the defendant.[81] To their benefit or detriment, the defendant's life story, hardships, and choices are laid before the judge for consideration.

Congress has spoken. Federal law provides: "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[82]

The United States Supreme Court has also spoken. It held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[83] It is noteworthy that for the proposed amendment to exist in the Guidelines, the Commission would strike the current, binding language of the Supreme Court in *Watts*.[84] It is a bedrock principle of jurisprudence that federal courts must follow the pronouncements of the United States Supreme Court.[85]

In its February 24, 2023, public hearing, the Commission raised the legitimate concern of public confidence in the system.[86] The Commission posed the question: does it deteriorate public confidence if a judge has the discretion to consider conduct related to an acquitted count when sentencing a defendant for a convicted count? The answer is that the court is allowed to consider it where the burden of proof is met and it is relevant to the defendant's history or characteristics.[87] An equally important question is: what impact does it have on public confidence in the

[81] 18 U.S.C. § 3553(a).
[82] 18 U.S.C. § 3661
[83] *United States v. Watts*, 519 U.S. 148, 157 (1997).
[84] USSG, *Proposed Amendments* at 43 (Dec. 26, 2023).
[85] *Pacific Gas & Electric Co. v. United States*, 45 F.2d 708 (9th Cir. 1930).
[86] USSG, Public Meeting Feb. 24, 2023 at 92, transcript available here: https://www.ussc.gov/policymaking/meetings-hearings (last visited Feb. 9, 2024).
[87] Indeed, no Circuit court has gone as far as the Commission seeks to bar the admission of acquitted conduct in its entirety. "Here, there is no circuit split as to whether district courts may use acquitted conduct in sentencing. The circuit courts that have addressed this issue have held that the use of acquitted conduct in sentencing is constitutional. *See United States v. Waltower*, 643 F.3d 572, 577 (7th Cir. 2011) (citations omitted) (citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits and stating that '[e]very circuit to have considered the question post-Booker, including ours, has held that acquitted conduct may be used in calculating a guidelines sentence, so long as proved by a preponderance standard');" *United States v. Ball*, 962 F. Supp. 2d 11 (D.D.C. 2013).

Commission if the Commission passes limitations inconsistent with laws passed by our direct representatives and held by our United States Supreme Court?

Just as the Option 1 amendment barring consideration would violate the Commission's authority, the Option 2 amendment regarding a downward departure oversteps when the matter is pending before Congress.

B. The Commission Should Reject the Amendment Regarding a Downward Departure For Acquitted Conduct Because the Matter is Pending Before Congress.

Option 2 would amend the Commentary to §1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction.

Although the law is settled allowing judicial consideration, the Commission should especially not act where change may come from Congress or the Court. The Supreme Court's June 30, 2023, 5-4 denial of certiorari of the Seventh Circuit's decision in *United States v. McClinton*,[88] has drawn the nation's attention to the Commission's directive on the use of acquitted conduct. Less than three months after that denial was issued, Congress grabbed the baton and introduced Senate Bill 2788 (Sept. 13, 2023).[89] That Bill, entitled "Prohibiting Punishment of Acquitted Conduct Act of 2023" is in committee. It provides, in pertinent part, "a court of the United States shall not consider, except for purposes of mitigating a sentence, acquitted conduct."[90] Where Congress is poised to act – either passing this law or rejecting it, the Commission must wait.

Respectfully, legal process requires the Commission to follow, and not lead, Congress and the Supreme Court. Where Congress and the Supreme Court have settled the law to allow judicial consideration of acquitted conduct, this agency is not permitted to act contrary to the law.

Beyond legal and separation of powers reasons to reject the proposed amendments, the Commission should reject them because they violate victims' rights.

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[88]United States v. McClinton, 23 F.4th 732 (7th Cir. 2022), *cert denied*, 143 S. Ct. 2400 (2023).

[89]S. 2788, 118th Cong. (2023). Available at: https://www.congress.gov/bill/118th-congress/senate-bill/2788/text?s=1&r=5 (last visited Jan. 23, 2024).)

[90] *Id.*, at 2.

C. The Proposed Amendments Will Undo Victims' Rights and Restrict Victims' Right to Be Heard, Contrary to Law.

The Commission is further prohibited from passing any amendment that is inconsistent with the Crime Victims' Rights Act (CVRA).[91] It is important to remember the CVRA defines "victim" as a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[92] This focus on "harm" is key to understanding why the court should not be restricted from considering the full truth[93] of the harm that happened to the victim, even in cases resulting in an acquittal. With rare exceptions, an acquittal does not mean the harm did not occur. It only means the government failed to meet the burden of proof beyond a reasonable doubt. In cases where there exists a preponderance of evidence that the harm to the victim has occurred, justice requires that the truth of the harm be considered in determining the appropriate consequence. This is consistent with the fact that, even upon a showing of probable cause, a victim has the rights "to be reasonably protected from the accused," "to timely notice of any … release or escape of the accused," and "to be treated with fairness and with respect for the victim's dignity and privacy," among other rights. Each of these rights are directly focused on reducing the risk of harm to the victim as a fundamental part of justice.

A victim has a right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[94] Victim Impact Statements (VIS) often include information related to the emotional, physical, and financial harm that victims have endured because of the offender's criminal conduct. The VIS's "provide information to the sentencing judge or jury about the true harm of the crime-information that the sentencer can use to craft an appropriate penalty."[95] [96] Recent scholarship underscores and reaffirms the substantive value VIS provide to sentencing judges. They provide critical contextual information – often known only to the offender and victim – addressing how he executed his crime and the gravity of

[91] 18 U.S.C. § 3771.
[92] Id.
[93] Fed. R. Evid. 1101(d)(3).
[94] 18 U.S.C. § 3771(a)(4).
[95] Paul G. Cassell, *In Defense of Victim Impact Statements,* 6 Ohio St. J. Crim. Law 611 (2009*).*
[96] Julian V. Roberts & Edna Erez, *Victim Impact Statements at Sentencing: Expressive and Instrumental Purposes*, in HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS, AND THE STATE (Anthony Bottoms & Julian V. Roberts, eds. 2010); *see also* Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims*, 65 U. TORONTO L.J. 85, 90-92 (2015).

the impact.[97] Empirical research confirms that such statements "are not considered superfluous by judicial officers who receive them" and do not divert from the sentencing at issue.[98]

The VIS are also beneficial to all involved in the criminal justice system. Making a VIS "may have therapeutic aspects, helping crime victims recover from crimes committed against them."[99] They also "help to educate the defendant about the full consequences of their crime, perhaps leading to greater acceptance of responsibility and rehabilitation."[100] The VIS~~'s~~ "create a perception of fairness at sentencing, by ensuring that all relevant parties - the state, the defendant, and the victim-are heard."[101] Prohibiting the consideration of acquitted conduct will prevent victims from making a true VIS that adequately describes the true emotional, physical, and financial harm they have endured because of the criminal conduct. If a victim cannot ask the court to consider acquitted conduct and the harm that flowed from the acquitted conduct, the benefits of the VIS~~'s~~ are lost.

Prohibiting consideration of acquitted conduct will also contravene the intent of the CVRA "to transform the federal criminal justice system's treatment of crime victims.…"[102] Victims' rights are "intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings."[103] The lead sponsor of the law, Sen. Jon Kyl, made clear, the right to fairness includes the right to due process.[104] The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[105]

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[97] E.g., Cassell, Paul G. and Erez, Edna, How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing (November 3, 2023). 107 MARQUETTE L. REV. __ (Barrock Lecture 2024), Forthcoming, University of Utah College of Law Research Paper No. 576, Available at SSRN: https://ssrn.com/abstract=4622666

[98] *Id.* at 45-47.

[99] *Id*.

[100] *Id.*

[101] *Id.*

[102] Honorable Jon Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, And Nila Lynn Crime Victims' Rights Act,* 9 Lewis & Clark L.R. 581, 593 (2005).

[103] Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421, 424 (2015).

[104] 150 Cong. Rec. S4269 (Apr. 22, 2004) (statement of Sen. Jon Kyl) (explaining that the right to be treated with "fairness" under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, "includes the notion of due process")..

[105] Mathews v. Eldridge, 424 U.S. 319, 333, (1976); *accord* Hamdi v. Rumsfeld, 542 US 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded.") (internal citations omitted).

The VAG offers this not infrequent example to illustrate the critical nature of such conduct in fashioning an appropriate sentence that is both accurate and fulfills the requirements of the CVRA. Often defendants charged with child sex trafficking also face charges of sexual violence and production of Child Sexual Abuse Material (CSAM). If in such a trial the victim is unable to testify or does so but is unclear on dates or locations of the offense, or is so traumatized from the criminal exploitation that she falters as a witness a jury may acquit of the trafficking charge but convict of the CSAM charge. At sentencing on the CSAM charge, it would be illogical and artificial for both the victim to not be able to discuss and the judge to not be able to consider the trafficking context if proved by a preponderance of the evidence. It would be traumatizing for the victim to have to offer a VIS without mentioning the trafficking context which would deny her a right to be reasonably heard. Similarly, the court must be able to sentence the defendant in the context of his crime and CSAM occurring against a backdrop of sex trafficking is certainly an entirely different scenario than CSAM in a different context. It would be artificial and traumatic for a victim to have to experience a sentencing that disaggregates the crime and its impact from reality.

The CVRA provides victims of federal crimes due process by paving the way for victims to participate and to be reasonably heard in a meaningful way. To make a meaningful VIS to a sentencing court, victims must be able to tell the sentencing court the true emotional, physical, and financial harm they have endured and the sentencing court must be able to consider the information victims are providing even if the harm flowed from acquitted conduct. Otherwise, the right to be reasonably heard is no longer meaningful.

D. The Definition of Acquitted Conduct Should Be Rephrased to "Acquitted Count."

If the Commission chooses to amend the Guidelines, acquitted conduct should be retitled "acquitted count." There is no jury verdict related to conduct, but only to counts.[106] We propose, though still maintaining no action should be taken, "acquitted counts" be defined in the Guidelines as "a criminal charge in an Indictment in federal court, presented to a judge or jury for purpose of guilt, where the fact finder reached a verdict of 'Not Guilty' or for which a Rule 29 Motion for Acquittal has been granted."

[106] Fed. R. Crim. Pro. 31.

This definition is broader than that offered by Justice Sotomayor's statement respecting the denial of certiorari.[107] In her statement, she distinguishes acquitted conduct and other conduct not subject the of a conviction and focuses on the participation of a jury. The "Not Guilty" verdict, whether by bench or jury, should receive the same weight.

E. The Commission's Consideration of an Exception to its Bar, Automatic Reduction, or Higher Standard of Proof for Conduct Acquitted for Reasons Other Than Substantive Proof Issues Is Unworkable.

Absent a bench trial, the idea that there will be exceptions based on the *reasons* for the verdict is not practical. The bases of a jury's verdict in a criminal case is not known. A special verdict form or jury polling is unlikely to be unanimous and improperly invades the province of the jury. The proposal fails to consider that acquittals may be the result of jury nullification, dislike of the victim for improper reasons such as race or ethnicity, misunderstanding the jury instructions, or any other non-substantive reason that will not be apparent in the record.

F. The Bar, Automatic Reduction, or Higher Standard of Proof for Acquitted Conduct is an Illogical Limitation of Judicial Consideration.

If any of the three proposed amendments is adopted, the law would still allow judicial consideration of relevant conduct not subject to an acquitted count. This would result in a wholly illogical sentencing hearing. If, for instance, sensing an acquittal the prosecutor dismisses the count during jury deliberations, the conduct may be fully considered by the court as relevant conduct. The problem becomes clear when the criminal procedure process is followed and the proposed amendments' allowance of judicial consideration of the conduct is considered. The holistic approach to sentencing required by federal statute allows courts to consider aspects of a person's history that fall short of the rigorous process that ends in trial. The chart below demonstrates that logical absurdity that results from the proposals:

[107] *McClinton v. United States*, 143 S.Ct. 2400 (2023).

Procedural Posture	Relevant conduct that must be proved by preponderance of the evidence	Judicial consideration barred, reduced, or must be proved by clear and convincing evidence
law enforcement responds to a crime, but decides not to make an arrest	X	
there is an arrest, but law enforcement "scratches" that charge and does not investigate	X	
law enforcement investigates the crime but decides not to submit the count to the prosecutor for charges	X	
law enforcement submits the count to the prosecutor for charges but the prosecutor turns the count down	X	
the prosecutor seeks and receives an indictment for the conduct subject of a count, but dismisses the count short of trial	X	
the charge survives each of the steps above, and the count proceeds to trial, and the jury finds the prosecutor did not meet their burden		X

Consistent with the Supreme Court's holding in *Watts*, consideration of conduct related to acquitted count is permitted under §1B1.3 of the Guidelines.[108] The commentary to §1B1.3

[108] USSG §1B1.3(a)(1) provides that relevant conduct comprises "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and all acts and omissions of others "in the case of a jointly undertaken criminal activity," that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.""

explains that "[c]induct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

If the proposed amendments pass, conduct that has not endured the tests of an arrest, a prosecutor's charging decision, a grand jury's decision to indict, and other processes of criminal matters could be considered. Meanwhile conduct that passes each of those but falls short of our system's highest burden cannot or with limitations. As Justice Alito addressed, "the most that can be inferred from a not guilty verdict is that this high standard was not met."[109] The Commission should not adopt this illogical outcome.

G. Conclusion

The proposals should be denied because it is axiomatic that a core aspect of sentencing is individualized sentencing which allows courts to consider the full context of an offense, the defendant, and the impact of the crime to craft an appropriate sentence. Because a prohibition on acquitted conduct may infringe on a victim's right to be heard at sentencing and limit what can be said in a VIS, possibly hindering emotional recovery, the VAG opposes these proposals.

4. Circuit Conflicts

A. Circuit Conflict Concerning §2K2.1(b)(4)(B)(ii)

VAG agrees that the Commission should approve Proposed Amendment Option 2, resolving the Circuit Court conflict by amending §2K2.1(b)(4) to include the Commission's proposed language:

> For purposes of subsection (b)(4)(B)(i), an "***altered or obliterated serial number***" **[**ordinarily**]** means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the **[**original**]** information less accessible, even if such information remains legible.**]**

The Circuit Court conflict needs to be resolved as the noted conflicting court decisions are diametrically opposed in their interpretation of what "altered or obliterated serial number" means. Since application of §2K2.1(b)(4) requires judges, lawyers and law enforcement to view and make judgments on physical evidence (the firearm), VAG believes that Option 2 provides

[109] McClinton, 143 S. Ct. at 2403-06 (2023) (Alito, J. *concurring*); *citing* Watts, 519 U.S. at 155.

the clearest definition of "altered or obliterated serial number" to the courts and the public. The Option 2 definition follows the plain definition of the word "alter" and makes clear that if the firearm's serial number is in some way "altered", even if not illegible, the unlawful receiver, possessor or transporter of a firearm would be on fair notice that there was at least an attempt to make the serial number less accessible.

The Option 2 definition properly follows the approach the Commission notes is taken by the Fourth, Fifth and Eleventh Circuits.[110] The Commission properly notes the Eleventh Circuit's reasoned decision that interpreting "altered" to mean illegible "would render 'obliterated' superfluous."[111]

The Option 1 definition, on the other hand, is flawed. Option 1 should not be adopted by the Commission as it confuses the plain definition of "alter", provides less clarity to the courts and the public, and will generate evidentiary dispute over the meaning of its proposed language "rendered illegible or unrecognizable to the unaided eye."

The unlawful use of firearms is always directed to criminal violence against people. "Eight-in-ten U.S. murders in 2021 – 20,958 out of 26,031, or 81% – involved a firearm"[112] Robberies, burglaries, assaults and non-fatal shootings are all criminally violent offenses against people, many of which involve firearms. Not all criminal offenders using firearms use stolen firearms, but the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) finds that "stolen firearms are a significant source of firearms to violent criminals."[113] It stands to reason then that

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[110] *United States v. Millender*, 791 F. App'x 782 (11th Cir. 2019); *United States v. Harris*, 720 F.3d 499 (4th Cir. 2013); *United States v. Perez*, 585 F.3d 880 (5th Cir. 2009).

[111] *Millender*, 791 App'x at 783.

[112] Pew Research Center, April 26, 2023. https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

[113] A 2023 report from the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) notes that between 2017-2021:

> "ATF and FBI data documented *approximately 215,000 guns stolen and reported to LEAs [Law Enforcement Agencies] annually during the study period*. Most stolen firearms originated from thefts from private citizens' homes and vehicles. A much smaller but noteworthy number of stolen firearms originated from FFL [Federal Firearms Licensees] robberies, burglaries, and larcenies as well as from thefts and losses from common carriers in interstate shipments. FFLs are required to report all thefts and losses to ATF. There is no national firearm theft reporting requirement for private citizens. In 2016, the U.S. Bureau of Justice Statistics National Crime Victimization Survey provided data that citizens reported about 75% of firearm thefts to a LEA that, presumably, reports all thefts to the FBI NCIC. As such, the annual total number of stolen firearms in the U.S. can be

every person to whom §2K2.1(b)(4) will apply, because they were convicted of the unlawful possession, receipt or transportation of firearms, clearly is in the chain of criminal violence against people.

In addition to the approximately 266,000 firearms stolen in the United States each year, ATF also reports that of the 1,922,577 requested crime gun traces in the United States submitted to the ATF between 2017-2021, ATF was able to determine the purchaser in 77% (1,482,861) of the traces.[114] ATF was unable to determine the purchaser because of an *obliterated serial number* in only 2.5% (48,601) of requested crime gun traces for the same time period."[115]

With the small percentage of crime guns with obliterated serial numbers submitted for tracing to the ATF, it appears that the Commission's proposed Option 1, restricting the addition of four levels only to those convicted of unlawfully possessing a firearm with a serial number "illegible or unrecognizable to the unaided eye" will hold very few offenders wholly accountable for their firearm offense and their role in the chain of criminal violence against people.

Option 2 more clearly announces a reasonable definitional standard of an "altered or obliterated serial number" which more reasonably allows the courts to hold firearm offenders accountable to the community and to their victims for their role in the chain of criminal violence.

VAG asks the Commission to adopt Option 2.

> estimated at approximately 266,000 per year during the study period. *There are enough firearms stolen on an annual basis to arm all offenders who commit firearm homicides, firearm assaults, and firearm robberies each year. However, less than 5% of surveyed firearm offenders report acquiring their most recent crime gun through theft; firearm offenders frequently report informal acquisitions of firearms from friends, family members, and street sources. Hence, most firearm offenders do not appear to obtain crime guns through direct theft. Instead, stolen firearms play an indirect role in trafficking and diversion to the underground firearm markets used by prohibited persons, juveniles, and other risky individuals seeking firearms. Given the very large scale of firearm thefts in the U.S., it seems likely that stolen firearms are a significant source of firearms to violent criminals."*
>
> National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns, Vol. II, Pt. V: Firearm Thefts, at 23 (Jan. 2023) https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download. (Emphasis added; internal citations omitted.)]

[114] National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns, Vol. II, 1/11/23, Part III, Figures OFT-02 and -03. https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.

[115] *Id.*, Figure OTF-05.

B. Circuit Conflict Concerning the Interaction between §2K2.4 and §3D1.2(c)

The use or possession of firearms in the context of criminal conduct should always be of concern to a sentencing court since the purpose of those firearms is to intimidate, threaten or inflict violence on others. As long as the Guidelines are clear that the mandatory consecutive statutory sentence under 18 U.S.C. § 924(c) must be applied, regardless of whether a felon-in-possession count under 18 U.S.C. § 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. § 924(c) are grouped, VAG has no further comment on this proposal.

5. Miscellaneous

A. Part E - Enhanced Penalties for Drug Offenders

The VAG notes the victim implications when a defendant is being sentenced for an offense under 21 U.S.C. §§ 841 or 960 and death or serious bodily injury results from the use of the controlled substance. A "crime victim" includes a person directly and proximately harmed as a result of the commission of a federal offense.[116] At a time when the nation is in a criminal and public health crisis due to record deaths related to narcotics distribution,[117] the VAG recognizes victims of such crimes include, not only the injured or deceased persons, but those proximately harmed including communities plagued by such narcotics trade.

The VAG is interested in ensuring that defendants who violate 21 U.S.C. §§841 or 960 and cause the death or serious bodily injury of another are held accountable for causing such harm. Because the Guideline § 2D1.1 allows for an increased base offense level under such circumstances, the VAG supports the application of that provision when proven by a preponderance of the evidence at sentencing or established during a plea colloquy. Moreover, such an approach allows the victim or family member of a victim to fully assert the impact of the narcotics offense.

Such an approach fulfills the purposes of sentencing and is consistent with the requirements to reflect the seriousness of the offense, to promote respect for the law, to provide

[116] 18 U.S.C. § 3771(e)(2).

[117] Understanding the Opiod Overdose Epidemic, Centers for Disease Control, https://www.cdc.gov/opioids/basics/epidemic.html; John Gramlich, *Recent surge in U.S. drug overdose deaths has hit Black men the hardest, Pew Research Center* **(**Jan.19, 2022), https://www.pewresearch.org/short-reads/2022/01/19/recent-surge-in-u-s-drug-overdose-deaths-has-hit-black-men-the-hardest/

just punishment for the offense, afford adequate deterrence to criminal conduct and protect the public from further crimes of the defendant.[118]

B. Part F - "Sex Offense" Definition in 4C1.1

In 2023 the VAG opposed the creation of the Zero-Point Offender category but agreed that if the Commission was going to adopt that amendment, offenders whose instant offense is a sex offense should be excluded from that category. This is particularly important because many sex offenders have no prior criminal record and take advantage of that status to have access to vulnerable victims. That reality is not limited to those who commit crimes against children. Offenders involved in sex trafficking, sexual abuse, and all forms of sexual exploitation often groom victims to whom they have access through employment (such as prison guards, law enforcement, military rank, higher education, athletics, medical care), status relationship (such as intimate partners, legal guardians of adults, caretakers) or community standing (government officials, clergy members). None of these individuals should benefit from a two-level decrease in their sentencing regardless of their lack of criminal arrests. Adult victims of these crimes experience severe trauma and the predation involved is different in kind not in severity to abuse against children.[119] All of the reasons for excluding offenders against minors from this benefit apply to those who prey on any person sexually. As such, the VAG supports Option 2.

6. Technical Amendments

Technical Changes Relating to 4C1.1

The VAG supports these changes to make clear what was clear in the Commission's intent to exclude defendants from the adjustment if they meet either of the disqualifying conditions listed in the provision.

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[118] 18 U.S.C. § 3553(a).

[119] Emily Dworkin, et al., *PTSD in the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies*, 24 Trauma, Violence, & Abuse 497 (2023). (noting that 36% of sexual assault survivors meet criteria for lifetime PTSD and 12%–25% meet criteria for current PTSD); DG Kilpatrick, et al., *Rape in America: A Report to the Nation*, National Victim Center & Crime Victims Research and Treatment Center at 7 (Apr. 23, 1992) (noting that 13% of all rape victims attempted suicide and are more likely to self-medicate with drugs) https://evawintl.org/wp-content/uploads/rape_in_america.pdf; Lynn Langton & Jennifer Truman, *Socio-emotional Impact of Violent Crime*, U.S. Dept. of Justice, Bureau of Justice Statistics at 3 (2014) (noting that approximately 70% of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime).

7. Simplification of Three Step Process

The Sentencing Commission seeks comment on its two-part proposed amendment that includes removing in its entirety one of only three steps that currently help ensure proper sentences, and creating an entirely new Chapter 6. The amendment is under the guise of "simplification."

As a threshold matter, the VAG is not opposed to the concept of simplifying the Guidelines. Ensuring that federal courts can readily navigate sentencing guidelines to ensure sentences account for the gravity of the offense suffered by crime victims, as defined by the federal Crime Victims' Rights Act (CVRA) 18 U.S.C. § 3771(e)(2) (persons "directly and proximately harmed as a result of the commission of a Federal offense."), is laudable. Pursuant to the CVRA, crime victims are afforded a number of rights implicated in any proposal to alter federal sentencing. Among these are the rights to protection (a)(1), the right to be reasonably heard (a)(4), the reasonable right to confer with the attorney for the government, the right to full and timely restitution (a)(6), the right to proceedings free from unreasonable delay (a)(7), and the right to be treated with fairness and with respect for their dignity and privacy. To abide these rights, any simplification must be characterized by certain components: (1) clarity and transparency and (2) retention of current protections of victim survivor rights and interests.

Unfortunately, with these points in mind, the VAG cannot support the current proposal. First, this proposal is premature. This proposal raises serious questions that require much more research and study. Second, as written, the proposal may compromise victim survivors' existing protections and undermine the goals of the Guidelines. Finally, the VAG has concerns about the Commission's authority to engage in some of these measures and would be directly contradicting Congress.

A. The Proposal is Premature

As stated, simplification may be a positive endeavor for the Commission. The VAG is confused, however, at the speed and lack of study underlying this proposal. The sheer magnitude of the change proposed should give everyone pause. Deleting an entire section and claiming that shifting something from a "departure" to "additional consideration" is not merely a

rhetorical shift. The VAG is unaware of research that has been done that reveals exactly how these changes will unfold in practice. While in 2022, the Commission noted simplification was a long term goal, the VAG is unaware of extensive reports or studies on proposals in 2022.[120] To promulgate such a significant change without any real indication of how it will impact existing protections is the opposite of transparency and leaves the VAG concerned that victim survivor rights and interests will be undermined. Further, without such study and alternative proposals, the VAG simply cannot recommend that this approach to "simplification" is the best approach.

B. Some Specific Concerns – The Amendments are Not Neutral and Appear to Harm Victims

The VAG is concerned and seeks further comment and study from the Commission on how this change would affect victim survivors. Because of the scope of the over 500 pages of change, the VAG is unable to identify or comment upon every potential concern. That being said, we will attempt to try to highlight some.

The Commission states that the deletion of the steps outlined in §1B1.1(b) that implicate Chapter 5 parts H and K and the reclassification of them, as "general considerations" in a new Chapter 6 would be neutral. Notably, however, the Commission's own wording gives pause. The Commission notes that the departures "would be retained *in more generalized language*" (emphasis added) as they shift to "additional considerations." Basic statutory/rule interpretation that every lawyer and court abide tells us that differently phrased things have different meanings. So, as written, the changes actually cannot be deemed neutral without detailed interrogation. By way of example, the text located in §§ 5H1.1 – 5H1.12 is more than just a list, it has language explaining the relevance of the factors. More specifically, it gives courts guidance on how each factor can be used. For example, § 5H1.2, entitled Education and Vocational Skills, states:

> Education and vocational skills *are not ordinarily relevant in determining whether a departure is warranted*, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
>
> Education and vocational skills may be relevant in *determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service*.(emphasis added)

[120] United States Sentencing Commission, Annual Report (2022), at 7.

This language gives courts explicit direction: (1) education and vocational skills should not ordinarily be considered for departures; (2) they are an express guideline factor if a defendant has misused his training or education to facilitate a crime; (3) they may be relevant to determining conditions of release or probation and public safety. That text clearly limits use of this information. However, the proposed Chapter 6 simply lists education and vocational skills as characteristics that *"may be relevant."*[121] There is no direction regarding how to consider that relevance nor guidance limiting its use as is within the original language. Such is not a neutral change. The change takes a factor that is explicitly not to be used to depart from a sentence and opens up its usage to do exactly that.

> Another example is drug or alcohol dependence. The Guidelines currently state:
>
> [d]rug or alcohol dependence or abuse ordinarily *is not a reason for a downward departure.* Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)). [122]

The proposed Guideline § 6A1.2 contains none of this limiting language but simply states drug or alcohol dependence "may be relevant."[123] This is a substantive change allowing a judge to consider such dependence without limit- which is radically different from the text "is not a reason for a downward departure," as the Guidelines now read.

The same is true for nearly all of the relevant Guidelines in Chapter 5 Part H. Currently they contain language informing and limiting how to use the information whereas the new proposed Guidelines leave consideration completely open to each judge.[124] Such a change simply cannot properly be deemed "neutral" and will result in disparities.

Of more concern is the complete elimination of departures directly tied to victims currently found in §5K. The Commission proposes to eliminate "nearly all" of this chapter. For example, courts would no longer be directed that it is proper to depart upward due to Death (5K2.1), Physical Injury (5K2.2), Extreme Psychological Injury (5K2.3), use of Extreme

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[121] Proposed S6A1.2.
[122] § 5H1.4
[123] Proposed §6A1.2
[124] As will be discussed infra, there is also a more significant concern when dealing with crimes against children and sex crimes which Congress specifically excluded from downward departures.

Conduct (5K2.8), Public Welfare (5K2.14), etc. These are among the most common reasons given to depart upward.[125] The VAG is concerned that this will disproportionately affect victim survivors. While it is true that the amount of upward departures is less than downward departures in the post *Booker* era, the existence of these departures convey to judges that such aggravating aspects of a case are valid and likely influence them in their decisions to vary from the Guidelines upward or downward under 18 U.S.C. §3553. They contextualize variances for judges.

While the Commission asserts these are all neutral changes designed only to simplify, the VAG simply cannot endorse this approach without each change being more clearly studied and the impact of the changes detailed. By way of a small detour for an example - for a victim to meaningfully confer with the attorney for the government in a case, as is their right under the CVRA, and to meaningfully be heard at sentencing, a victim needs to know what the Guidelines are telling the court to consider and how. If the amendments move forward every victim consulting with every Assistant United States Attorney will be in the dark due to the lack of clarity and transparency and, therefore, will not have a meaningful consultation with the government.

While the Commission did publish general statistics about the percentage of cases that include departures and whether they were upward or downward, the VAG thinks the public could benefit from a much more in-depth analysis. The VAG is concerned that this will disproportionally affect crimes with victims. Of the 9 primary sentencing guidelines listed as most frequently involving departures, 7 of them involve victims including narcotics distribution, firearms offenses, theft, alien smuggling, robbery, and child pornography.[126] The VAG would like further study on the types of crimes and numbers of victims affected by these and all the proposed changes.

[125] Other Departure Reasons Given by Sentencing Courts, https://www.ussc.gov/education/backgrounders/2024-simplification-data. While the Commission does include language in Proposed §6A1.3 that these factors "may be relevant," that is not the same as directing the court that these factors are appropriate for an upward departure. Such a change is not neutral.

C. Some Specific Concerns – The Commission Lacks This Authority

The Commission has also requested comment on its authority to adopt such a radical change to the Guidelines. The VAG agrees this is a valid concern and the Commission should engage in a long study of its authority to do so. Specific to victims of crime, however, the VAG believes the Commission lacks the authority to make certain changes. While this list is not exhaustive, if these sorts of legal violations are in the proposal, it signals there are likely others and the Commission should engage in a close study of Congressional mandates.

In 2003 Congress enacted the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act). Congress was expressly concerned with judges inappropriately departing downward in cases involving children and sexual violence. To address this problem, Congress bypassed the Commission and legislatively diminished the abilities of courts to engage in such a practice which disproportionally affected women and girls and favored men. Not only did it pass legislation statutorily designed to prevent courts from doing so, it drafted specific amendments to the Sentencing Guidelines. Indeed, the Guidelines note this significant problem in §5K2.0 Commentary stating,

> As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.[127]

More specifically, the PROTECT Act legislatively required specific language resisting downward departures in §5K2.0. The proposal appears to simply delete that legislation.

The proposal seems to have eliminated that direction in the commentary of the Guideline affecting Trafficking in Material Involving the Sexual Exploitation of a Minor.[128] Similarly, in the Guidelines affecting Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor;

[127] § 5K2.0 Commentary note 5.
[128] § 2G2.2.

Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor have all been substantively changed by Congress and the Commission has simply deleted these provisions. The Commission cannot eliminate an Act of Congress. Yet, it has replaced the commentary permitting an *upward* departure if ten or more minors are involved to a comment that such "may be relevant."[129]

Additionally, by the Commission's deletion of § 5H, the Commission has removed the PROTECT Act's specific limitation on these factors, specifically noting they could not be used to depart downward in cases involving children or sexual offenses.[130] These are specific directives and amendments to the Guidelines ordered by Congress found in Section 408 of the PROTECT Act entitled "Sentencing Reform." This proposal raises serious questions as to whether the Commission has the authority to delete them from the law when Congress directly authored them. More study is needed.

Notably, the PROTECT Act allowed courts to decrease the defendant's offense level pursuant to a disposition program. The Commission has *not deleted that component favorable to defendant, but specifically included it in the new Guideline* §3F1.1. In addition to the above arguments about authority, such an inclusion of the one provision favorable to defendants in the proposal and the elimination of all those unfavorable raises questions of the claimed neutrality of the proposal.

These proposals also have implications for the rights of crime victims in 18 U.S.C. §3771. This is a congressionally passed statute that the Commission does not have the authority to delete or compromise. Yet, as discussed supra, it seems to have done so by eliminating the opportunity of a meaningful consultation with the government. Similarly, these proposals are in tension with Federal Rule of Criminal Procedure 32. This rule gives specific directives for the PSR and the parties about departures during sentencing. Again, it is unclear whether the Commission can contradict the Rule.[131] The VAG believes the authority and the practicality of how these interact needs to be studied more for two reasons. First, the Commission may be

[129] §2G1.3.
[130] E.g., § 5K2.22, § 5H1.1, § 5H1.4, § 5H1.6, § 5K2.13, § 5K2.20
[131] Just last year the VAG urged the Commission to require courts to notify victims of hearings regarding Extraordinary and Compelling Relief. The Commission fell short of requiring this notice, presumably because it believed it lacked the authority. In this instance, then, the Commission should have the same position that it cannot do something in the Guidelines that conflicts with the Rules.

acting far outside its authority. Second chaos may ensue in sentencing proceedings as courts, victims, and parties seek to reconcile these amendments and their contradiction with federal law.

Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission and to share Victim perspectives on the sentencing process. It respectfully requests the Commission to stay within its authority, avoid defraying individualized sentencing, and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Mary Graw Leary
Chair

cc: Advisory Group Members

CJHD Center for Justice and Human Dignity | www.cjhd.org

aleph INSTITUTE

February 22, 2024

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

Proposed 2024 Amendments to the United States Sentencing Guidelines

Dear Chairman Reeves and Members of the Commission:

We are grateful for the opportunity to provide our comments on two proposed amendments to the United States Sentencing Guidelines.

Specifically, we recommend that the Commission adopt amendments (1) prohibiting consideration of acquitted conduct in calculating a defendant's Sentencing Guideline range, and (2) allowing appropriate consideration of a defendant's youth in calculating their offense level, but generally not including youthful offenses in calculating their criminal history category.

The Center for Justice and Human Dignity

The Center for Justice and Human Dignity (the "Center")[1] is a nonprofit organization whose mission is safely reducing the use of incarceration in the United States while improving conditions for incarcerated people and correctional staff. The Center promotes human dignity and shared safety while keeping in mind the needs of survivors, system-impacted people, and society at large. Alongside

[1] https://www.cjhd.org.

diverse partners, the Center works with judges and prosecutors on ways to expand the use of alternatives to incarceration; with correctional leaders on the conditions of confinement; and with policymakers on legislative reforms to the criminal legal system. At its October 2023 Rewriting the Sentence II Summit on Alternatives to Incarceration, the Center convened nearly 400 key criminal legal system stakeholders to discuss and formulate strategies for implementing innovative sentencing practices in the criminal justice system.

The Center is closely guided by the expertise of its steering committee, comprised of 20 current and former federal judges. The Center's board also lends the guidance of a range of experts, including the Honorable Larry D. Thompson, former U.S. Deputy Attorney General; the Honorable Nancy Gertner, Senior Lecturer, Harvard Law School and former U.S. District Judge; the Honorable Jeremy D. Fogel, Executive Director of the Berkeley Judicial Institute, former U.S. District Judge, and former Director of the Federal Judicial Center, and Alan Vinegrad, former United States Attorney for the Eastern District of New York.

The Aleph Institute

The Aleph Institute ("Aleph")[2] served as the incubator for the Center's formation. Aleph was founded in 1981, has a decades-long history of direct service in prisons around the country, and has worked with judges, legislators, executive branch officials (including prosecutors and prison officials), academics, and legal practitioners on criminal legal reform. Aleph was honored to have been a part of the bipartisan effort resulting in the passage of the First Step Act of 2018, which brought about much-needed reform to our federal criminal legal system.

Aleph has also submitted alternative sentencing recommendations in dozens of criminal cases around the country. In many of them, the judge imposed a below-Guideline sentence, based at least in part on considerations set forth in Aleph's submissions. Most frequently, courts in these cases rely upon defendants' genuine expressions of remorse and acceptance of responsibility, their prior service to their community, the damage that would be caused to their family members were the defendant to be imprisoned, and their willingness to make amends. These are among the very factors that support the government's expanded use of

[2] https://www.aleph-institute.org.

alternatives to incarceration, especially for defendants who do not pose a risk to public safety.

In 2016, Aleph convened a high-level Alternative Sentencing Key Stakeholder (ASKS) summit at the Georgetown Law Center, featuring nearly 200 current and former leaders and senior government officials serving in the criminal legal system. And in 2019, Aleph co-hosted (with Columbia Law School) a second summit on Alternatives to Incarceration—titled Rewriting the Sentence—to examine the significant changes taking place in the alternatives to incarceration arena. This summit was attended by approximately 300 criminal legal stakeholders, including federal and state judges, prosecutors, defense counsel, probation and pretrial officers, individuals directly affected by incarceration, advocacy groups, and other key stakeholders.

Acquitted Conduct

The Commission's proposal to eliminate reliance on acquitted conduct for sentencing purposes is well-founded, for several separate reasons.

1. Bad Policy. Respect for our criminal justice system is fundamental to our country's freedoms and liberties. People must have confidence in our system – that it works, and works fairly – in order to command respect for it. Trial by jury, in particular, has played a vital role in that system since our nation's founding. The jury system ensures that individuals facing criminal charges may only be punished if the jury concludes that they are in fact guilty of the crime charged against them. And our system accords that judgment great respect; for example, the government is precluded as a matter of law from appealing a not-guilty verdict. The jury's decision is considered final, binding and controlling.

All of these principles seem obvious. And yet, we now live in an Orwellian world in which an individual can be punished for conduct for which they were charged and found by a jury to be *not* guilty. In other words, our system abides a heads-I-win, tails-you-lose system in which the government is able to extract, through the back door, increased punishment that they are unable to secure through the front door. Such a system all but eliminates the impact of a jury's not guilty verdict or court dismissal of a charge, so long as a defendant is convicted of

something; indeed, for punishment purposes, it essentially renders an acquittal meaningless.

Allowing punishment for acquitted conduct also forces a defendant to defend themselves twice, for the same conduct. Indeed, it's even worse than that, because the second time is under a lower standard of proof. Rather than bar the government from seeking punishment for unproven conduct, the system merely lowers the bar to make it easier for the government to do just that.

Given this, it is no surprise that an increasing number of judges have condemned the practice of sentencing based on acquitted conduct – and have done so in increasingly harsh terms. *See, e.g., United States v. Brown*, 892 F.3d 385, 401, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) ("there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness"); *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("the unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent"); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (punishment based on acquitted conduct is "cruel and perverse"); *United States v. Lombard*, 102 F.3d 1, 5 (1st Cir. 1996) ("many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct in calculating the guideline range"); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) ("the Guidelines' apparent requirement that courts sentence for acquitted conduct utterly lacks the appearance of justice"); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (sentencing based on acquitted conduct "is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Sumerour*, 2020 WL 5983202, at *4 (N.D. Tex. Oct. 8, 2020) (sentencing based on acquitted conduct "offends a sense of justice"); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 n. 14 (S.D. Ohio 2005) ("consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system"); *see also United States v. Watts,* 519 U.S. 148, 164 (1997) (Stevens, J., dissenting) (describing the practice as "perverse"); *United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) (sentencing based on defendant's arrest record "undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings").

Indeed, according to a U.S. Sentencing Commission survey, 84% of over 600 federal judges stated that they disagreed with the practice of sentencing based on acquitted conduct. *See* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf. These judges are amply supported by an ever-growing group of academics, legislators and others. *See, e.g., United States v. Baylor*, 97 F.3d 542, 549-50 & nn.2 and 4 (D.C. Cir. 1996) (Wald, J., specially concurring) (noting, with respect to sentencing based on acquitted conduct, the "growing body of resistance to what commentators and scholars recognize as a blatant injustice"); *Durbin, Grassley, Cohen, Armstrong Introduce Bipartisan, Bicameral Prohibiting Punishment Of Acquitted Conduct Act* (Sept. 13, 2023) (Sen. Grassley) (sentencing based on acquitted conduct "undermines a bedrock principle of American criminal justice: 'innocent until proven guilty.'"); *id.* (Sen. Durbin) (describing the practice as "unjust" and "inconsistent with the Constitution's guarantees of due process and the right to a jury trial").

2. Unconstitutional. Many jurists have condemned the practice of sentencing based on acquitted conduct as a violation of the Fifth Amendment's Due Process clause and/or the Sixth Amendment right to trial by jury. *See, e.g., United States v. Martinez*, 769 Fed. Appx. 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (Sixth Amendment); *United States v. Brown*, 892 F.3d at 409 (Millett, J., concurring) (Sixth Amendment); *United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (Fifth and Sixth Amendments); *United States v. Bell,* 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc) (Sixth Amendment); *United States v. Canania*, 532 F.3d at 776-77 (Bright, J., concurring) (Fifth and Sixth Amendments); *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting) (Sixth Amendment); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (Sixth Amendment); *United States v. Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) (Fifth and Sixth Amendments); *United States v. Baylor*, 97 F.3d at 549 & n.2 (Wald, J., specially concurring) (Sixth Amendment); *United States v. Lanoue*, 71 F.3d at 984 (Fifth and Sixth Amendments); *United States v. Hunter,* 19 F.3d 895, 898 & n.4 (4th Cir. 1994) (Hall, J., concurring) (Fifth, Sixth and Eighth Amendments); *see also United States v. Pimental*, 367 F.Supp.2d 143, 149–55 (D. Mass. 2005); *United States v. Jones*, 863 F.Supp. 575, 578 (N.D. Ohio 1994) (sentencing based on lesser standard of proof than was rejected by jury "implicates the rights to trial by jury and due process").

Notably, five current or recent-former Justices of the United States Supreme Court also have expressed constitutional doubts about the practice. *See Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., joined by Thomas, Ginsburg, JJ., dissenting from denial of certiorari) (use of judicial factfinding to increase sentences for acquitted conduct "has gone on long enough" and "disregard[s] the Sixth Amendment"); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (use of judicial factfinding to increase sentences is based on a "questionable foundation").

We recognize, as does the Commission, the Supreme Court's decision in *United States v. Watts*, upholding, in a summary *per curiam* opinion, a court's authority to rely on acquitted conduct at sentencing so long as the conduct is proven by a preponderance of the evidence. Although the decision seemingly rejected only a double jeopardy challenge to the practice (519 U.S. at 154), *Watts* has interpreted more broadly as condoning (constitutionally) the practice. Nonetheless, several judges, particularly in the wake of the Supreme Court's subsequent decision in *United States v. Booker*, 543 U.S. 220 (2005), have found that *Watts* did not resolve, and thus does not foreclose, a challenge to the practice under the Sixth Amendment's jury trial clause and/or the Fifth Amendment's Due Process clause. *See United States v. Lasley,* 832 F.3d at 920 & n.10 (Bright, J., dissenting); *United States v. White,* 551 F.3d at 391–92 (Merritt, J., dissenting); *United States v. Mercado,* 474 F.3d at 658 (Fletcher, J., dissenting); *United States v. Faust,* 456 F.3d at 1349 (Barkett, J., specially concurring); *United States v. Coleman*, 370 F. Supp. 2d at 669; *United States v. Pimental,* 367 F. Supp. 2d at 150–52.

Indeed, at least some members of the United States Supreme Court view the constitutionality of the practice to be an unresolved issue – preferring instead that the Commission resolve, in the first instance, whether to allow it under the Guidelines. *See McClinton v. United States,* 143 S. Ct. 2400, 2401 (2023) (statement of Sotomayor, J.) ("the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system"); *id.* at 2403

(statement of Kavanaugh, Gorsuch and Barrett, JJ.) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions.").

We agree that the Commission ought to resolve this issue, bearing in mind the increasing number of persuasive decisions by jurists who have found the practice unconstitutional. To the extent the Commission agrees, this is yet another reason to prohibit consideration of acquitted conduct under the Guidelines.

3. Racially disproportionate impact. In recent years, the Commission has done a commendable job in revising Guideline provisions that exacerbate the racially disproportionate impact of our federal sentencing regime. *See, e.g.,* Amendments 706 and 750 (reducing crack cocaine disparity); Amendment 821 (limiting use of criminal history status points). Punishment based on acquitted conduct is another example. One academic (a formerly incarcerated person) has argued that the practice results in a disproportionate impact on racial and ethnic minorities. *See* Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?* 54 Santa Clara L. Rev. 675, 709–10 (2014).

4. Excess prosecutorial power. Allowing punishment based on unproven conduct creates an inherent incentive for prosecutors to charge every conceivable, potentially provable offense – confident in the knowledge that if they secure at least one conviction, acquittals on others basically won't matter because they can secure the same punishment. If there is anything our criminal justice system does not need, it is increased opportunities for prosecutors to leverage even more punishment authority than the powerful reservoir of it that they already enjoy.

5. Trial penalty. The trial penalty is already a cloud hanging over our modern-day federal criminal justice system. Exceedingly few cases actually go to trial, at least in part because of the significant downside risks (from a punishment perspective) of a conviction. This, in turn, erodes the significance of trial by jury in our criminal justice system, and in some cases may encourage defendants to plead guilty to crimes they did not commit in an effort to mitigate their punishment exposure.

Allowing acquitted conduct to increase punishment can only serve to exacerbate this problem. If a defendant can go to trial, "win" (by being found not

guilty of one or more charges), but still face punishment for the conduct underlying those charges, this serves as a further disincentive for defendants to go to trial in the first place. Going to trial in multiple-charge cases will only make sense for defendants who believe they can win it all. Sentencing reform should be directed toward the criminal trial's survival, not its extinction.

6. Unwarranted disparities. A central purpose of the Guidelines is to avoid unwarranted disparities in how defendants are sentenced. *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f); *see also* 18 U.S.C. § 3553(a)(6). Reliance on acquitted conduct for sentencing purposes is flatly inconsistent with this goal. Example: defendant A is charged with mail fraud and obstructing the investigation into the fraud. He is found not guilty of mail fraud and guilty of obstruction. Defendant B is charged with the same offenses. She is found guilty of both. One would think the two defendants ought to be treated differently for sentencing purposes. And yet, under the Guidelines' current relevant conduct rule, a court could punish both exactly the same. Treating defendants the same, even though found guilty of different conduct, is just as "unwarranted" a disparity as treating defendants differently even though found guilty of the same conduct (assuming other sentencing factors don't otherwise justify such a result).

More broadly, judges have sentenced defendants, and presumably will continue to do so, based on their individual views of whether it is appropriate to increase punishment based on acquitted conduct. This is consistent with their sentencing discretion. *See United States v. Khatallah,* 41 F.4th 608, 652 (D.C. Cir. 2022) (Millet, J., concurring); *Bell,* 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). But in light of the ever-growing division among judges regarding the propriety (legally and as a policy matter) of the practice, defendants in this situation will inevitably be treated differently for reasons unrelated to who they are and what they were convicted of. This is an unwelcome state of affairs, conducive to potentially arbitrary sentencing inconsistencies.

7. Real-life injustices. The use of acquitted conduct to punish defendants is no mere theoretical issue. It has real, and potentially dramatic, real-life consequences for defendants caught in its crosshairs.

One such example is an individual assisted by The Aleph Institute during the course of his case: David Clark. Mr. Clark, a first-time, non-violent defendant, was

prosecuted for various financial crimes. His first trial ended in a hung jury on all charges. (His wife was found not guilty of all charges.) During his second trial, he was convicted of counts with a single victim, based on loans obtained by family members – but was sentenced based on conduct encompassed by a conspiracy charge for which he was found *not* guilty, which included over 1,000 alleged victims and a $300 million intended loss and resulted in an astronomical increase in his Guideline range, from a few years to life imprisonment. On that basis, he was sentenced to 40 years in prison. This outcome is simply antithetical to the values espoused in our criminal legal system.

Fortunately, this profoundly unjust outcome was ultimately ameliorated when Mr. Clark, having served several years in a high-security penitentiary, received a Presidential sentence commutation. But the exceedingly rare remedy of commutation is not an adequate substitute for eliminating the ill-advised and constitutionally suspect practice of allowing such an outcome in the first place.

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The Commission has proposed several approaches to contain the influence of acquitted conduct on federal sentencing. Of them, prohibiting the use of such conduct (Option 1) is the simplest and clearest, with the greatest capacity to eliminate the evils presented by a system in which people can be punished for conduct a jury refused to find they committed. To allow consideration of such conduct by means of a departure rather than as relevant conduct (Option 2), or based on a higher standard of proof (Option 3), is little more than changing the procedural vehicles for its consideration; it doesn't eliminate the constitutional, policy, fairness and other concerns with allowing its consideration in any form.

To be sure, Congress has directed that, as a general matter, no limitation shall be imposed on the information concerning a defendant's background, character and conduct that a court can consider in imposing sentence. *See* 18 U.S.C. § 3661. One can question whether Congress did, or does, contemplate that this includes conduct for which the government has tried, but failed, to convict the defendant in the first place. Perhaps Congress does not (or will not) accept this practice: bipartisan legislation has been introduced in both houses of Congress to prohibit it. *See* Prohibiting Punishment of Acquitted Conduct Act of 2023 (S. 2788, H.R. 5430). In any event, nothing in this statute prevents the Commission from

concluding, for purposes of determining the proper scope of the Sentencing Guidelines, that acquitted conduct has no appropriate place in the determination of a defendant's Sentencing Guideline range.

Youthful Offenders

The Commission's proposed amendments for youthful offenders, if adopted, would accomplish two worthy goals: (1) allowing full consideration of a defendant's youth in determining whether a downward departure is warranted, without the current limitations of the relevant departure provision, and (2) generally not including youthful offenses in calculating a defendant's criminal history. Both proposals are consistent with a data-driven, scientifically supported approach to the Guidelines.

Downward Departure Based on Youth

The current downward departure provision based on age, 5H1.1, allows consideration of a departure based on youth only if age considerations are present "to an unusual degree and distinguish the case from the typical cases covered by the guidelines." And unlike for elderly defendants – for whom there is language supporting a departure without such a limitation (i.e., where "the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration") – a youth-based departure has no equivalent provision. A youth-based departure is, in Guidelines parlance, discouraged.

That should not be. The limitations on a youth-based departure give insufficient weight to the increasing body of "recent case law and neuroscience research in which there is a growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average." U.S. Sentencing Commission, *Youthful Offenders in the Federal System* 5 (2017). The United States Supreme Court has recognized that "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Miller v. Alabama*, 567 U.S. 460, 472

& n.5 (2012) (citing *Brief for American Psychological Association et al. as Amici Curiae* 3). This body of authorities, and the defendant's individual circumstances (both as to the offense conduct and their own personal characteristics), should guide the departure decision, not whether age considerations are present "to an unusual degree." Very simply, all other things being equal, a person who robs a bank when they are 19 years old shouldn't necessarily be treated the same for sentencing purposes as a person who robs a bank when they are 35 – and a sentencing court ought to have ample authority to avoid that outcome.

Criminal History Based on Youthful Offenses

The Guidelines currently provide for higher criminal history – and thus increased punishment – for youthful offenses (i.e., offenses committed prior to age 18), including certain juvenile adjudications. This is problematic, for several reasons. Different jurisdictions treat youthful offenses differently, such that two defendants who engaged in the same or similar conduct may have materially different criminal histories as a result. Records of youthful offenses can be harder to locate and obtain, due in part to confidentiality restrictions, again leading to potentially disparate treatment of similar youth.. Youth may serve their sentences in different types of facilities, which, in turn, may or may not constitute "confinement" for purposes of the criminal history guidelines. Adjudications may be less reliable due to the absence of core procedural protections enjoyed by adult defendants, including no right to trial by jury or a public trial, lack of counsel (or qualified counsel), and far fewer appeals of adverse decisions. Sentences may be based on factors unrelated to the defendant's culpability. And data shows that punishment is imposed disproportionately on minority defendants, thereby potentially disqualifying them from "safety valve" relief as well. All of these considerations, in combination, support the general exclusion of youthful offenses from the criminal history computation.

The Commission's alternate proposal – to allow consideration of youthful offenses solely to determine whether an upward departure for inadequate criminal history – would allow for consideration of such conduct, but should be limited to those cases in which the record establishes the fairness and reliability of the youthful offender adjudication, and where the underlying conduct is factually relevant to the determination of an appropriate Guideline range for the defendant.

Finally, to the extent data shows that youth have the highest recidivism rate of any age group, sentencing courts would retain the authority to take that into consideration, along with all of the other applicable statutory and Guideline factors, in determining the nature and extent of punishment to impose in any particular case. Nothing in the adoption of either proposed amendment would preclude consideration of that factor.

Conclusion

We urge the Commission to adopt the proposed amendments prohibiting consideration of acquitted conduct in calculating a defendant's Sentencing Guideline range, and allowing consideration of a defendant's youth in calculating a defendant's offense level but, in general, not including youthful offenses in computing their criminal history category.

Respectfully,

Christopher Poulos

Christopher Poulos
Executive Director
Center for Justice and Human Dignity

Rabbi Sholom Lipskar
Founder and Chairman of the Board
The Aleph Institute

February 21, 2024

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

Re: Public Comment on U.S. Sentencing Commission's Proposed Amendment on Youthful Individuals (Proposed Amendment 2)

Dear U.S. Sentencing Commission:

We write to encourage the Sentencing Commission to amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. This is Option 3 of the proposed amendments to §4A1.2(d) concerning criminal history calculations for offenses committed by youthful individuals (hereinafter "Option 3"). Removing consideration of all convictions or adjudications received prior to age eighteen when calculating criminal history for sentencing purposes would further the Sentencing Commission's stated goals of "reduc[ing] sentencing disparities and prompt[ing] transparency and proportionality in sentencing."[1] As scholars and practitioners with decades of experience representing individuals who have come in contact with the justice system at both the federal and state levels, we have seen firsthand the ways that inequities in sentencing schemes foreclose opportunities for adults to move forward with their lives and contribute to their communities upon completion of their court-ordered obligations. As a result, we offer these comments in support of Option 3, and urge the Commission to exclude in its calculation all sentences resulting from offenses committed when the individual was a minor, for the reasons outlined below.

Option 3 Appropriately Recognizes that Children Under Age Eighteen have Diminished Culpability.

The diminished culpability of minors has been codified by the Supreme Court in a series of Eighth Amendment opinions,[2] relying on settled scientific research on adolescent development that establishes the ways in which youth are different from adults.[3] In the seminal 2012 case *Miller v.*

[1] United States Sentencing Commission, *About the Commission*, available at: https://www.ussc.gov/#:~:text=The%20Commission%20collects%2C%20analyzes%2C%20and,effective%20and%20efficient%20crime%20policy.
[2] *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471 (2012). *See also Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016).
[3] *See, e.g.*, Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, American Bar Association (Aug. 1, 2015), available at: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_

Alabama, the Supreme Court struck down the automatic sentencing of children to life without the possibility of parole because it violated the Eighth Amendment's prohibition against "cruel and unusual punishments."[4] The Court relied heavily on neuroscientific research establishing that youth have diminished culpability relative to adults.[5] As the Court described, "[d]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds . . . [in] parts of the brain involved in behavior control."[6] Additionally, the Court reasoned that the characteristics indicative of a child's diminished blameworthiness—namely impulsivity, recklessness, immaturity, and inability to assess consequences—also supported the prospect that, as the individual matured, these characteristics could be "reformed."[7] Ultimately, the Court found these truths undermine the "penological justifications for imposing the harshest sentences on juvenile offenders."[8]

The retributive theory of punishment, which focuses on the defendant's morality in committing a criminal act,[9] is weakened for children in light of this diminished culpability. The deterrence rationale, which the American justice system also relies on to justify penal punishment with the goal of disincentivizing individuals from re-offending,[10] similarly is compromised with respect to youthful defendants, since "the same characteristics that render juveniles less culpable than adults . . . make them less likely to consider potential punishment."[11] Finally, subjecting a child to the harshest punishments without consideration of their age and circumstances cannot be justified by a theory of rehabilitation or incapacitation because such a sentence "reflects 'an irrevocable judgment about [a young person's] value and place in society,' at odds with a child's capacity for change."[12] For all of these reasons, convictions and adjudications received for offenses committed prior to age eighteen should not be considered in a defendant's criminal history score calculation. We therefore urge the Sentencing Commission to adopt Option 3.

Option 3 Protects Against Unjust Differential Treatment in Federal Sentencing Based on State-by-State Differences in Juvenile Court Jurisdiction.

A major rationale underlying the adoption of the Federal Sentencing Guidelines in 1984 was to apply uniformity in sentencing across the United States.[13] As scholars who practice in court and also research and analyze national youth justice policy issues, including the recent trend among states to expand their maximum age of juvenile court jurisdiction, we are concerned that Option 1 or Option 2

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practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/#:~:text=The%20Court%20considered%20differences%20between,Graham%20v.

[4] 567 U.S. 460, 489 (2012).

[5] *See, e.g., id.* at 472.

[6] *Id.* at 471–72 (other citations omitted).

[7] *Id.* at 472.

[8] *Id.*

[9] Alec Walen, *Retributive Justice*, Stanford Encyclopedia of Philosophy (Jul. 31, 2020), available at: https://plato.stanford.edu/entries/justice-retributive/.

[10] *Id.*

[11] *Miller*, 567 U.S. at 472 (other citations omitted).

[12] *Id.* at 473.

[13] *See, e.g.*, Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, U.S. Department of Justice (Jun. 2001), available at https://www.ojp.gov/pdffiles1/nij/186480.pdf; *see also* Department of Justice, *Fact Sheet: The Impact of* United States v. Booker *on Federal Sentencing* (Mar. 15, 2006), available at: https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf.

of the proposed amendments to §4A1.2(d) would lead to differential treatment in federal sentencing exposure based on state-by-state differences in juvenile court jurisdiction. Only Option 3 ensures the Sentencing Commission's intended uniformity in the sentencing exposure and treatment of defendants.

As this Commission well knows, there are various state-by-state differences in the maximum age at which an individual is subject to the jurisdiction of a juvenile court. In other words, states differ in their definition of "juvenile"[14] and who is therefore subject to the jurisdiction of a youth-specific court. While most states set their maximum age of juvenile court jurisdiction at age seventeen for most offenses, at least three states (Georgia, Wisconsin, Texas) have a lower maximum age.[15] Further, some states have expanded juvenile court jurisdiction to young adults between ages eighteen and twenty-five in certain circumstances based on scientific research that shows brain development continues up to age twenty-six.[16]

States also differ in the minimum age at which a youth may be transferred from the jurisdiction of a juvenile court to that of an adult court.[17] For instance, as of 2018, California's minimum transfer age is sixteen (the highest of all the states), while many states, including Iowa and Wisconsin, for example, allow a child to be adjudicated as an adult as long as the child is not younger than ten.[18]

These disparities offer a strong justification for selecting Option 3 of the proposed amendments to §4A1.2(d). While Options 1 and 2 recommend that the Guidelines exclude or limit the consideration of "juvenile" sentences, only Option 3 would address the state-by-state differences in the maximum ages of juvenile court jurisdiction and transfer to adult court by placing a blanket rule against considering *any* sentences resulting from offenses committed prior to an individual's eighteenth birthday. For purposes of criminal history calculations in federal sentencing, only Option 3 would ensure a defendant who received an adult conviction at age seventeen in Wisconsin would stand on the same footing as a defendant who received only a juvenile adjudication at age seventeen in Vermont.

Option 3 Protects Against Unjust Differential Treatment in Federal Sentencing of Youth Convicted in North Carolina.

As scholars and practitioners who live and work in North Carolina, we are especially attuned to the inequity that the current federal sentencing structure furthers for our fellow North Carolinians. In our state, ongoing changes in sentencing law for youth have shifted the landscape dramatically for some

[14] As advocates who have been privileged to partner with young people who came in contact with the adult and juvenile justice systems, we choose not to use the noun "juvenile" to describe children, adolescents or young people. The term appears throughout this submission in the context of quotations from courts and other sources, and also when referencing the youth justice system.

[15] Chuck Carroll, *Raise the Age: Where Legislation Stands in the Final Three States*, THE IMPRINT, available at: https://imprintnews.org/justice/raise-age-where-legislation-stands-final-three-states/52186.

[16] Vermont has expanded juvenile jurisdiction to nineteen-year-olds, while Michigan and New York have both raised the age of juvenile court jurisdiction to include eighteen-year-olds. *See* Katie Dodds, *Why All States Should Embrace Vermont's Raise the Age Initiative*, COAL. FOR JUV. JUST. (July 22, 2020), available at: https://www.juvjustice.org/blog/1174; NAT'L GOVERNORS ASS'N, AGE BOUNDARIES IN JUVENILE JUSTICE SYSTEMS 2–3 (2021), available at: https://www.nga.org/wp-content/uploads/2021/08/Raise-the-Age-Brief_5Aug2021.pdf.

[17] NAT'L GOVERNORS ASS'N, *supra* note 16, at 4.

[18] *Id.* at 5.

federal defendants based on *where* the defendant was convicted or adjudicated as a minor and *when* they were convicted or adjudicated as a minor. Only Option 3 would guard against this unjust differential treatment.

Until 2019, North Carolina was unique in its punishment of children, as the only state to automatically charge all sixteen and seventeen year-olds as adults regardless of the individual circumstances of the young person or the crime they were alleged to have committed.[19] As a result, each year thousands of our state's children were processed in the more punitive and less developmentally appropriate adult criminal system and faced the life-long consequences of an adult criminal record.[20] Recognizing how devastating this policy was to children in North Carolina, the state legislature passed so-called "Raise the Age" legislation, effective in 2019.[21]

Since the implementation of North Carolina's Raise the Age legislation, our system more closely approximates justice in its treatment of young people accused of crimes. All people under the age of eighteen charged with H or I felonies, or any misdemeanors, are automatically charged in juvenile court.[22] Although North Carolina youth are still processed in adult court in some circumstances, data from the North Carolina Department of Public Safety shows an immense positive impact from Raise the Age already. In the first three years of Raise the Age implementation, over 13,000 children in North Carolina avoided the jurisdiction of adult courts.[23] The positive impacts of this statutory change are backed by research that shows keeping children out of adult court decreases risk of harm to the individual youth, reduces recidivism rates, and yields economic and public safety benefits to the entire community.[24]

However, this statutory change is not retroactive. North Carolina children charged as adults before Raise the Age was implemented still face the consequences of those adult convictions despite the current recognition that they were children with diminished culpability at the time of the offense. This means that any federal sentencing policy that draws its distinctions based on whether something was a "juvenile adjudication" or "adult conviction" would disadvantage individuals who were convicted under the age of eighteen in North Carolina prior to 2019 when compared to their peers in other states. Further, such a distinction would additionally punish these defendants as compared to similarly situated people charged with crimes as older teens in North Carolina after 2019. Only Option 3 of the proposed amendments to §4A1.2(d), which draws its distinctions based on whether someone was above or below eighteen at the time of the offense, would prevent these sentencing disparities.

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[19] Juvenile Justice Geography, Policy, Practice, & Statistics, Jurisdictional Boundaries, JJGPS, available at: http://www.jjgps.org/jurisdictional-boundaries.

[20] N.C. Comm'n on the Admin. of Law & Just., Recommendations for Strengthening the Unified Court System of North Carolina, Final Report, Appendix A, 95 (2017) available at: https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf.

[21] Juvenile Justice Reinvestment Act ("Raise the Age"), S.L. 2017-57 §§ 16D.4.(a)–(tt), available at https://files.nc.gov/ncdps/documents/files/SB257%20-%20JJ.pdf.

[22] N.C. Gen. Stat. Ann. § 7B-2200.5.

[23] *Id.*

[24] N.C. Comm'n on the Admin. of Law & Just., Recommendations for Strengthening the Unified Court System of North Carolina, Final Report, Appendix A, 95 (2017) available at: https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf.

The pre- or post-2019 distinction is not the only equity concern we have with how federal sentencing exposure impacts individuals with prior convictions as youth in North Carolina. Initially, North Carolina's Raise the Age law required the automatic transfer to adult court of all youth ages sixteen and seventeen charged with Class A-G felonies, which are considered to be more serious or violent crimes.[25] There was no explicit statutory path for these youth to be returned to juvenile court, even if the charges were later reduced or the youth's individual circumstances merited juvenile court processing. Recognizing the potential harm of this provision, North Carolina revised its transfer requirements in 2021 and gave discretion to prosecutors to decline transfer to adult court for Class D through G felonies.[26] Therefore, youth charged before 2021 face another disadvantage since there was no clear legal mechanism to return these youth to juvenile court. On the other hand, youth charged after 2021 had the opportunity to be returned to juvenile court based on the prosecutor's consideration of the individual facts of the case. Again, only Option 3 of the proposed amendments to §4A1.2(d) would control for these constantly evolving statutory developments and prevent inequitable sentencing disparities.

We are also concerned that defendants convicted as minors in North Carolina could face disparate sentencing based simply on the county where they were convicted. North Carolina has various legal mechanisms that allow the transfer of a youth from juvenile court to adult court, including several mechanisms that give broad discretion to locally elected prosecutors and judges in matters of transfer.[27] Data on judicial transfer of thirteen to fifteen year-olds to adult court prior to Raise the Age implementation bears this out, showing an extreme disparity based on the assigned judge, with four judges granting every single one of the 145 transfers that collectively came before them.[28] North Carolina is still refining its transfer laws to achieve the right balance of local discretion and statewide uniformity, but until this is achieved, youth in certain judicial districts are at a stark disadvantage from a sentencing perspective. Only Option 3 would address this injustice and prevent further disparity.

Finally, forcing individuals to face increased sentencing consequences for crimes committed as minors but processed in adult court would lead to even harsher disproportionate impacts on children of color. Nationally, Black youth are far more likely than their white peers to be transferred to adult court by prosecutors and juvenile court judges.[29] These racial disparities stem not from an increased likelihood that Black youth will commit serious or violent offenses, but rather the inaccurate and harmful biases held by many individuals that leads them to mistakenly perceive Black youth as older and more culpable.[30] The same trends are present in North Carolina. In the first three years of Raise

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[25] Juvenile Justice Reinvestment Act ("Raise the Age"), S.L. 2017-57 §§ 16D.4.(a)–(tt), available at: https://files.nc.gov/ncdps/documents/files/SB257%20-%20JJ.pdf.

[26] G.S. 7B-200.5(a1), available at: https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_7b/GS_7b-2200.5.html.

[27] Jacquelyn Greene, Transfer of Juvenile Delinquency Cases to Superior Court, UNC Sch. of Gov't Juv. Law Bulletin No. 2022/01 (January 2022) available at: https://www.sog.unc.edu/sites/www.sog.unc.edu/files/ reports/JLB%2022-01.pdf.

[28] N.C. Comm'n on the Admin. of Law & Just., Recommendations for Strengthening the Unified Court System of North Carolina, Final Report, Appendix A, 95 (2017), available at: https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf.

[29] Jeree Thomas, The Prosecution of Black Youth as Adults, Campaign for Youth Justice (Feb. 1 2018) available at: https://www.campaignforyouthjustice.org/voices/item/the-prosecution-of-black-youth-as-adults.

[30] Goff et al., The Essence of Innocence: Consequences of Dehumanizing Black Children, Journal of Personality and Social Psychology (Feb. 24, 2014) available at: https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf.

the Age implementation, 51.4% of sixteen and seventeen year old youths charged of crimes were Black and only 33.3% were white,[31] while the entire state of North Carolina, in comparison, is 22.2% Black and 69.9% white.[32] While pre-2019 data disaggregated by race is not readily available, it can be assumed that similar racial disparities were present, meaning that Black children ages sixteen and seventeen were disproportionately arrested and subjected to adult court processing in the years leading up to Raise the Age. Options 1 or 2 of the proposed amendments would exacerbate the harm of these existing disparities by allowing the prior adult convictions of Black defendants for youthful offenses to be considered more harshly in later sentencing matters. In contrast, white defendants would have been less likely to be arrested and more likely to have received only a juvenile adjudication for the same youthful offense, placing them at an sentencing advantage under Options 1 or 2.

Thank you for your consideration of our viewpoints, which are informed by collective decades of practice as attorneys and scholars in the areas of youth law, criminal and juvenile justice. We hope the Commission takes this important and necessary step toward equity by amending §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score.

Sincerely,

Lauren Fine, Esq.
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Supervising Attorney, Criminal Defense Clinic
Duke Law School
Co-Founder, Youth Sentencing & Reentry Project

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[31] Juvenile Jurisdiction Advisory Committee, Juvenile Age Final Report 41 (Jan. 15, 2023) available at: https://www.ncdps.gov/juvenile-age-report-2023/download?attachment.
[32] *See* U.S. Census Bureau Quick Facts, North Carolina Population Estimates July 1, 2023, available at: https://www.census.gov/quickfacts/fact/table/NC/PST045222.

January 30, 2024

The Honorable Carlton W. Reeves
Chair
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC, 20002-8002

RE: Justice Action Network/Due Process Institute Comments on the U.S. Sentencing Commission's Notice of Proposed Amendments to the Sentencing Guidelines

Dear Chair Reeves and Members of the Commission:

We write in response to your request for public comment on proposed amendments to the Sentencing Guidelines and related policy issues posted in December 2023. We appreciate the opportunity to comment on these critical amendments.

The Justice Action Network (JAN) is the nation's largest bipartisan organization dedicated to criminal justice reform. We believe in a strategic, data-driven approach to changing hearts, minds, and laws for a smarter, fairer, more efficient and effective justice system. JAN brings policymakers, stakeholders, and advocates from across the political spectrum together to advance strong, bipartisan criminal justice reform efforts at both state and federal levels.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. Founded in 2018, it is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

We write today in support of proposed amendments to the Sentencing Guidelines regarding criminal history of youthful offenders and consideration of acquitted conduct. Together, these amendments help to fulfill the Commission's mission to "establish sound and equitable sentencing policies and practices for the federal courts." Research and evidence from states demonstrate that justice-involved youth must be viewed and treated differently than adults due to their cognitive stage of development and the impact incarceration of youth has on recidivism rates. Because of this state-tested evidence base, increasing federal sentences for these individuals, later in life as adults, raises equity concerns. Similarly, the prohibition of considering acquitted conduct at sentencing would change one of the more unsound federal sentencing processes. The practice of considering acquitted conduct at sentencing faces continuous litigation in the courts and potential legislation in Congress due to the threat it poses to due

process and the right to trial enshrined in the U.S. Constitution. Judges and Congress alike would benefit from revised sentencing guidance from the Commission that stops this practice.

The proposed amendments are under consideration as more than 150,000 people are currently serving sentences in the custody of the Bureau of Prisons, an agency that is chronically understaffed and struggling to manage the safety of staff and incarcerated people. It is imperative that the Commission consider amendments to the Guidelines that consider this backdrop and we thank the Commission for considering these comments in working to ensure people are not serving unduly lengthy sentences.

1. **Significantly Limit or Eliminate consideration of Youth Offenses in Criminal History Scores.**

In Proposed Amendment 2, Part A, the Commission proposes options to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score. In considering these changes, the Commission points to research on age and brain development that show "brain development continues until the mid-20s on average, potentially contributing to impulsive actions and reward-seeking behavior, although a more precise age would have to be determined on an individualized basis." The Commission separately notes the correlation between age and rearrest rates, where "younger individuals being rearrested at higher rates, and sooner after release, than older individuals," which is backed by data nationwide.

Courts have long considered the cognitive state of defendants in conviction and sentencing, and they should do so when factoring criminal history into a sentence. If there are class-wide factors that may have impacted a defendant's state of mind while committing prior offenses, such as undeveloped brains due to age, the courts should not weigh this history the same as a history absent such factors.

Additionally, a growing body of research shows that incarcerating youth may increase their rate of recidivism, leading to further disparities if these offenses are weighed the same as adult offenses. These differences in recidivism rates were revealed by states looking to reform their juvenile justice systems as it became increasingly clear that they were showing a poor return on investment: growing rates of recidivism and growing costs. In developing policy solutions to address this problem, states studied their juvenile justice systems, including offense types, punishment types, and outcomes. What they found was that most youth offenders sent to secure facilities did not see a change in recidivism rate when released, and offenders sent to these facilities for low-level offenses were at an increased risk of recidivating when released. In response to this evidence, states as geographically and politically diverse as California, Florida, Georgia, Kentucky, and Utah reformed their juvenile justice systems to limit the incarceration of youth, instead using community-based solutions to address recidivism, especially for low-level offenses. These states marked both a cost savings and reduced recidivism rate.

These points are particularly salient when considering studies about aging out of crime. The Commission released a report in 2017 that showed older offenders were far less likely to recidivate than younger offenders, regardless of sentence length. Therefore, increasing sentence length because of past offenses committed as a juvenile is unlikely to increase community safety.

Now the Commission must now consider whether youth offenders, whose risk of recidivism may have been exacerbated by secure confinement as well as cognitive development due to their age, should be penalized in calculating their criminal history score for an unrelated offense they later committed as an adult. This penalization for juvenile offenses would come even as many of the states who incarcerated them as youth have recognized that this approach did not work, reforming their justice systems to better tailor them to hold youth accountable. It would not serve justice for the federal system to hold youth offenses to the same standard as adult offenses when the jurisdictions where the youth offenses occurred have changed course.

We urge the Commission to significantly limit or eliminate the consideration of youth offenses in the calculation of a criminal history score. We also urge the Commission to apply these changes retroactively, allowing currently incarcerated offenders the opportunity for judicial review of whether their current sentences are fair and just.

2. Eliminate Use of Acquitted Conduct in Determining Sentences.

Proposed Amendment 3 would change the Sentencing Guidelines to limit or prohibit the consideration of acquitted conduct at sentencing. The Commission notes that the Guidelines currently give wide latitude to sentencing judges to consider conduct that may be "relevant information without regard to its admissibility under the rules of evidence applicable at trial." The Commission further notes that the Guidelines state the consideration of relevant conduct should fall under a preponderance of evidence standard, lower than the standard needed to convict a defendant of this conduct at trial.

The consideration of acquitted conduct at sentencing violates fundamental rights of the accused, raising major due process and right to trial issues under the Fifth and Sixth Amendments to the Constitution. Further, considering this conduct at sentencing creates a separate system of criminal justice where the burden of proof is lower, but the consequences can be just as severe.

The issues created by the consideration of acquitted conduct at sentencing are unfortunately not solely theoretical. The federal courts have considered several cases on appeal where considering acquitted conduct significantly impacted sentences, and some of these cases reached the Supreme Court. In fact, the Commission's consideration of Amendment 3 today in part stems from the Supreme Court's indication in 2023 that it would benefit from the Commission weighing in on this issue.

Congress is also considering intervening to prohibit the punishment of acquitted conduct. Legislation has been introduced on a bipartisan, bicameral basis that would completely bar the consideration of acquitted conduct at sentencing. This legislation has already begun to advance in the House of Representatives, where it passed out of the Judiciary Committee by a vote of 23-0, and could soon be considered by the full House. However, as Congress, the courts, and the Commission determine how best to address this issue, people with unfairly long sentences continue to serve them in prison. Due to the harm this practice is currently causing to people in prison and the impact it has on the tenants of our justice system, the Commission should act now and act broadly to curb it. The revised guidelines should include defining state, local, and tribal court conduct as prohibited from consideration. The Commission should also allow currently sentenced offenders whose sentences were lengthened because of the consideration of acquitted conduct to petition for a reduced sentence.

We thank the Commission for proposing these amendments to the Sentencing Guidelines, and we appreciate your consideration of our comments. If you have any questions, please contact JC Hendrickson at jc@justiceactionnetwork.org or Jason Pye at jason@idueprocess.org.

Sincerely,

JC Hendrickson
Director of Congressional Affairs
Justice Action Network

Jason Pye
Director, Rule of Law Initiatives
Due Process Institute

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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: Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, and Citizens for Juvenile Justice Comment on Proposed 2024 Amendments

Dear Judge Reeves:

Enclosed please find comments to the U.S. Sentencing Commission's proposed 2024 Amendments to the Federal Sentencing Guidelines concerning Youthful Individuals presented by Juvenile Law Center, The Sentencing Project, The Gault Center, National Youth Justice Network, and Citizens for Juvenile Justice.

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has worked to ensure that laws, policies, and practices in states affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. Established in 1986, The Sentencing Project has produced a broad range of scholarship on extreme sentencing and juvenile and young adult justice in jurisdictions throughout the United States.

The Gault Center, formerly the National Juvenile Defender Center, was created to promote justice for all children by ensuring excellence in the defense of youth in delinquency proceedings. Through systemic reform efforts, training, and technical assistance, the Gault Center seeks to disrupt the harmful impacts of the legal system on children, families, and communities; decriminalize adolescence; and ensure the constitutional protections of counsel for all young people.

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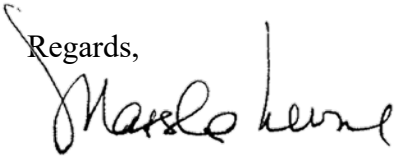
National Youth Justice Network (formerly National Juvenile Justice Network) builds the movement for anti-racist, healing-centered youth justice. We center the needs of the most marginalized, and we seek a reimagined future where Black, Brown, Indigenous, LGBTQIA+ youth, and youth with disabilities have the freedom, resources, and opportunities necessary to thrive. To this end, we unite a diverse network of advocates and organizers in nearly every state across the U.S., providing technical assistance as they advance policies and best practices in line with research on youth development.

Citizens for Juvenile Justice ("CfJJ") is the only independent, statewide, nonprofit organization working exclusively to improve the juvenile justice and other youth serving systems in Massachusetts. CfJJ's mission is to advocate for statewide systemic reform that achieves equitable youth justice. CfJJ believes that both the needs of young people and public safety are best served by fair and effective systems that recognize the ways children are different from adults and that focus primarily on rehabilitation rather than an overreliance on punitive approaches.

We appreciate the Commission's consideration of our comments relating to Youthful Individuals.

Regards,



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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

COMMENTS OF JUVENILE LAW CENTER, THE SENTENCING PROJECT, THE GAULT CENTER, NATIONAL YOUTH JUSTICE NETWORK, & CITIZENS FOR JUVENILE JUSTICE TO U.S. SENTENCING COMMISSION PROPOSED AMENDMENT 2 REGARDING YOUTHFUL INDIVIDUALS

INTRODUCTION

The Commission's proposed Amendments concerning Youthful Individuals offer an important opportunity to align the federal sentencing guidelines with current case law and research. With respect to the treatment of criminal history presented in **Part A**, we believe the purpose of the sentencing guidelines and the juvenile justice system, inconsistent juvenile records and transfer laws, and the substantial racial disparities in youth sentencing dictate that the Commission adopt Option 3 and remove all consideration of youthful offenses from criminal history scoring. With respect to **Part B**, we agree that the explicit consideration of youth at sentencing is a critical update, but believe the Commission should avoid specifying precisely what aspects or elements of youth the trial court should consider and do not believe recidivism studies are reliable or relevant to the trial court's sentencing decision. We appreciate the Commission's consideration of our comments relating to Youthful Individuals.

THE COMMISSION'S MANDATE TO CORRECT DISPARITIES, ARBITRARINESS, AND INDETERMINACY

The United States Sentencing Commission was created, and the Guidelines developed, in order to decrease disparities, arbitrariness, and indeterminacy in sentencing.

Congress passed the Sentencing Reform Act (SRA) as Title II of the Comprehensive Crime Control Act of 1984.[1] The SRA created the Commission and directed it to develop mandatory guidelines to promote greater uniformity in sentencing outcomes. The report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 captures the reasoning and concerns of the SRA's drafters.[2] The report observed that "every day federal judges mete out

[1] Pub. Law 98-473

[2] Comprehensive Crime Control Act of 1983, Report of the Committee on the Judiciary United States Senate, S. 1762, 22.

an unjustifiably wide range of sentences to offenders with similar histories, convicted or similar crimes, committed under similar circumstances. . . These disparities, whether they occur at the time of the initial sentences or at the parole stage, can be traced directly to the unfettered discretion the law confers on these judges and parole authorities responsible for imposing and implementing the sentence."[3]

The report's authors explain that such disparities harm both individuals and public safety: "Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons."[4] The report concludes: "The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward."[5]

As such, the SRA charged the Commission with promulgating guidelines "with particular attention to the requirements of § 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C.A. § 994. And in the words of then-President Ronald Reagan upon the signing of the Sentencing Guidelines Act of 1986, the "core purpose of the Sentencing Reform Act was to establish fairness and certainty in sentencing."[6] Using such a framework in a uniform manner is intended to "secure nationwide consistency."[7]

THE PROPOSED AMENDMENTS:

The Commission's proposed amendments regarding the sentencing of youthful individuals are fully in line with the objectives discussed above. As explained in these comments, juvenile adjudication points introduce disparities, arbitrariness, and indeterminacy into federal sentencing practices that are anathema to the Guidelines' purpose and the Commission's mission.

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[3] *Id.*
[4] *Id.* at 45-46.
[5] *Id.* at 66.
[6] Ronald Reagan, Statement on Signing the Sentencing Guidelines Act of 1986, July 11, 1986, 1986 U.S.C.C.A.N. 1770.
[7] *Gall v. United States*, 552 U.S. 38, 49 (2007).

In its landmark sentencing decisions concerning youthful individuals, the United States Supreme Court has repeatedly held that offenses committed by those under the age of eighteen must be treated differently from offenses committed by adults and that the youth who commit these offenses cannot be subjected to the harshest punishments.[8] The behavioral science adopted by the Supreme Court in the juvenile sentencing cases is supported and bolstered by neuroscience that demonstrates that critical regions of the human brain do not fully develop and become mature until an individual reaches their mid-twenties. Accordingly, offenses committed by youth cannot be treated in the same manner as adult offenses regardless of whether they are adjudicated in the juvenile or criminal justice systems.

Accordingly, the Commission's proposed Amendments concerning youthful individuals offer an important opportunity to align the Guidelines with current case law and research. **Part A** of the Amendments offers three separate options to address the current use of offenses committed under age 18 in the calculation of an individual's criminal history score. In evaluating these options, the Commission must consider: (1) the purpose of the Guidelines, (2) the unique history, purpose, and practice of the juvenile justice system, (3) racial disparities in the adjudication and sentencing of youth, (4) the impact of juvenile records laws, and (5) disparities in laws governing how and when youth are transferred for prosecution and sentencing in adult court. Based on these considerations, the Commission should select Option 3 and remove all consideration of youthful offenses from the criminal history score.

Part B of the Amendments takes the important step of explicitly including considerations and characteristics of youth for purposes of downward departures from the standard guideline ranges. Under the proposed Amendment, however, the trial court would be required to consider a list of specific individual factors related to youth as well as the influence of certain recidivism studies suggesting the

[8] *See Roper v. Simmons,* 543 U.S. 551 (2005) (striking the juvenile death penalty as unconstitutional under the Eighth Amendment); *Graham v. Florida,* 560 U.S. 48 (2010) (striking life without parole sentences for juveniles convicted of nonhomicide offenses and requiring "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Miller v. Alabama,* 567 U.S. 460 (2012) (striking mandatory imposition of life without parole sentences for juveniles convicted of homicide); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (finding that *Miller* applies retroactively); *Jones v. Mississippi*, 593 U.S. 98, 106 n.2 (2021(affirming that *Miller* and *Montgomery* require the trial court to consider unique attributes of youth before imposing life without parole).

propensity of youthful individuals to reoffend. While the explicit consideration of youth at sentencing is a critical advancement, the Commission should avoid specifying precisely what aspects or elements of youth should be considered to ensure an expansive view as research, knowledge, and experience evolves. Moreover, because the relevant neuroscientific research reflects aggregate, general characteristics of brain development in teens and young adults, requiring the specific consideration of neuroscience on an individualized basis at sentencing is not recommended. Additionally, given the highly variable methodologies and timelines associated with many recidivism studies, the use of any particular recidivism study is unreliable and, at best, merely reflects what brain and behavioral science and the age-crime data confirm: youth have a propensity for poor decision making, risk taking and reckless behavior that desists as they mature.

Part A: Offenses Committed by Youth Under 18 Should Not Be Considered When Computing Criminal History Under §4A1.2(d)

Under §4A1.2(d) of the current Guidelines, an individual's criminal history score includes points assessed for all juvenile adjudications as well as for adult criminal convictions the individual received when they were under eighteen. The inclusion of juvenile adjudications in any form violates the original mandate and purpose of the Commission in establishing the Guidelines as well as that of the juvenile justice system, while perpetuating arbitrary and inconsistent outcomes that only serve to exacerbate existing racial disparities in sentencing. Accordingly, Options 1 and 2, despite improvements upon the current Guidelines, do not go far enough. Given existing disparities in youth transfer laws as well as the science and case law dictating that youth be treated differently than adults, using any offenses before age 18 in computing criminal history is problematic. Accordingly, Option 3 offers the most consistent and fair approach to the handling of youthful offenses.

Relevant Background Information:

1. History, Purpose, and Practices of the Juvenile Justice System

Today's juvenile justice system traces its origins to the establishment of the first juvenile court in Cook County, Illinois in 1899. By the mid-1920's, most states had created separate juvenile courts for youth. From its inception, the juvenile justice system was established to differentiate juvenile offenses from adult criminal conduct and to ensure that youth were spared the harsh criminal consequences of

adult court, from sentencing through the stigma of being branded criminal.[9] In this new system, with the judge serving in the role of *parens patriae*, the state's intervention was considered a civil matter rather than a criminal one.[10] By removing youth from adult criminal court jurisdiction, the founders of the juvenile court believed they could supervise and treat youth and respond to their needs with greater flexibility. While the criminal justice system focused on punitive responses to crime, the juvenile justice system was developed in large part to facilitate the opportunity for juveniles to reform and abide by the law.[11]

The juvenile court's rehabilitative focus was premised on the assumption that a young person's actions were primarily the function of their environment and therefore did not warrant a punitive response: "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control . . . [their] conduct is not deemed so blameworthy that punishment is required to deter him or others."[12] The rehabilitative ideal further rested on the belief that a child's character, not yet fully formed, could meaningfully be improved by intervention strategies geared to the minor's "best interests."[13]

The complete judicial discretion of the *parens patriae* model, however, led to vastly different outcomes for youth depending on the state, county, juvenile court judge and even other stakeholders. And throughout the history of the juvenile court system, from arrest through adjudication, disposition and transfer to criminal court for prosecution, Black, Brown, immigrant, and Indigenous youth have been treated more harshly. While the U.S. Supreme Court finally required some basic due process protections for youth in the 1960s and 1970s,[14] much of the *parens patriae* model still remains.[15] The most notable difference perhaps is the absence of jury trials; in juvenile court, the judge is still the ultimate finder of fact. Thus, issues

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[9] *In re Gault*, 387 U.S. 1, 14-15 (1967).
[10] *Id.* at 17.
[11] *Id.* at 15-16.
[12] *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971).
[13] Barry Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime*, 84 Minn. L. Rev. 327, 337 (1999).
[14] *In re Gault*, 387 U.S. 1 (1967); *Kent v. U.S.*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970); *Breed v. Jones*, 421 U.S. 519 (1975).
[15] Eduardo R. Ferrer, *Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of Parens Patriae*, Loyola U. Chicago L. J. 54, No. 885 (2023).

that would be aggressively litigated before a jury with the presentation of experts may be seen by the juvenile court as a waste of time and resources, as the court may feel they can evaluate such things on its own.[16]

More importantly, the juvenile system continues to rely on indeterminate sentencing – a particular concern of the Commission when first established and a stark contrast to the criminal system that has all but abandoned it. In a recent survey of 29 juvenile defenders from 24 different states conducted by The Gault Center, the vast majority reported the use of indeterminate periods of confinement in their state. This arbitrariness in sentence length is compounded by the multiple ways in which release and termination of confinement is determined: the ultimate discretionary decision to release a youth from confinement may be made by a judge, the executive agency overseeing the state juvenile justice system, or an independent parole-type board, depending on which state the youth has been adjudicated in. Using minimum terms of confinement for assigning points based on length of confinement is therefore wholly inappropriate.

Finally, juvenile adjudications are more unreliable because youth are particularly prone to false confessions.[17] In one study of proven false confessions, a disproportionately high percentage were found to come from juveniles, most of whom were under 15.[18] In another study of exonerations, false confessions were the reason in 42% of juvenile exonerations (compared to 15% of all exonerations).[19] In studies that have gauged youths' decision-making during hypothetical interrogations and plea offers, many self-reported that they would falsely confess, and they did so more often than adults. Indeed, confession experts overwhelmingly agree that the phenomenon of false confessions among youth is sufficiently reliable to present in court.[20]

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[16] Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* 34 N. Ky L. Rev. 257 18-19, 33 (2007).
[17] Lauren J. Grove and Jeff Kukucka, *Do Laypeople Recognize Youth As a Risk Factor for False Confession? A Test of the 'Common Sense' Hypothesis*, Psychiatr Psychol Law. (2021); 28(2): 185–205 (summarizing numerous studies related to false confessions among youth).
[18] *Id.*
[19] *Id.*
[20] *Id.*

2. Historic and Persistent Racial Disparities in Juvenile Adjudications and Criminal Sentencing

The use of juvenile adjudications for adult sentencing has a disproportionate impact on youth of color. From the beginning, studies have shown "that [Black] children are represented in a much larger proportion of the delinquency cases than they are in the general population" and that "[a]n appreciably larger percent of the [Black] children came in contact with the courts at an earlier age than was true with the [w]hite children."[21] Further, "cases of [Black] boys were less frequently dismissed than were [w]hite boys. Besides, they were committed to an institution or referred to an agency or individual much more frequently than were [w]hite boys."[22] Little has changed in the intervening decades. Even as arrest and custody rates have dropped dramatically in the last twenty-five years, racial disparities persist.[23] Black, Brown, and Indigenous youth continue to be disproportionately represented at every stage of the juvenile system, including arrests, court referrals, detention, adjudications, incarceration and other out-of-home placements.[24] Youth of color are also disproportionately involved with the child welfare and school to prison pipelines, both feeders to the juvenile justice system.[25] Black, Brown, and Indigenous Youth are more likely to end up in the child welfare system and are typically held for longer periods of time when they are removed from their

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[21] James Bell & Laura John Ridolfi, W. Haywood Burns Inst., *Adoration of the Question: Reflection on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System,* 8 (2008).

[22] *Id.*

[23] Josh Rovner, *Youth Justice by the Numbers*, The Sentencing Project (May 16, 2023); https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/ (finding a 77% drop in juvenile justice incarcerations between 2000 and 2020 and an 80% decline in arrests, but finding that Black youth are 4.4 times as likely, and indigenous youth 3.2 times as likely, as white youth to be incarcerated).

[24] *Id.; see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. 383, 408–09 (2013).

[25] DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD 36-39 (2022); Jay Blitzman, *Shutting Down the School-to-Prison Pipeline*, American Bar Association (Oct. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/empowering-youth-at-risk/shutting-down-the-school-to-prison-pipeline/; Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *Proving the School-to-Prison Pipeline: Stricter Middle Schools Raise the Risk of Adult Arrest*, 21 Educ. Next 52, 52-57 (2021).

homes.[26] Similarly, Black and Brown youth are more likely to attend schools with school resource officers and police and are disproportionately represented among school referrals to juvenile court.[27]

Finally, as discussed further below, youth of color are more likely to be transferred or waived to criminal court to be prosecuted as adults, which contributes to their being disproportionately represented among youth under 18 with adult convictions and sentences. According to a 2017 American Communities Survey, Black individuals under the age of 18 comprised 14% of all youth, while white youth accounted for approximately 68%. Despite this, Black youth represented approximately 54% of all youth who were judicially waived to adult court and 58% of youth transferred to adult court for persons offenses according to national data; the biggest gap in disparities in forty years.[28]

The actual impact on racial disparities of the three options presented by the Commission is detailed below.

3. <u>The Supreme Court Adopts Science Dictating that Youth Must Be Treated Differently</u>

In a series of cases decided by the Supreme Court between 2005-2021, the Court relied upon both behavioral and neurological research to ban extreme sentences for youth under 18. In *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. 460 (2012), the Court identified distinct attributes of youth that reduce their culpability and thus require

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[26] Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, The Appeal (May 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS Am. Acad. Pol. and Soc. Sci. 253, 254 (2020); *"If I Wasn't Poor, I Wouldn't Be Unfit,"* Human Rights Watch (2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare; Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works*, Teen Vogue (May 25, 2018), https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works

[27] Amir Whitaker et al., *Cops and No Counselors*, ACLU (March 2019), https://www.aclu.org/publications/cops-and-no-counselors; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. 383, 410-411 (2013);

[28] Campaign for Youth Justice, Justice Policy Institute, (n.d.), *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, https://www.campaignforyouthjustice.org/images/child_not_the_charge_report_1.pdf

that youth be treated differently than their adult counterparts. These characteristics include: 1) immaturity of judgment and an underdeveloped sense of responsibility which results in "impetuous and ill-considered actions and decisions," *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); 2) a greater susceptibility "to negative influences and outside pressures, including peer pressure" and limited control over their environment; and 3) the fact that their character is "not as well formed as that of an adult," making their personality traits "more transitory," "less fixed," and capable of change, *id.* at 569-71. These cases and the scientific research upon which they are based counsel against using youthful offenses to further criminalize and punish individuals.

4. Access and Availability of Juvenile Record Information is Different in Every State

The wide variability, state to state, in juvenile records laws makes the assignment of points for juvenile adjudications highly problematic. While one of the original hallmarks of the juvenile justice system was its commitment to confidentiality to protect young people from the criminal consequences of an adult conviction, such protection is no longer uniformly provided.[29] All states have laws regarding the confidentiality of juvenile records and record information and most states provide some legal mechanism to provide record sealing or expungement at some point after a case is closed. However, the protection afforded to juvenile records and the ability of federal authorities or courts to access them varies greatly from state to state.[30] What this means in practice is that a federal court may have access to certain juvenile convictions in one state, while the records of those same offenses and adjudications may not be available in another state.

For example, in Washington, juvenile court records are open to public inspection unless and until the youth turns 18 and successfully petitions to have their record sealed.[31] Even when sealed, however, the records can still be shared with federal law enforcement agencies. By contrast, in California the juvenile court record is protected as confidential, sealed as soon as the case is closed, and destroyed after a

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[29] Riya Saha Shah, Lauren Fine & Jaime Gullen, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 8 (Juv. Law Ctr. 2014), http://tinyurl.com/3ce5je2t.

[30] *See Failed Policies, Forfeited Futures: Revisiting a Nationwide Scorecard on Juvenile Records*, Juv. L. Ctr. (July 15, 2020), http://tinyurl.com/2nmrfp3s.; *see also* Counsel for State Governments, Clean Slate Clearinghouse, https://cleanslateclearinghouse.org.

[31] Wash Rev. Code § 13.50.050

period of time depending on the offense.[32] Unlike in California and a handful of other states, automatic expungement is not the norm. In the majority of states like Washington, where individuals have to petition the court to have their records sealed or expunged, fees, unpaid restitution, inadequate notice, and other barriers leave many juvenile records arbitrarily accessible, particularly among youth with limited means or legal sophistication. These discrepancies lead to the inconsistent and arbitrary treatment of juvenile adjudications, further undermining the purpose of the sentencing guidelines.

5. Transfer Laws Differ in Every State

As with the disparities in juvenile records laws across the country, laws for the transfer of youth to criminal court likewise vary greatly across the country. All states have laws that provide for the transfer and prosecution of youth in criminal court.[33] However, states differ in the use of discretionary versus mandatory transfer and differ in the eligibility criteria for transfer, with wide variations in both the age and types of defenses for which a child may be eligible for prosecution as an adult.[34] The actual decision maker regarding a youth's prosecution in criminal court also varies state to state, with states allocating responsibility among juvenile court judges, criminal court judges, or even prosecutors. [35]

There are also substantial racial disparities involved in cases being transferred to criminal court for prosecution.[36] In 2016, Black youth were nine times as likely as white youth to be sentenced to prison while Indigenous youth were twice as likely and Latino/a youth were 40% more likely than white youth to be prosecuted as adults.[37]

Nearly every state provides juvenile court judges with discretion to transfer youth to the adult system. However, even when the transfer authority rests with judges,

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[32] Cal. Welf. & Inst. Code §§ 826, 827, 827.12

[33] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 21 (2021), https://www.campaignforyouthjustice.org/images/reportthumbnails/CFYJ%20Annual%20Report.pdf

[34] Campaign for Youth Justice, *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, Justice Policy Institute, https://www.campaignforyouthjustice.org/images/child_not_the_charge_report_1.pdf

[35] *Id.*

[36] *Id.*

[37] Campaign for Youth Justice, *Key Facts: Youth in the Justice System*, 7 (2016), http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.

the amount of discretion they have varies. There are discretionary, presumptive, and mandatory judicial waiver laws, with discretion of the judge during a formal hearing process varying from expansive to extremely limited.[38] While transfer is generally perceived to be used for youth who engage in serious crimes or crimes of violence, the fact is that judges are still transferring nearly half of youth to adult court for charges involving property offenses, drugs, and public order violations.[39] While total numbers of youth being judicially transferred has decreased since the 1990's, racial disparities have actually increased. In 2005, Black youth comprised 39% of all youth transferred by a judge, a proportion that increased to 55% in 2021, the most recent year for which there are data. Conversely, white youth comprised 45% of all judicial transfers in 2005, a proportion that fell to 29% in 2021. In 2021, seven in ten (71%) children transferred to the adult system by a judge were youth of color.[40]

Over half of states have transfer laws that automatically exclude certain youth from juvenile court because of their age and/or offense. These laws vary widely. For example, in Massachusetts, youth are only statutorily excluded from juvenile court if they are age 14 or older and are charged with first or second degree murder. By contrast, Maryland statutorily excludes youth 16 and older for 33 separate offenses.[41] Similar to statutory exclusion are mandatory waiver and presumptive waiver, which are transfer mechanisms that technically start in juvenile court, but the judges do not have full discretion and are either required to transfer a case to adult court upon a probable cause showing (11 states), or are required to presume that the case must be transferred absent clear proof the child should remain in the juvenile system (11 states).[42] Finally, in 12 states and the District of Columbia, youthful offenses can be filed directly to criminal court by the discretion of the prosecutor.

In states with statutory exclusion and direct file laws, as with discretionary transfer, racial disparities are stark.[43]

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[38] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 21 (2021)
[39] *Id.*
[40] https://www.ojjdp.gov/ojstatbb/ezajcs/
[41] Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005 – 2020*, 25 (2021)
[42] *Id.*
[43] *Id.*

Option 3 Should be Adopted Because Options 1 & 2 Do Not Fully Address the Issues Raised by the Inclusion of Youthful Offenses in Criminal History Calculations.

Option 1 takes the important step of eliminating from the computation of criminal history under §4A1.2 the two points currently allocated automatically for juvenile sentences based on a certain period of "confinement." Eliminating this provision is necessary, not only because of the issue recognized by the Commission of how to define "confinement" in the context of the juvenile system, but also because of the indeterminate nature of juvenile sentences and the arbitrary imposition of them, identified herein. Further, because the goal of a juvenile disposition is rehabilitation, as opposed to punishment or incapacitation, the notion that each child requires a different course or term of incarceration, confinement, and or supervision based on age and circumstances leads to disparate responses from case to case. Dispositions in the juvenile justice system are intended to be both indeterminate and individualized. There is no rule of thumb dictating either a particular type or duration of confinement for each particular offense for which a child is adjudicated. Depending on the circumstances of the offense, the individual characteristics of the child, and the particular judge presiding over the case, a child adjudicated delinquent for rape could receive the same or lesser term of confinement as a child adjudicated delinquent for theft, robbery or simple assault. Applying points for a specified term of "confinement" is wholly unworkable when assessing the relevance of a juvenile disposition.

While Option 1 eliminates the two points added for minimum terms of confinement in the juvenile system, it nevertheless continues to penalize all youth who are adjudicated delinquent in the juvenile system by assessing them one point. This provision should also be eliminated. The juvenile system was not intended to impose consequences beyond the period of juvenile court supervision and involvement, let alone potentially lifetime penalties on the one in eight youth who come into contact with it, 63% of whom will only have one encounter with juvenile courts.[44] Giving points in adult sentencing for juvenile adjudications does just that.

However, while **Option 2** improves on Option 1 by eliminating automatic points for juvenile adjudications, it would replace the automatic points with a

[44] Charles Puzzanchera and Sarah Hockenberry, *Patterns of Juvenile Court Referrals of Youth Born in 2000*, Juvenile Justice Statistics, Nat'l Report Series Bulletin, OJJDP (Aug. 2022).

discretionary mechanism under §4A1.3 to permit the sentencing court to use juvenile adjudications for departures from the guidelines. Option 2 would also continue to assign automatic points for youth under 18 who were convicted and sentenced in the adult system.

Using juvenile adjudications, even as a matter of discretion, still undermines the rehabilitative purpose of the juvenile justice system and leads to inconsistent results due to the widespread variations in juvenile court laws, practices and policies across the country. Such an approach is also likely to exacerbate already existing racial disparities by subjecting Black, Brown, and Indigenous youth to the likelihood that their juvenile adjudications will be used for departures with greater frequency and to greater effect than white youth. To avoid increased racial disparities, discretionary departures based on juvenile adjudications should be avoided.

Indeed, the over-representation and excess punishment of youth of color is evident from available data showing disparities among individuals who receive juvenile adjudication points and individuals who receive criminal history points for offenses committed under age 18.

Option 1 would likely reduce racial disparities among those who received at least one 2-point juvenile adjudication. In FY2022, *two-thirds* of those individuals who received a 2-point juvenile adjudication under the Guidelines were Black, 22% were Latino/a, and 9% were white. By comparison, 46% of those who received a one-point juvenile adjudication were Black, 38% were Latino/a, and 11% were white.[45] According only one point to all juvenile adjudications therefore has the potential to address the particularly egregious racial disparity amongst those individuals who received 2-point juvenile adjudications. The potential impact of this amendment, however, is limited: in FY2022 only 363 individuals received at least one 2-point juvenile adjudication, a mere 0.9% of all individuals with criminal history points.[46] Additionally, this proposal would fail to address the significant disparities that would remain amongst individuals who received at least a 1-point juvenile adjudication and individuals charged as adults for offenses committed as minors.

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[45] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 10.

[46] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 8.

Individuals who have received at least one juvenile adjudication point are disproportionately Black and Latino/a compared to individuals who otherwise received at least one criminal history point. In FY2022, *over half* of all individuals who received at least one juvenile adjudication point were Black, 31% were Latino/a, and 10% were white.[47] Meanwhile, amongst those who otherwise received at least one criminal history point 30% were Black, 22% were white, and 44% were Latino/a.[48]

Option 2, eliminating points for juvenile adjudications entirely, would reduce disparities more than addressing solely 2-point juvenile adjudications and expand relief to more individuals: in FY2022, 940 individuals received at least one juvenile adjudication point.[49] Limiting relief, however, to individuals charged as juveniles rather than all offenses committed under age 18, fails to address the arbitrariness and bias characterizing whether a youth is prosecuted as a juvenile or adult.

Option 3, eliminating all points for offenses committed prior to age 18, would most comprehensively address racial disparities apparent in current federal sentencing practices and present throughout the juvenile justice system. In FY2022, 3,112 individuals received at least one criminal history point for offenses committed prior to age 18 and *nearly 60%* were Black, whereas 27% were Latino/a, and 11% were white.[50] By comparison, amongst those who otherwise received at least one criminal history point, 28% were Black, 45% were Latino/a, and 23% were white.[51]

Accordingly, **Option 3** is the only solution of the three available options that fully accords with the intended purpose of the juvenile justice system, the adolescent brain and behavioral science recognized by the Supreme Court, and addresses the inconsistencies imposed by records and transfer laws while minimizing the

[47] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 19.
[48] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 19.
[49] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 17.
[50] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 28.
[51] U.S. Sentencing Commission (2023), Public Data Briefing: Proposed 2024 Amendment on Youthful Individuals, 28.

disparate impact imposed on youth of color. The Commission should adopt **Option 3**.

Part B: The Commission Should Incorporate Language Dictating that Youth Be Considered in Relevant Cases Under §5H1.1.

Some of the Commission's proposed revisions to §5H1.1 should be incorporated, but not all. Youth must be a relevant consideration for a downward departure to be consistent with the mandates of the Supreme Court in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones,* but specifying what aspects of youth should be considered is unnecessary and may lead to inconsistent and inequitable results. Specifically, we recommend the following amendment:

> Age ~~(including youth)~~ may be relevant in determining whether a departure is warranted~~, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines~~. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

This enables the youthful individual and their counsel to present evidence and argument on why their age is relevant in each individual case without imposing factors for a judge to consider that may not have anything to do with the case before them, and allows for a more expansive view of the mitigating qualities of youth as knowledge, experience, and research continue to evolve. Moreover, because the neuroscientific research reflects aggregate, general characteristics of brain development in teens and young adults, requiring the specific consideration of neuroscience on an individualized basis at sentencing is not recommended.

1. **The Recidivism Data is Unreliable and Should Not Be A Factor for Trial Courts to Consider Under Part B**

Recidivism data in general tends to be unreliable and varies greatly across studies. "[C]urrently, no consensus exists with respect to defining recidivism or the length

of follow-up period for determining occurrences of recidivism."[52] Rates of recidivism can vary by state.[53] They are influenced by which system the youth was adjudicated in.[54] They also vary by offense type. For instance, in a series of studies examining recidivism rates among youth adjudicated delinquent for sex offenses, including rape, recidivism rates for any type of further offending consistently fall below 5%.[55]

The three-year look-back for the recidivism data reviewed by the Commission merely reinforces what the science says about youthful offending. Indeed, researchers have established that the regions of the brain associated with immature decision making and reduced culpability relied on by the Supreme Court in *Roper, Graham*, and *Miller*, continues to develop into the twenties.[56] Some research finds that sensation-seeking peaks at approximately age 19 and self-regulation does not reach full development until ages 23 through 26.[57] The parts of the brain associated with impulse control, propensity for risk, vulnerability, and susceptibility to negative peer pressure, are still developing well into late adolescence and into one's twenties.[58]

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[52] Angela A. Robertson, *Recidivism Among Justice-Involved Youth: Findings From JJ-TRIALS*, Crim Justice Behav. (Sep. 2020); 47(9): 1059–1078. ("The definition (i.e., new offense/rearrest, adjudication, or re-incarceration/commitment), the length of the tracking period, and youth characteristics used influence recidivism rates differently.")

[53] Angela A. Robertson, *Recidivism Among Justice-Involved Youth: Findings From JJ-TRIALS*, Crim Justice Behav. (Sep. 2020); 47(9): 1059–1078. ("findings of large differences in recidivism rates across sites in five states suggests a lack of generalizability of rates from one state to another even when recidivism is measured in the same way on the same type of youth.")

[54] Testimony to Massachusetts Coalition for Juvenile Justice Reform the Joint Committee on the Judiciary in Support of An Act to Promote Public Safety and Better Outcomes for Young Adults S.920/H.1826 – November 5, 2021 (Citing CDC data showing that "teens and young adults incarcerated in Massachusetts' adult correctional facilities have a 55% re-conviction rate, while teens exiting DYS commitment have a re-conviction rate of 22%").

[55] Caldwell, M. F. (2016). Quantifying the decline in juvenile sexual recidivism rates. *Psychology, Public Policy, and Law, 22*(4), 414–426. https://doi.org/10.1037/law0000094

[56] *See* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. Neurosci. 10937, 10937 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NeuroImage 176, 189 (2013).

[57] Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 Developmental Sci. 1, 1-2 (2018).

[58] Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have

2. Recidivism Data Is Contrary to The Age-Crime Curve

Even if higher youth recidivism rates are accurate in some instances, such rates ultimately bump up against the "age-crime curve," an undisputed pattern in propensity to engage in crime over the life course.[59] As studies have shown, youthful offending desists with maturity, and indeed that is what the crime data demonstrate. Therefore, considerations of recidivism, particularly by using a three year look-back window, should not have any influence on sentencing youthful individuals and should be dropped from the proposed amendment.

Trends in arrests over the life course supports the existence of an "age-crime curve." Specifically, criminal conduct is most common when individuals are young and drops dramatically as adulthood is reached.[60] Adulthood is marked by greater maturity, complete brain development, and factors that encourage desistance from crime, like family and work responsibilities. The combination of these factors result in a natural cessation in criminal conduct by the end of one's thirties for acts of violence, and typically much sooner.[61]

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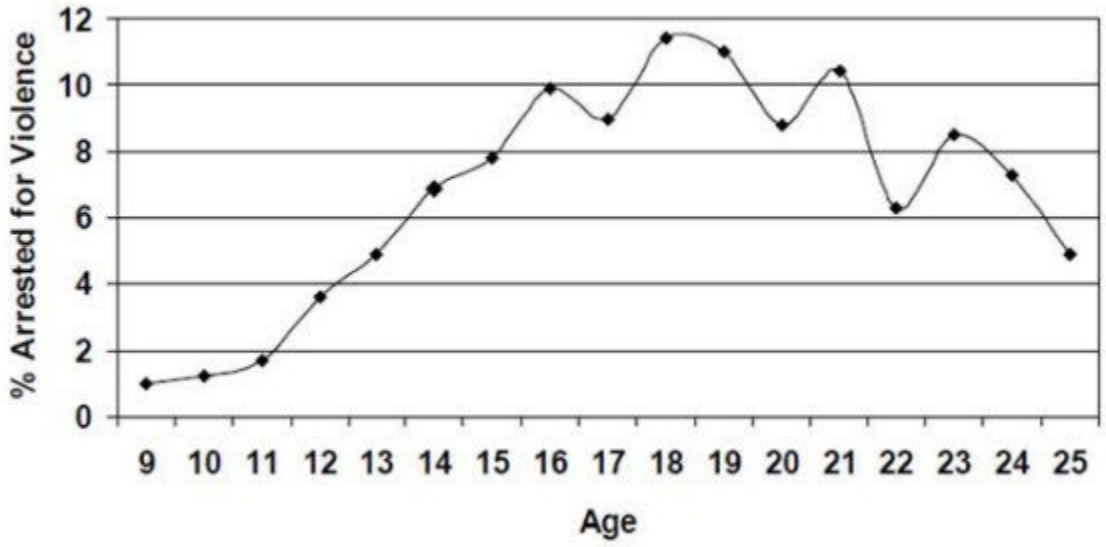
found that biological and psychological development continues into the early twenties, well beyond the age of majority.") (citing Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014)); *see also* Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. Med. & Phil. 256, 263-64 (2013); Nat'l Acads. of Scis., Eng'g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* 22 (Richard J. Bonnie & Emily P. Backes eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK545481/pdf/Bookshelf_NBK545481.pdf. ("the unique period of brain development and heightened brain plasticity . . . continues into the mid-20s," and that "most 18–25-year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood,' developmentally speaking.")

[59] Robert J. Sampson & John J. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 Criminology 555, 585 (2003); Loeber, R., & Farrington, D. (2014). *Age-crime curve*. Bruinsma & D. Weisburd (Eds.), Encyclopedia of Criminology and Criminal Justice. Springer, pp. 12–18; Neil, R., & Sampson, R.(2021). *The birth lottery of history: Arrest over the life course of multiple cohorts coming of age, 1995–2018*. American Journal of Sociology, 126(5), 1127–1178. https://doi.org/10.1086/714062

[60] Robert J. Sampson & John J. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 Criminology 555, 585 (2003).

[61] *See* Thomas A. Loughran et al., *Differential Deterrence: Studying Heterogeneity and Changes in Perceptual Deterrence Among Serious Youthful Offenders*, 58 Crime & Delinq., 3, (2012).

Historical Example of Age-Crime Curve For Persons Arrested for Violent Offenses



National Institute for Justice, *available at* https://nij.ojp.gov/media/image/2776

State courts and legislatures have begun to take notice. A number of courts have relied on the current science to extend the reasoning of *Roper, Graham*, and *Miller* to find that the inappropriateness of harsh sentences like life without parole and the death penalty also applies to emerging adults older than 18.[62] And some state legislatures have also passed laws affecting sentencing and early release for youth over 18.[63]

As these courts and legislatures recognize, youth do not automatically desist from risky, compulsive and at times criminal conduct when they turn 18. Considering the unique attributes of youth, punishment and the threat of punishment are

[62] *In re Monschke*, 482 P.3d 276 (Wash. 2021) (finding life without parole unconstitutional for youth under 21); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024) (same); *People v. Taylor*, 987 N.W.2d 132 (Mich. 2022) (holding that 18 year olds are also precluded from receiving mandatory life without parole sentences).

[63] *See, e.g.*, Wyo. Stat. Ann. §§ 7-13-1002, 7-13-1003 (providing eligibility to individuals under 30 for placement in a youthful transition program and to a sentence reduction); Conn. Gen. Stat. Ann. § 54-125a (providing earlier parole eligibility to people under 21 at the time of their offense); Cal. Penal Code § 3051 (providing youth offender parole hearings to inmates who committed crimes when they were under 26); Ill. Comp. Stat. 5/5-4.5-115 (providing inmates who committed crimes when they were under 21 parole eligibility after 10-20 years); D.C. Code Ann. § 24-403.03 (allowing judges discretion to review sentences for individuals under 25 years old at the time of their offense after 15 years).

unlikely to have a deterrent effect until youth reach the age of maturity. Accordingly, the recidivism data the Commission is evaluating should not play a major role in guiding the Commission's decision making in implementing these proposed amendments.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

American Litigation Consultant LLC

Topics:

Youthful Individuals

Acquitted Conduct

Circuit Conflicts

Comments:

As an ex offender who served a 30-year sentence who was released in 2014 and is now the CEO of American litigation consultant LLC I receive many emails from prisoners who are without hope of release because they had their sentences enhanced based upon acquitted conduct or for juvenile convictions that occurred earlier in their lives. I support 100% the commissions actions to end these practices and applaud you. The work you're doing is not easy and requires a serious balancing for justice to be served on all involved.

Submitted on: December 16, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Apex Alternative Solutions Feb. 23, 2024

Topics:

Acquitted Conduct

Comments:

Honorable Commissioners:

I believe acquitted conduct should not be allowed to be used to enhance a defendants sentence because this is double jeopardy and a violation of ones constitutional rights. I support option 1 of the acquitted conduct proposal because it would eliminate the use of acquitted conduct at sentencing. When the jury finds a defendant not guilty it is unjust to use the acquitted conduct to calculate the guideline sentence. Doing so undermines the jury verdict. It also undermines trust in the fairness and accuracy of the trial system.

Respectfully,

Adam Bentley Clausen
Founder and CEO
www.ApexAlternativeSolutions.com
Adam@ApexAlternativeSolutions.com
Cell # (725) 230-0935

Submitted on: February 23, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Camellia house

Topics:

Youthful Individuals

Comments:

Males are not mentally/ emotionally developed into men until the age of 25. It's been proven. The justice system don't treat adults like kids so why should it treat kids like adults. ? We would like you to approve opt 3 for youthful/kids. 4A1.2"d"
NO criminal history before age 18 should be considered. Anything before age 18 should be completely removed from a child's record. A lot of these kids didn't have parents and a stable upbringing…

Submitted on: February 21, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Coalition for Civil Freedoms

Topics:

Youthful Individuals

Comments:

Individuals under 25 have problems with impulse control, risk assessment, decision making and vulnerability to peer pressure. For these reasons, it is particularly inappropriate to target youth in sting operations.

Submitted on: January 29, 2024

February 22, 2024

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

Re: Proposed Amendments for the 2024 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless lives, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission on December 14, 2023.

I. Proposed Amendment 2 – Youthful Individuals

FAMM applauds the Commission for examining the treatment of youthful individuals in the Guidelines. Notably, the use of juvenile convictions to augment adult criminal history calculations has been included in its original form at §4A1.2(d) since 1987. In the over 35 years since §4A1.2(d) was adopted, our understanding of the juvenile justice system has evolved.[1] Nationwide, juvenile justice systems vary significantly. The resulting patchwork system is rife with inequality and disparate treatment of youthful offenses. In fact, the first Commission recognized issues inherent to counting juvenile convictions. The Commission initially limited the kinds of juvenile priors that would count towards criminal history points because, "[a]ttempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. . . .To avoid disparities from jurisdiction to jurisdiction in

[1] *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

the age at which a defendant is considered a 'juvenile,' this provision applies to all offenses committed prior to age 18."[2] Sadly, even with this adjustment, large disparities persist.

Calculating a federal guideline sentence using state juvenile adjudications does not advance the purposes of federal sentencing. Doing so only exacerbates racial disparities and other inequities in the instant conviction. It is high time that the Commission eliminate this practice in the Guidelines. FAMM believes that Option 3 is the only option that will realize the goals of the Commission and the purposes of sentencing.

Before delving into the details, we find it imperative to acknowledge the backdrop against which this proposal sits. Crimes committed by youth are on the rise. These crimes, often influenced by and encouraged on social media, include carjackings that are serious and have a detrimental impact on victims and their communities.[3] CNN recently identified a "youth crime emergency," as juveniles, whose average age is 15, make up "the majority of arrests in DC for crimes like robbery and carjacking."[4] The sentences imposed on those youngsters are likely to be lengthy and unforgiving.[5] One might think that this is therefore not the time to consider revisiting the impact of youthful criminal history on adult convictions. But the exact opposite is true. The high incidence of youthful crime is precisely why the Commission needs to revisit the impact of juvenile convictions on adult sentences.

As the Commission noted, there are a plethora of reasons to be concerned about baking a juvenile sentence into a federal sentence. Juvenile courts are distinct from their adult counterparts. Not all youth are sentenced in juvenile courts. And juvenile court processes, including when and whether to transfer a youth to adult court, vary by state. Youthful convictions are thus a faulty basis on which to increase a sentence in the federal system that strives to treat similarly situated defendants similarly.

Juvenile courts were originally created with the intent to establish a separate path for minors accused of crimes, with a focus on rehabilitation and their treatment, rather than

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[2] USSG §4A1.2(d), comment 7.

[3] *See e.g.*, Taylor Dorrell, *The Kia Boys Will Steal your Car for Clout*, The Verge (Jun. 8, 2023) (discussing the phenomenon known as "kia boys" which started on TikTok and involves youth who steal Kias and Hyundais and post about their crimes on social media), https://www.theverge.com/23742425/kia-boys-car-theft-steal-tiktok-hyundai-usb; Tim Arango & Jacey Fortin, *Teens are Stealing More Cars. They learn How on Social Media*, NYTimes (March 10, 2023).

[4] Gabe Cohen, "*It's definitely a crisis': This is the reality for kids caught up in DC's violent crime spike,"* CNN (Feb. 19, 2024), https://www.cnn.com/2024/02/17/us/washington-dc-teens-crime-mentors/index.html#:~:text=Data%20show%20juveniles%20make%20up,of%20carjackings%2C%20police%20data%20show.

[5] *See, e.g.*, Dana Thiede, John Croman, *Carjacking penalties established by state sentencing commission* (July 28, 2023) (reporting that carjacking was increased to a level 9 crime, making it more serious than robbery), https://www.kare11.com/article/news/crime/carjacking-penalties-increased-by-state-sentencing-commission/89-a470dfbb-0fb2-4939-ac17-6a829594dddc.

punishment.[6] The lack of formal process, which was once seen as a beneficial feature of the system, quickly became a bug as the impact of juvenile adjudications resulted in substantial deprivation of "children's liberty through extensive periods of incarceration."[7]

In 1967, the Supreme Court held that juvenile courts must afford youth the same due process rights as afforded adults accused of crimes.[8] But that command has not been followed.[9] As one scholar noted, *Gault* may have ironically created more procedural unfairness in juvenile courts "[b]y endorsing an adversarial court process for children and engrafting into the juvenile court some, but not all, of the procedural rights afforded to adults." As a result, "the Court unwittingly triggered the juvenile court's ideological, jurisprudential, procedural, jurisdictional, and penal transformation into a second-class criminal court for youth that meted out punishment without the protection of its criminal counterpart. . . . [T]hese changes disproportionately disadvantaged youth of color."[10]

In present day, youth accused of crimes still do not have the same procedural safeguards as adults accused of crimes. Protections that are a given in adult criminal court are not a given in juvenile court. Juveniles do not have the right to a jury,[11] they are not subject to open court proceedings,[12] and they do not have access to effective counsel.[13] Moreover, court and agency records that are kept regarding youth offenses vary by state.[14] Given the lack of uniformity among the states and the lack of procedural protections for youth accused of crimes, the Commission's reliance on juvenile adjudications as meaningful evidence of culpability is misplaced and undermines the carefully crafted process the Commission uses to fashion a fair adult sentence.

This may prompt one to ask whether the reliability concerns with juvenile court might be ameliorated by counting solely youthful convictions in *adult* courts. This question is reflected in

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[6] *See* Juvenile Law Center, *Youth Justice System Overview*, www.jlc.org/youth-justice-system-overview.
[7] *Id.*
[8] *In re Gault*, 387 U.S. 1 (1967).
[9] *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 772 (2010), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1058&context=faculty_publications; Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 AU L. Rev. 743 (2020).
[10] Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 AU L. Rev. 743, 772 (2020).
[11] *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).
[12] Charles Puzzanchera et al., Nat'l Ctr. for Juvenile Just., *Youth and the Juvenile Justice System: 2022 National Report* at 93 (2022) (Twenty-six states and D.C. restricted the public from attending delinquency adjudication hearings, with limited exceptions). Although closed courtrooms for youth are seen to protect their privacy, closed courtrooms can also invite predatory practices that likely would not occur with observers.
[13] *See supra* n.9.
[14] *See generally*, Juv. L. Ctr., *A National Review of State Laws on Confidentiality, Sealing and Expungement* (2014), https://jlc.org/sites/default/files/publication_pdfs/national-review.pdf.

the Commission's Option 2, which would count as relevant to the criminal history calculation only those juvenile convictions that were prosecuted in adult court. But adult convictions for youth are also rife with inequality and counting them would not solve unwarranted disparities in federal sentencing.

Juvenile transfer is a product of state law. Transfer of youth to adult court is a common practice in many states for certain crimes. As such, there is no uniformity in who is transferred or under what circumstances those cases are transferred. In 2019, 47 states had laws designating some category of cases as subject to a waiver of jurisdiction from juvenile court to criminal court.[15] In 14 states, prosecutors have the power to determine whether to file a juvenile case in juvenile or adult court.[16] And in 27 states, legislatures have provisions in law excluding certain crimes from jurisdiction in juvenile court.[17] Compounding this patchwork of state law is the fact that each state has a different age limit for youth who may be transferred to adult court. In 21 states, there is *no minimum age* limit, meaning that a child as young as five years old may be transferred to adult criminal court.[18] And unsurprisingly, Black youth are waived into adult criminal court more often than other youth, regardless of the offense type.[19] Thus, Option 2 is not a "compromise" position – it would incorporate into the federal sentence an adult conviction that is rife with disparity.

For similar reasons to those outlined above, some states have initiatives to examine whether their own state's juvenile adjudications should be used to enhance state adult convictions. FAMM recently was involved in a successful effort in Washington State to eliminate the use of most juvenile adjudications to increase sentences for adults convicted of crimes.[20] In Washington, racial disparities in youth convictions were a primary motivation for the legislative change.[21] That same disparity is evident in federal sentencing.[22] Nearly everyone who received a criminal history point for a youth offense in Fiscal Year 2022 was non-white.[23]

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[15] *See supra* n.12.
[16] *Id.* at 98.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 162.
[20] *See* Wa. Ch. 415 L. 23, https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1324.SL.pdf#page=1.
[21] Derrick Belgard, et al., *Comment: Counting Juvenile Crimes Against Adults Unjust to Many*, The Herald Net (Apr. 11, 2023), https://www.heraldnet.com/opinion/comment-counting-juvenile-crimes-against-adults-unjust-to-many/?fbclid=IwAR0O1xn_Hl1tFs3jezUaMfbyfF0NbOzwVXrX_HbqJqAgTcw1mnzwfAg7xz8
[22] *See* U.S. Sent'g Comm'n, *Public Data Presentation: Proposed Amendments on Youthful Individuals* 28 (Jan. 2024) ("USSC Data Briefing"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf.
[23] *Id.* (reporting that of the 3,112 people who received at least one point for an offense prior to age 18, 11.2% were white, 59.7% were Black, 26.5% were Hispanic, and 2.6% were another race).

Amidst all the statistics and policy positions, let us not forget who we are talking about. We are talking about children. Should we equate the legal and moral culpability of a thirteen-year-old with that of a thirty-year-old? The "Kia boys" example is contextualized by recent brain science research, which demonstrates that children are more likely to make impulsive decisions influenced by their peers.[24] Of course this does not diminish the harm that youthful crimes can cause. A judge may very well find youthful crimes relevant to the analysis under 18 U.S.C. § 3553(a). But given the disparities – procedural and racial – that permeate the juvenile justice system, juvenile convictions should not be used to calculate adult criminal history. Option 3 is the only option that will ensure the criminal history calculation does not perpetuate unwarranted disparities in federal sentencing.

As for the Commission's proposal regarding Chapter 5 departures, FAMM understands that this proposed amendment is subject to the Commission's decision regarding simplification more generally. However, assuming that amendment is not adopted, and §5H1.1 remains, FAMM supports the proposed amendment with changes recommended by the Federal Defenders.[25]

FAMM commends the Commission in its endeavor to ensure the guidelines create more fair sentences. For the reasons discussed above, including youthful convictions in criminal history calculations undermines this endeavor. We are hopeful that the Commission will adopt Option 3 and eliminate all offenses incurred prior to age 18 from the adult criminal history calculation.

II. Proposed Amendment 3 – Acquitted Conduct

We wrote to the Commission on August 1, 2023, to recommend that it include in its initiatives a proposal to revisit acquitted conduct, and we are particularly pleased that the Commission decided to include such a proposed amendment.

FAMM supports Option 1 of the proposal to end the use of acquitted conduct as relevant conduct for the purposes of calculating a guideline range, sentence within the range, or departure above the range. We support defining acquitted conduct as conduct underlying the charge of which the defendant was found not guilty. Further, we favor not excluding from the definition admissions made by the defendant during a plea colloquy or found beyond a reasonable doubt by the trier of fact.

We prefer this bright line rule because it will help ensure the sentencing guidelines meet the Commission's aim of advancing the purposes of punishment. Furthermore, it avoids providing prosecutors undue influence over sentencing, respects the jury's verdict, enhances

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[24] *See, e.g.*, U.S. Sent'g Comm'n, *Youthful Offenders in the Federal System* at 6–7 (2017); Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 Dev. Cognitive Neuroscience 19 (2017); Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. Dev. Psych. 21 (2019).

[25] *See* Comment to the Sent'g Comm'n, Federal Public and Community Defenders on Youthful Individuals, Part II (2024).

public confidence in the criminal justice process, and helps ensure procedural and actual fairness and accuracy. Should the Guidelines exclude acquitted conduct, courts, exercising sentencing discretion guaranteed by 18 U.S.C. § 3661 and guided by 18 U.S.C. § 3553(a), may resort to acquitted conduct rarely and only when necessary to accurately fashion a sentence that is sufficient but no greater than necessary to meet the purposes of punishment.[26]

a. Eliminating acquitted conduct entirely will help ensure the Sentencing Guidelines better advance the purposes of punishment.

Sentencing Guidelines exist to "assure the ends of justice."[27] These include just punishment, deterrence, incapacitation, rehabilitation, and respect for the law.[28] Sentencing a defendant using acquitted conduct can and does undermine several of these goals.

When a jury has found a person not guilty of a charge, it might be because the defendant is factually innocent. Punishment for a crime not committed is the antithesis of just punishment. But jury decisions are often opaque with respect to the underlying reasons for acquittal.[29] Even when the jury makes special findings supporting actual innocence, or finds for the government only on lesser included charges, relevant conduct counsels a judge to set aside the jury's finding using the relaxed preponderance of the evidence screen. Permitting a judge to enhance a guideline sentence using the lower standard of proof when a person is factually innocent defeats the guideline goal of just sentencing. In addition, juries are "fundamental to the American scheme of justice."[30] As such, this practice is patently unjust and offends due process. The relaxed preponderance of evidence standard is used to set aside acquittals and, under the veil of "relevant conduct," undermines the careful deliberation of a jury.[31]

Acquitted conduct fails in other respects as well. One can hardly be rehabilitated for or deterred from a crime they did not commit. As U.S. Senators Durbin, Booker, and Hirono pointed out when they commented on the acquitted conduct rule proposed last year: "since most

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[26] Clare McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 82 St. John's L. Rev.1419, 1421 (2011) (suggesting "balancing the good of accuracy in sentencing with the compelling public policy reasons weighing against any introduction of prior acquitted conduct at sentencing."), https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1038&context=lawreview.
[27] USSG Ch.1, Pt. A, intro, 1.2. *The Statutory Mission* 1.
[28] *Id.* at 2.
[29] Letter from Jonathan J. Wroblewski to Hon. Carlton W. Reeves at 14 (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=387.
[30] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).
[31] *See* Eang L. Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 269-70 (2009) (providing multiple examples of courts disregarding jury's special verdicts and sentencing based on acquitted conduct supported by jury special findings).

people are unaware that they can be punished for acquitted conduct, the availability of such punishment does not result in either specific or general deterrence."[32]

While it is argued that acquitted-conduct sentencing perhaps at times can advance some ends of justice, for example when a person is factually guilty but nonetheless found not guilty, the many harms associated with the practice counsel against its use even in such circumstances. Moreover, our constitutional system privileges legal guilt and legal innocence, as evidenced by the Sixth Amendment guarantee of trial by jury, which may only convict on a finding of guilt beyond a reasonable doubt.[33] The full impact of disregarding that protection is felt at sentencing, where courts can sentence without the need to provide the defendant with trial protections, such as the opportunity to confront witnesses and exclude evidence.[34]

One key protection afforded at sentencing is against unwarranted disparity among similarly situated defendants.[35] One area of consistent concern to the Commission is unwarranted racial disparity at sentencing. The Commission historically has exposed and worked steadily to eradicate facially neutral rules that result in disparate outcomes based on race. Starting in 1995, the Commission has steadily worked to end the racially disparate outcomes of the crack-powder sentencing delta.[36] As with those rules, acquitted conduct sentencing produces racially disparate outcomes. Acquitted conduct is used more frequently against defendants of color than against white defendants, transforming this facially neutral practice into a racialized one.[37] Acquitted conduct leads to longer sentences that are imposed disproportionately on defendants of color.

Racially disparate sentencing outcomes due to acquitted conduct are abhorrent and it is within the Commission's power to address and mitigate the cause. Eliminating the use of acquitted conduct will also advance other goals of sentencing.

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[32] Letter from Senator Richard J. Durbin, et al., to Hon. Carlton W. Reeves at 5 (March 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=298%20target=.
[33] *See* Letter from Nancy Gertner to Hon. Carlton W. Reeves at 8 (March 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1505; *see also* Clare McCusker Murray, *supra* n.26 at 1460 (arguing that even in the face of acquitted actual guilt, "compelling public policy reasons" favor not enhancing using acquitted conduct), https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1038&context=lawreview.
[34] *Supra* n.32.
[35] *See* 18 U.S.C. § 3553(a)(6); *see also* 28 U.S.C. § 994(f).
[36] *See, e.g.*, U.S. Sent'g Comm'n, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf.
[37] *See* 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. 676, 709-10 (2014), https://digitalcommons.law.scu.edu/lawreview/vol54/iss3/4/.

b. Ending acquitted conduct sentencing will lessen inappropriate government influence over sentencing.

Permitting acquitted-conduct sentencing distorts every phase of the criminal sentencing process, handing prosecutors undue influence over outcomes for people who elect to go to trial. It incentivizes prosecutorial overcharging without fear of the consequence of losing, infects the plea-bargaining process, and mangles trial strategies as defendants find themselves required to argue two different standards of proof to two different factfinders. And, it forces defendants who may wish to acknowledge their blameworthiness at the sentencing phase for convicted conduct to continue to dispute acquitted conduct.[38]

Acquitted conduct has also helped lead to the demise of the jury trial, which has been reduced to a vanishing act in the criminal justice system. The Guidelines' recognition of acquitted conduct provides the government with risk-free incentives to overcharge defendants in an effort to secure a guilty plea. The risk of losing a conviction at trial is no bar to this practice. Overcharging works. Only 2.5 percent of the 64,142 federal defendants convicted in 2022 went to trial.[39] Even when it doesn't secure a plea, overcharging has its benefits for the government.

One consequence of prosecutorial control is the punishment structure colloquially known as the "trial penalty." The trial penalty is expressed as the delta between the sentence imposed on a person found guilty on their plea and the one imposed following conviction at trial. The National Association of Criminal Defense Lawyers (NACDL) has demonstrated that acquitted conduct contributes to the trial penalty. The practice discourages a defendant from exercising their constitutional right to trial because they can be sentenced despite being found not guilty.[40] Attorneys find themselves sometimes explaining to their clients that it is in their best interest to plead guilty to weak charges to avoid a partial acquittal that could do them more harm than good.[41]

The availability of acquitted conduct sentencing promises the government a win if you win; win if you lose bonanza. The prosecution wins if (1) the defendant succumbs and pleads

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[38] *McClinton v. United States,* No. 21-1557, Brief of Nat'l Ass'n of Federal Defenders and FAMM as Amici Curiae Supporting Petitioner for Cert. at 5-6 (July 14, 2022).
[39] U.S. Sent'g Comm'n, *F.Y. 2022 Sourcebook of Federal Sentencing Statistics*, Tbl. 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.
[40] *See* letter from JaneAnne Murray et al. to Hon. Carlton W. Reeves at 24 (March 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1152*; see also,* Statement of Melody Brannon, on Behalf of the Federal Public and Community Defenders before the U.S. Sentencing Commission Public Hearing on Acquitted Conduct at 12 (Feb. 24, 2023) (relating how counsel used examples of acquitted conduct sentencing to advise clients considering going to trial), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FPD3.pdf.
[41] *Supra* n.38 at 11.

guilty, even when not factually guilty;[42] (2) if they go to trial and are convicted of a charge; or (3) when they go to trial and are found not guilty, including by being actually innocent.[43] The prosecution need only secure a conviction on a more easily proven charge and then persuade the sentencing judge of the defendant's guilt, notwithstanding acquittal, using reliable "information" which is not necessarily "evidence."[44]

This has a corrosive effect on the charging and sentencing phases and on a defendant's ability to take a case to trial secure in the meaning of the jury's verdict.

Ending the use of acquitted conduct in the calculation of a guideline sentence will lessen the incentives currently available to prosecutors to lard on charges and over-punish defendants who prevail at the guilt phase.

c. *Ending acquitted conduct will strengthen public and stakeholder confidence in the criminal justice system.*

> *"It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty."*[45]

A criminal justice system that deprives its citizens of liberty as punishment for wrongdoing depends on the trust of the governed for its legitimacy. As bond for that trust, our system provides defendants significant constitutional protections against the unwarranted deprivation of liberty. The use of acquitted conduct makes a mockery of constitutional protections that can be set aside so readily and at the direction of sentencing guidelines that purport to ensure that the purposes of punishment are met. The practice also undermines respect for the law.

With the exception of the U.S. Department of Justice, it appears that nearly every criminal justice system stakeholder and student of the system; those subject to the practice and their loved ones; and every observer who learns that our system of law sentences people for conduct for which they were found not guilty, abhors the practice. From Supreme Court justices, including Scalia, Thomas, and Ginsburg who proclaimed: "This has gone on long enough"; to then-Judge Kavanaugh, who implored the Court to "fix it" based on "good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness"[46]; to Justice Sotomayor, who expressed "concerns about procedural fairness and accuracy when the State gets a second bite of the apple with evidence that did not

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[42] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 9-10 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.
[43] *Supra* n.38 at 7.
[44] *Id.*
[45] *McClinton v. United States*, No. 21-1557, Brief of 17 Former Federal Judges as *Amicus Curiae* in Support of Petitioner, at 15 (Aug 10, 2022).
[46] *Id.* at 3.

convince the jury coupled with a *lower* standard of proof."[47] Appellate and lower court jurists have criticized the practice.[48]

The Model Penal Code does not recognize acquitted conduct sentencing and its drafters have described acquitted conduct sentencing as "an anomaly with grave impacts upon fairness and process regularity."[49]

People subject to acquitted conduct sentencing naturally have strong feeling on the topic. They include FAMM constituents.

Raul Villarreal was acquitted of an obstruction of justice charge, but received a two-level obstruction of justice enhancement. He told us he "feels devastated and betrayed by the justice system" due to the use of acquitted conduct to increase his sentence. In electing to go to trial he "sacrificed everything for believing in something" when he was treated as "'guilty' when [he] was declared 'not guilty' in a public trial by a jury of [his] peers." A jury acquitted Davon Kemp, another FAMM member, of conspiracy charges. The judge nonetheless enhanced his base offense level significantly using the conspiracy charge of which he had been found not guilty. He described the criminal justice system as "foul for stripping [him] of [his] right to a jury trial." Mr. Kemp's mother attended the sentencing hearing and was "shock[ed] at the outcome. She came away feeling that acquitted conduct sentencing rendered "worthless" her son's right to a jury trial. Elichi Oti, acquitted of a gun charge that was, nevertheless used to enhance her sentence, asked "[w]hy did I have a jury if the government was going to usurp their authority and implement their own judgment regardless of the jury's decision?"[50] Why, indeed?

Meanwhile, everyone who pays attention has a story about what the uninformed say when told that a person acquitted at trial can be sentenced as if found guilty. Even Justice Sotomayor remarked that "[v]arious jurists have observed that the woman on the street would be quite taken aback to learn about this practice."[51]

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[47] *McClinton v. United States*, No. 21-1557, 600 U.S. ____ (2023) (Sotomayor, J.) *denial of certiorari* at 4.
[48] *See McClinton v. United States*, No. 21-1557, Brief of Professor Douglas Berman as *Amicus Curiae* in Support of Petitioner at 9-11 (July 8, 2022) (collecting quotes from numerous appellate and district court pronouncements on the practice of acquitted conduct); *see also* Statement of Melody Brannon *supra* n.40 at 3-4, n.7 (collecting judicial statements and law review articles critical of the practice).
[49] *See* Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law Inst., Proposed Official Draft 2017).
[50] *Supra* n.38 at 18-20.
[51] *Supra* n.47 at 4.

d. Ending the use of acquitted conduct will help ensure procedural and actual fairness and accuracy.

"It is a matter of significant debate whether using acquitted conduct, established by a preponderance of the evidence, appropriately meets due process standards."[52] FAMM believes there is *no* debate that ignoring a jury verdict raises due process alarms and surfaces more policy concerns than it addresses. Ending its hold on the criminal justice system will advance the aims of fairness and accuracy.

In fashioning §6A1.3, the Commission explained that it believed that "use of the preponderance of the evidence standard is appropriate to meet the due process requirements and policy concerns in resolving disputes regarding applications of the guideline to the facts of the case."[53] The Commission may not have had acquitted conduct in the frame when it devised this comment on the policy statement. Since then, however, it has become apparent that disputes regarding applying acquitted conduct are not appropriately addressed by a relaxed preponderance of the evidence standard. The U.S. Supreme Court has likely only held off addressing the practice to give the Commission an opportunity to review and in the view of many, correct course.

There are "compelling public policy reasons" for avoiding the use of acquitted conduct. These reasons include: undermining the meaningful message that acquittal should convey, interfering with the deterrence value of sentencing, and providing probation officers and judges too much power and discretion.[54] While acquittal may not convey actual innocence, "failing to treat it as such in the sentencing context would result in an acquitted defendant essentially reaping no benefits from the jury's finding of not guilty, and continuing to carry the stigma and consequences of being accused of a crime."[55] This cannot be what the Commission intends as a matter of policy or a measure of fairness and accuracy. And it cannot be what the founders intended when they enshrined in the constitution significant protections against unjustified deprivations of liberty.

Past Commissions have tried on several occasions to examine the use of acquitted conduct as relevant conduct. Commissions of the 1990s published numerous proposals to end the use of acquitted conduct at sentencing.[56] In 1995 the staff looked into ways to limit consideration

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[52] John Elwood, *Acquitted Conduct Sentencing Returns*, Relist Watch, SCOTUSblog (May 24, 2023) (stating that the Court was entertaining 13 petitions for certiorari challenging on due process and jury right grounds the use of acquitted conduct.) https://www.scotusblog.com/2023/05/acquitted-conduct-sentencing-returns-the-constitutionality-of-felon-disenfranchisement-and-good-behavior-in-capital-sentencing/.
[53] USSG §6A1.3, p.s., comment.
[54] *Supra* n.26 at 1469-70.
[55] *Supra* n.32 at 5.
[56] *See* 62 Fed. Reg. 152-01 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg 62,832 (1992).

of acquitted conduct to calculations within the guideline range[57] and the next year floated a priority that would "develop[] options to limit the use of acquitted conduct at sentencing."[58]

Acting to end the use of the practice will do no significant harm to our sentencing practice and promises instead to do a world of good with respect to the fairness, integrity and public perception of our federal sentencing system. While curtailing consideration of acquitted conduct at sentencing would be a significant departure from longstanding sentencing practice,[59] it would be an appropriate one. Longevity alone is no reason to continue a practice that has been demonstrated to be unjust, abusive of defendant's due process protections, and antithetical to the purposes of punishment.

e. Establishing a bright-line rule will abolish the harms of acquitted conduct while providing clear guidance to the judiciary.

FAMM supports ending the use of acquitted conduct for all guideline considerations, including for departures and for within-range decisions. The policy and equity concerns that lead us to oppose setting aside a jury verdict apply with equal force to its use locating the range, identifying the sentence within the range, and/or departing from that range. Permitting its use for departures, for example, risks inviting back in the disparities that plague the practice. Actors in the system who criticize acquitted conduct sentencing are unlikely to change their view because it is confined to departures and within-guideline calculations. Departures in such situations can swamp the fix, erasing any benefit that eliminating acquitted conduct from calculating the guideline range might have. Permitting the use of acquitted conduct to depart above the guideline defeats the purpose and likely eliminate any mitigating impact of discarding it for guideline calculation purposes.

Moreover, all acquitted conduct sentencing should be eliminated, no matter the basis, real or imagined, for the acquittal. Distinguishing among types of acquittals can be difficult, given the relative opacity of the jury findings. A bright-line rule is easy for the court to follow, gives parties and stakeholders in the system confidence that the jury verdict is not undermined, and avoids the policy concerns that animate the proposal to discard acquitted conduct.

Finally, to the extent that overlapping conduct is an issue, it should only be used when the conduct is clearly underlying the instant federal offense of conviction. While that conduct may overlap with acquitted conduct from another forum, so long as the jury has used that conduct to find the instant conviction, there should be no concern that the sentence resulting from the instant conviction relies on acquitted conduct. If the conduct admitted or proven elsewhere is not considered by the instant jury in arriving at its decision, it should be treated as acquitted conduct and not feature in the sentence.

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[57] Brent Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 FED. SENT. RPTR. 68, 69 (1995).
[58] *See* 61 Fed. Reg. 34,465 (1996).
[59] *Supra* n.29 at 13.

f. Conclusion

Justice Brennan said: "A society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . There is always, in litigation, a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake **an interest of transcending value**—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact-finder of his guilt.[60]

While the protections envisioned by Justice Brennan have suffered erosion, it is commendable that the Commission is considering ending the use of acquitted conduct for purposes of calculating a guideline sentence or departure from the sentence. We urge the Commission to do so.

III. Proposed Amendment 7 – Simplification of the Three-Step Process

It has been nearly two decades since the Supreme Court transformed the Guidelines from a mandatory to an advisory system.[61] The *Booker* three-step sentencing process has guided courts for quite some time. That the process has been used for a long time does not mean, however, that it should continue in its current form. After all, departures have taken on the characteristics of a legal fiction.

Given that the entire post-*Booker* Guideline sentencing scheme is advisory, departures are simply less important than they were pre-*Booker*. A sentencing court is required to consider departures but can then use its discretion to apply the departure or disregard it entirely and/or to vary up or down. The Commission's own data demonstrates that judges are relying on departures less and variances more.[62] What is more, the law already requires judges to consider an individual's unique circumstances, including many that are not addressed by departures, in determining an appropriate sentence. To this end, the Supreme Court makes pellucid that fashioning a sentence requires two steps, not three: (1) correctly calculating the applicable Guideline range; and (2) weighing the factors set out in 18 U.S.C. § 3553(a).[63] The factors in § 3553(a) are required by statute and account for many, if not all, of the circumstances highlighted by the guidelines departures. To be sure, there may be some judges who rely on the departures as a basis for diverging from a guideline range. But the fact that some judges use departures while others do not only proves the case for eliminating them. Using § 3553(a) as a basis from which to vary from a guideline sentence, instead of departures, will likely lead to more fair and less disparate sentencing outcomes. The § 3553(a) factors together comprise a

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[60] *In re Winship*, 397 U.S. 358, 363-64 (1970) (emphasis added).
[61] *United States v. Booker*, 543 U.S. 220 (2005).
[62] U.S. Sent'g Comm'n, *Proposed Amendments to the Federal Sentencing Guidelines* at 123 (Dec. 2023).
[63] *Peugh v. United States*, 569 U.S. 530, 536 (2013).

standard set of considerations that must be weighed in every single case and promote the ability of courts to consider the broadest set of information as relevant to sentencing.

In eliminating departures from the Guidelines, however, the Commission should be careful to avoid converting 18 U.S.C. § 3553(a) into a guideline. The open-ended nature of § 3553(a) already directs the sentencing judge to consider a breadth of information.[64] This is critical, as no two defendants are alike and sentencing considerations therefore should, and do, differ in each case. A constitutionally sound sentence requires judges to freely consider a "largely unlimited" set of information at sentencing.[65] The Commission's proposal may result in the unintended consequence of constraining judge's discretion under § 3553(a).

FAMM supports the Commission in its innovative effort to eliminate departures from the Guidelines. We wholeheartedly agree with the comment submitted by the Federal Public Defenders. We thank the Defenders for their exhaustive analysis which assess the chapter-by-chapter impact of the proposed modification. We also agree with and echo the concerns voiced by the Defenders regarding § 3553(a), as discussed briefly above. FAMM remains optimistic that the Commission can accomplish its commendable goal of eliminating departures and simplifying the guidelines without unduly constraining individual sentencing as designed by 18 U.S.C. § 3553(a).

IV. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We also appreciate the Commission's invitation to incarcerated individuals to write directly to the Commission. The Commission's commitment to hear from those whose lives your work touches is deeply appreciated. We look forward to the public hearings on these issues.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

[64] *Concepcion v. United States*, 597 U.S. ___, 142 S. Ct. 2389, 2398 (2022) ("There is a 'long' and 'durable' tradition that sentencing judges 'enjoy discretion in the sort of information they may consider' at an initial sentencing proceeding.").
[65] *Id.* at 2399.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Fresh Start Project

Topics:

Acquitted Conduct

Comments:

I support option 1 of the acquitted conduct proposal because it would eliminate the use of acquitted conduct at sentencing. When the jury finds a defendant not guilty it is unjust to use the acquitted conduct to calculate the guideline sentence. Doing so undermines the jury verdict. It also undermines trust in the fairness and accuracy of the trial system. Ending the use of acquitted conduct can help bolster faith in the rule of law and our system of justice. Thank you

Submitted on: February 12, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Fresh Start Project Feb. 12, 2024

Topics:

Acquitted Conduct

Comments:

You and her can word it exactly like this akhi: "I want to add to my previous comments. I believe that the acquitted conduct should be for federal, state, tribal and juvenile acquittals. This would restore our citizens constitutional right, and restore fairness and integrity in our justice system.

Submitted on: February 12, 2024

fwd.us

February 22, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: Adoption of the Youthful Individuals Amendment and Acquitted Conduct Amendment

Dear Judge Reeves:

Bryan Stevenson, founder of the Equal Justice Initiative and author of *Just Mercy*, tells the story of a case in which a state court judge ruled that his 14-year-old client would be tried as an adult, asking, "How can a judge turn a child into an adult? The judge must have magic powers."[1] Stevenson's observation—that no legal process can transform a child into something that they are not—strikes at the core of the Commission's proposed Youthful Individuals Amendment.[2] Our evolving understanding of adolescent brain development makes clear that young people's brains do not reach neurobiological maturity until their mid-20's and that young people who commit offenses are not culpable, in our traditional and legal understanding of the word, in the same way as adults may be. Critically, this is true regardless of the seriousness of the offense—that is, a child is no less a child because he or she committed a serious offense.

FWD.us is a bipartisan advocacy organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, we are committed to ending mass incarceration, eliminating racial disparities in the criminal justice system, expanding opportunities for people and families impacted by the criminal justice system, and promoting data-driven approaches to advance public safety. We now write to urge the Commission to adopt Part A (Option 3) (calculating criminal history points for youthful convictions) and Part B (downward departures based on age) of the Youthful Individuals

[1] TEDBlog, "All of Our Survival Is Tied to the Survival of Everyone: Bryan Stevenson at TED2012," Mar. 1, 2012, available at https://blog.ted.com/all-of-our-survival-is-tied-to-the-survival-of-everyone-bryan-stevenson-at-ted2012/.
[2] U.S. Sentencing Commission, "Proposed Amendments to the Sentencing Guidelines," Dec. 2023, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

Amendment to the Federal Sentencing Guidelines, which reflect both an up-to-date understanding of adolescent brain development and an acknowledgement of the arbitrariness and racial disparities that define our country's patchwork youth justice system.

Part A (Option 3) and Part B will help correct decades-long deficiencies in our youth justice system, at both the federal and state level.[3] The Guidelines' current approach to assessing criminal history points for youthful convictions and to sentencing youthful individuals:

- Is inconsistent with the science of adolescent brain development and our understanding of young people's neurobiological maturity;
- Perpetuates and exacerbates the arbitrariness and racial disparities that plague state-level youth justice systems; and
- Does not advance public safety.

We commend the Commission's recognition that the Guidelines' current method of weighting youthful convictions and taking age into account at sentencing does not further its mission of implementing data-driven sentencing policies.

We also write to urge the Commission to eliminate the consideration of acquitted conduct at sentencing. Because the consideration of acquitted conduct at sentencing conflicts with both basic constitutional guarantees of due process and the Commission's commitment to fact- and data-driven sentencing policy, we also write to urge the Commission to adopt the Acquitted Conduct Amendment (Option 1), which would amend §1B1.3 to clarify that acquitted conduct is not relevant conduct for purposes of determining a person's guideline range.

I. <u>The Guidelines' Current Treatment of Youthful Convictions and Youthful Individuals at Sentencing Is Inconsistent with Science of Brain Development</u>

A. *Youthful Individuals Have Not Reached Neurobiological Maturity*

There is broad scientific consensus that the human brain is not fully developed and does not reach neurobiological maturity until a person reaches their mid-20's.[4] During adolescence—the period from approximately age 10 to age 24—the adolescent brain is still developing. Young people experience developmental changes that make them more prone to engaging in impulsive and risky behavior, succumbing to peer pressure, and being unable to appropriately

[3] *See id.*
[4] *See* National Institute of Mental Health, "The Teen Brain: 7 Things to Know," available at https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know; *see also* Mariam Arain, et al., "Maturation of the Adolescent Brain," Neuropsychiatric Disease and Treatment, 2013, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/.

weigh long-term consequences.[5] The prefrontal cortex, the brain's reasoning and control center, is one of the last regions of the brain to reach maturation, and, as such, adolescents operate with a diminished capacity to exercise good judgment.[6] While teenagers and emerging adults can recognize risks, the incomplete development of the prefrontal cortex reduces the likelihood that youthful individuals will take heed of those risks and act accordingly.[7] Moreover, a 2010 study on cognitive control suggests that during adolescence, brain circuits focused on immediate rewards develop faster than the prefrontal cortex.[8] This results in adolescents taking "disproportionately more risky gambles compared to adults."[9] Neuroscience research shows that young people tend to be more vulnerable to fear and reward-seeking behavior, with an underdeveloped brain circuit for careful reasoning.[10]

This robust research has enhanced our understanding of adolescent development and early adulthood, casting doubt on the way we have treated young people in our criminal justice system. The basic assumptions underlying the legal notions of culpability, criminal liability, and classical deterrence models—the ability to weigh risks, make fact-based rational decisions, and exercise meaningful choice—do not apply neatly, if at all, to young people.

The current Guidelines do not reflect this updated understanding of adolescent brain development. With respect to criminal history points calculations, §4A1.2 (Definitions and Instructions for Computing Criminal History) uses a three-tiered approach that assigns criminal history points for adult convictions or juvenile adjudications received before a person turned 18 according to whether the person was convicted as an adult or adjudicated as a juvenile, as well as the length of incarceration or confinement the person received. With respect to youthful individuals facing sentencing in federal courts, §5H1.1 (Age (Policy Statement)) provides that courts are only to consider a person's youth in determining whether a downward departure is appropriate where the "considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." That is, a person's youth is only to be considered in unusual or extraordinary cases, rather than as a matter of course. These two provisions are wholly inconsistent with what we know about the neurobiological maturity of young people. The Commission's proposed amendments rightfully address this inherent inconsistency by limiting or eliminating the impact of youthful convictions in criminal history calculations and by making the consideration of a person's youth in federal sentencing more straightforward and transparent.

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[5] *See id.*
[6] *See id.*
[7] *See* Center for Law, Brain & Behavior, Massachusetts General Hospital, "White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers," available at https://clbb.mgh.harvard.edu/juvenilejustice/.
[8] Leah H. Somerville and BJ Casey, "Developmental Neurobiology of Cognitive Control and Motivational Systems," Current Opinion in Neurobiology, Apr. 2010, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3014528/.
[9] *Id.*
[10] *See id.*

B. *Courts Are Beginning to Recognize the Import of Adolescent Brain Development*

Federal and state courts have increasingly taken adolescent development research into consideration in sentencing youth. Beginning with the Supreme Court's decision in *Roper v. Simmons*,[11] courts have recognized that "diminished culpability" resulting from adolescent neurobiological immaturity means that "penological justifications" for the criminal punishment of youthful individuals apply with "lesser force than to adults."[12] Because of this "diminished culpability," the Court in *Roper* held that imposing the death penalty on people under the age of 18 violated the 8th Amendment's prohibition against cruel and unusual punishment.[13] The same reasoning led the Court to extend the prohibition to sentences of life imprisonment without parole (LWOP) for young people under the age of 18 convicted of non-homicide offenses in *Graham v. Florida*[14] and then to mandatory LWOP sentences in *Miller v. Alabama*.[15] Several state courts and legislatures have since begun to reexamine the proper role of punishment in their own youth justice systems.

Most recently, in January 2024, the Massachusetts Supreme Judicial Court (SJC) recognized that young people's "diminished capacity" extends into their mid-20's and held in *Commonwealth v. Mattis*[16] that sentencing people under the age of 21 to a sentence of LWOP constitutes cruel and unusual punishment, becoming the first state to prohibit LWOP sentences for "emerging adults," ages 18, 19, and 20.[17] The principal finding driving the holding in *Mattis* was that "brains of emerging adults are similar to those of juveniles," thus requiring courts to rethink traditional notions of culpability and punishment in the context of young people who have not reached neurobiological maturity.[18] The *Mattis* court made four key findings of fact that mirror the current scientific consensus discussed above:

> [E]merging adults (1) have a lack of impulse control similar to sixteen and seventeen year olds in emotionally arousing situations, (2) are more prone to risk taking in pursuit of rewards than those under eighteen years and those over twenty-one years, (3) are more susceptible to peer influence than individuals over twenty-one years, and (4) have a greater capacity for change than older individuals due to the plasticity of their brains.[19]

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[11] 543 U.S. 551 (2005).
[12] *Id.* at 570-571. At the time of *Roper*, at least 32 states had banned the death penalty for minors through statute or case law. *See Thompson v. Oklahoma*, 487 U.S. 815, 826 n.25 and 829 n.30 (1988).
[13] *Roper*, 543 U.S. at 578..
[14] 560 U.S. 48 (2010).
[15] 567 U.S. 460, 489 (2012). In *Montgomery v. Louisiana,* 577 U.S. 190 (2016), the Court held that *Miller* applied retroactively.
[16] 224 N.E.3d 410 (2024).
[17] *Id.* at 415.
[18] *Id.* at 420.
[19] *Id.* at 421 (internal footnote omitted).

Mattis represents an important step forward in acknowledging the inherent inconsistencies in the way our courts treat young people charged with crimes.

Additionally, a number of states and the District of Columbia have enacted laws that allow for sentence reductions or reconsiderations for people who were convicted as youth.[20] For example, Washington, D.C. makes sentence reductions available for people who were under 25 years old at the time of the offense.[21] Illinois allows for special parole reviews and parole eligibility in most cases where the person was under 21 years old at the time of the offense.[22] These laws reflect state legislatures' increasing understanding of modern brain science and a recognition that youthful convictions are different from adult convictions.

Parts A (Option 3) and B of the Commission's proposed Youthful Individuals Amendment align with the growing recognition among state courts and legislatures that the "penological justifications" for youthful individuals apply with "lesser force than to adults."

II. The Current Guidelines Perpetuate and Exacerbate the Arbitrariness and Racial Disparities that Define Youth Justice Systems across the Country

The vast majority of youthful convictions considered in federal criminal history calculations are based on state law convictions. While the current science of adolescent brain development makes clear that young people should be treated differently than fully mature adults, however, there is a striking lack of uniformity among the states when it comes to the laws and regulations governing when and whether a young person should be charged, prosecuted, and sentenced in adult criminal court or in the youth justice system. Moreover, state youth justice systems are plagued by racial disparities. Thus, even apart from the brain science showing that adolescents have diminished culpability, state-level youthful convictions vary too widely and are too inconsistent to convey useful information to federal courts making criminal history calculations. And not only is the information fundamentally arbitrary, it is racially biased.

A. *There Is a Marked Lack of Uniformity across State Youth Justice Systems*

As the adolescent brain science discussed above illustrates, the extent to which "penological justifications" apply to young people depends on a person's "diminished capacity" and neurobiological maturity, not the seriousness of the offense. Despite this inherent tension—or, perhaps, in part because of it—procedures and outcomes for young people accused of crimes vary widely from state to state, making a certain level of arbitrariness a defining characteristic of the broader criminal justice and youth justice systems. Indeed, the manner in which states answer the initial question of whether a young person is to be prosecuted as a youth or an adult varies drastically. States differ in the minimum age required for a child to be transferred to adult

[20] *See id. at 231*.
[21] D.C. Code § 24-403.03.
[22] 730 Ill. Comp. Stat. 5/5-4.5-115.

criminal court.[23] Where a minimum age is specified, the minimum ranges from ages of ten to seventeen, depending on the severity of the offense.[24] California recently became the first state to limit adult criminal court transfer eligibility to 16- or 17-year-olds, regardless of the offense, reflecting the diminished culpability of youthful individuals.[25] Still in other states, a child may be transferred to adult criminal court at *any* age, depending on the offense.[26]

In addition to the vast differences in minimum age requirements, states also vary broadly when it comes to the discretion given to courts in determining the transfer process and the types of offenses that may be excluded from an age minimum.[27] As of 2019, 47 states allowed judges to make the transfer decision, 27 states had statutory provisions mandating transfer to adult criminal court for certain offenses, and 14 states gave prosecutors discretion on whether to file charges in the juvenile system or adult criminal court.[28]

These significant variations in the youth justice system across different states result in arbitrary and inconsistent handling of youth. They also result in inconsistent youth incarceration rates across states. For instance, children in Wyoming, South Dakota, and Nebraska are more than four times as likely to be incarcerated as children in North Carolina, Vermont, or New Hampshire.[29]

B. *Racial Disparities Permeate Our Youth Justice Systems*

Because racial disparities exist at every stage of the youth justice systems across all local, state, and federal jurisdictions,[30] the Guidelines' current approach to assessing criminal history points for youthful convictions effectively codifies existing disparities, perpetuating and exacerbating them across the federal criminal justice system.

Black youth are arrested, charged, and incarcerated at significantly higher rates than their white counterparts. A 2019 study found that across local jurisdictions nationally, Black youth were

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[23] Charles Puzzanchera, Sarah Hockenberry, and Melissa Sickmund, National Center for Juvenile Justice, "Youth and the Juvenile Justice System: 2022 National Report," 2022 (hereinafter "2022 National Report"), available at https://ojjdp.ojp.gov/publications/2022-national-report.pdf.
[24] *Id.*
[25] National Governors Association, "Age Boundaries In Juvenile Justice Systems," 2021, available at https://www.nga.org/publications/age-boundaries-in-juvenile-justice-systems/.
[26] The governing statute in Wyoming, for example, provides no minimum age. *See* Wyo. Stat. Ann. § 14-6-237 (courts shall determine whether a transfer is appropriate based on a number of factors, including gravity of offense and the sophistication and maturity of the young person, but providing no minimum age).
[27] 2022 National Report.
[28] *Id.*
[29] American Civil Liberties Union, "America's Addiction to Juvenile Incarceration: State by State," available at https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state.
[30] *See* 2022 National Report.

more than twice as likely to be arrested as white youth.[31] Prior to formal charging, law enforcement generally has significant discretion in determining whether to formally process an individual after arrest and refer them to court. A 2020 study found that once arrested, Black youth are 67% more likely to be formally charged and processed than white youth.[32] These disparities in arrest and charging decisions extend to the conviction and incarceration stages. A 2020 Sentencing Project report shows that Black youth are, on average, 4.7 times as likely as white youth to be incarcerated in state prisons or juvenile detention centers across the United States.[33] In Connecticut, New Jersey, Wisconsin, Massachusetts, and Illinois, Black youth were at least 10 times more likely to be incarcerated than their white counterparts.[34] Finally, sentencing enhancements, such as for certain drug convictions, are applied disproportionately to Black and Hispanic people charged with drug crimes, resulting in longer sentences after conviction.[35]

State-level racial disparities are mirrored in the federal system. For example, the Commission's own data indicates that 59.7% of individuals receiving at least 1 point towards their criminal history calculation for an offense committed prior to turning 18 are Black, as compared to only 11.2% who are white.[36] The Commission's data makes clear that the racial disparities in state youth justice systems have a disproportionate impact in increasing sentences under the current guidelines.

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[31] U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "Racial and Ethnic Disparity in Juvenile Justice Processing," available at https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity#2-0; *see also* 2022 National Report at 165 (finding that "[r]egardless of offense, detention and placement rates in 2019 were higher for cases involving Black or Hispanic youth than for cases involving White youth").
[32] Namita Tanya Padgaonkar, et al., "Exploring Disproportionate Minority Contact in the Juvenile Justice System Over the Year Following First Arrest," Journal of Research on Adolescence, Dec. 2020, available at https://onlinelibrary.wiley.com/doi/full/10.1111/jora.12599.
[33] Joshua Rovner, Sentencing Project, "Black Disparities in Youth Incarceration," Dec. 2023, available at https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/.
[34] *Id.*
[35] Nazgol Ghandnoosh, Celeste Barry, and Luke Trinka, The Sentencing Project, "One in Five: Racial Disparity in Imprisonment—Causes and Remedies," Dec. 2023, available at https://www.sentencingproject.org/app/uploads/2023/12/One-in-Five-Racial-Disparity-in-Imprisonment-Causes-and-Remedies.pdf; *see also* National Conference of State Legislatures, " Racial and Ethnic Disparities in the Criminal Justice System," May 2022, available at https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system.
[36] U.S. Sentencing Commission, "Public Data Presentation: Proposed Amendment on Youthful Individuals," Jan. 2024, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf.

III. Lengthy Youthful Incarceration Does Not Advance Public Safety

Evidence shows that incarceration is one of the most expensive and least effective tools for advancing public safety, especially when it comes to young people. As the Sentencing Project concluded in a recent review of the evidence in the field:

> Overwhelming evidence [shows] that incarceration is an ineffective strategy for steering youth away from delinquent behavior and that high rates of youth incarceration do not improve public safety. Incarceration harms young people's physical and mental health, impedes their educational and career success, and often exposes them to abuse. And the use of confinement is plagued by severe racial and ethnic disparities.[37]

The Youthful Individuals Amendment is an opportunity to begin to correct the way the federal criminal justice system contributes to the over-incarceration of young people without undermining public safety, guided by the principle that depriving people of their liberty beyond the minimum required to achieve the underlying purposes of punishment "constitutes state cruelty."[38]

A. *Reducing Youth Incarceration Does Not Jeopardize Public Safety*

Developments in adolescent brain science and research on the impact and effectiveness of approaches to youth justice increasingly make clear that youth incarceration does not make us safer. Indeed, studies have shown that young people who are arrested and formally processed in the youth justice system after their first arrest have worse outcomes on average than young people who are diverted from formal processing into an alternative program: "more intense contact with the justice system is related to worse outcomes, including higher rates of recidivism."[39] Research indicates that youth incarceration is far more likely to lead to rearrest and recidivism than probation and other community alternatives to incarceration.[40]

Furthermore, data and research indicate that declines in youth incarceration do not result in increases in youth crime.[41] A 2011 report found that states that saw greater reductions in youth

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[37] Richard Mendel, Sentencing Project, "Why Youth Incarceration Fails: An Updated Review of the Evidence," Mar. 2023 (hereinafter "Why Youth Incarceration Fails"), available at https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/.

[38] Jeremy Travis and Bruce Western, ed., *Parsimony and Other Radical Ideas About Justice*, p. 321 (2023). This is known as the "parsimony" principle, which provides both a metric for evaluating the Commission's policy decisions and an important framework for organizing future efforts

[39] Elizabeth Cauffman, et al., "Adolescent Contact, Lasting Impact? Lessons Learned from Two Longitudinal Studies Spanning 20 Years of Developmental Science Research with Justice-System-Involved Youths," Psychological Science in the Public Interest, Dec. 2023, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10799550/.

[40] *See* Why Youth Incarceration Fails.

[41] *See id.*

incarceration from 1997 to 2007 saw a larger decline in youth violent crime arrest rates than states with smaller reductions in youth confinement.[42] Most research indicates that incarceration increases recidivism and likelihood of rearrest when compared to probation and other community alternatives.[43] For example, a 2015 study in Seattle found that those incarcerated during adolescence were nearly four times more likely to be incarcerated in adulthood than comparable peers who were not incarcerated.[44] Similar results were found in Ohio and Texas.[45]

Recent experience in the wake of the Supreme Court's decisions in *Miller* and *Montgomery*, which led to the resentencing of people who were given LWOP sentences as youth, further illustrates that reductions in sentences for young people do not jeopardize public safety. A 2020 report analyzing data on individuals from Philadephia who had been given LWOP sentences as young people and released after *Montgomery* found vanishingly low recidivism rates among the people who had been released: of the 174 people tracked, only 2 had been convicted of a new crime following their release.[46] Other studies have similarly found extremely low recidivism rates among people who were given LWOP sentences as children and released following *Miller* and *Montgomery*, ranging between 0% and 2% by state.[47]

Similarly, a number of states have successfully reduced sentences of people convicted when they were children with exceedingly low resulting rates of recidivism. A study in Washington found that "[t]he recidivism rate among people who returned home after receiving a very long or life sentence for a crime they committed as a juvenile and who subsequently became eligible for a 'second look' after serving twenty or more years is remarkably low."[48] An evaluation of the first 24 people who were released under Maryland's 2021 Juvenile Restoration Act, which allows

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[42] *See* Richard A. Mendel, Annie E. Casey Foundation, "No Place for Kids: The Case for Reducing Juvenile Incarceration," 2011, available at https://www.aecf.org/resources/no-place-for-kids-full-report.
[43] *Id.*
[44] *See* Amanda B. Gilman, Karl G. Hill, and J. David Hawkins, "When Is a Youth's Debt to Society Paid? Examining the Long-Term Consequences of Juvenile Incarceration for Adult Functioning," Journal of Development and Life-Course Criminology, 2015, available at https://link.springer.com/article/10.1007/s40865-015-0002-5.
[45] *See* Edward J. Latessa, Brian Lovins, and Jennifer Lux, Center for Criminal Justice Research, University of Cincinnati, "Evaluation of Ohio's RECLAIM Programs," 2014, available at https://www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20(4-30-2014)%20.pdf; Tony Fabelo, Nancy Arrigona, and Michael D. Thompson, "Closer to Home: An Analysis of the State and Local Impact of the Texas Juvenile Justice Reforms," 2015, available at https://csgjusticecenter.org/wp-content/uploads/2020/01/texas-JJ-reform-closer-to-home.pdf.
[46] Tarika Daftary-Kapurvand and Tina M. Zottoli, The Legal Decision Making Lab, "Resentencing of Juvenile Lifers: The Philadelphia Experience," 2018, available at https://www.msudecisionmakinglab.com/philadelphia-juvenile-lifers. The report also found that the release of Philadelphia's juvenile lifers would result in an estimated $9.5 million in savings in correctional costs over ten years. *Id.*
[47] Defender Services Office Training Division, "1,000 Children Sentenced To LWOP Are Now Free," Jun. 2023, available at https://www.fd.org/news/1000-children-sentenced-lwop-are-now-free.
[48] Katherine Beckett and Allison Goldberg, "Sentencing Reform in Washington State: Progress and Pitfalls," Jan. 2023 (finding that only two of 98 people released had subsequently been convicted of a new felony offense), available at https://secondchanceslibrary.org/wp-content/uploads/2024/01/Sentencing-reform-in-WA.pdf.

people who were under 18 at the time of their offense and who have served at least 20 years in prison apply for a sentence reduction, found that none had been charged with a new crime or violated probation within a year of their release.[49] And in Washington, D.C., of the 195 people convicted as children who were released under an expanded "second look" law, only seven had been rearrested as of June 2023.[50]

At the same time a growing body of evidence shows that youth incarceration does not advance public safety, its profound negative effects are readily apparent. Incarcerated youth experience a high prevalence of exposure to violence and mental health disorders. One national review found that "systemic or recurring maltreatment or abuse" had been documented in 29 states and Washington, D.C. between 2000 and 2015 alone.[51] In one particularly horrifying example, a Kentucky newspaper found that between February 2018 and May 2021 there had been 116 incidents in which staff at a Kentucky state-run youth facility used excessive force against incarcerated youth, several of which resulted in serious injuries requiring transport to emergency rooms.[52] The newspaper found further evidence that facility employees engaged in "sexual conduct with youths," "used racial slurs . . . and failed to provide appropriate supervision . . . [leading] to . . . sexual assault and destructive riots."[53]

Moreover, incarceration as a youth diminishes the likelihood of high school graduation and college enrollment and has a long-term impact on future wages and employment.[54] For

[49] Maryland Office of the Public Defender, "The Juvenile Restoration Act: Year One — October 1, 2021 to September 30, 2022," 2022, available at https://secondchanceslibrary.org/wp-content/uploads/2024/02/OPD-Report-on-Juvenile-Restoration-Act-Year-One-FINAL.pdf.

[50] The Sentencing Project, Testimony of Warren Allen before the Committee on the Judiciary and Public Safety of the Council of the District of Columbia, Jun. 27, 2023, available at https://www.sentencingproject.org/app/uploads/2023/06/Warren-Allen-Safer-Stronger-Amendment-Act-2023-Testimony.pdf.

[51] *See* Why Youth Incarceration Fails (providing several studies that detail consistent reports on mental and physical harm to incarcerated juveniles).

[52] John Cheves, "'So Many Flaws': Broken Bones, Abuse and Isolation Inside Kentucky Juvenile Lockups," Lexington Herald-Leader, Sept. 26, 2021 (cited in Why Youth Incarceration Fails), available at https://www.kentucky.com/news/politics-government/article252923268.html.

[53] *Id.* Unfortunately, there are many other harrowing examples of abuse in juvenile centers, such as in the Oakley and Columbia centers in Mississippi. A Department of Justice investigation documented extensive use of "hog-tying" and "pole-shackling" of youth, in violation of the 8th Amendment. U.S. Department of Justice, "Oakley and Columbia Training Schools Findings Letter," Jun. 19, 2003, available at https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/oak_colu_miss_findinglet.pdf. The report also found arbitrary use of chemical spray, typically reserved for extreme circumstances like the "quelling of riots," and several instances of assault. *Id.*; *see also* Carol Marbin Miller, "Fight Club: Dark Secrets of Florida Juvenile Justice," Miami Herald, Oct. 10, 2017 (detailing allegations of a "Fight Club" for incarcerated youth by facility staff), available at https://www.tampabay.com/news/politics/stateroundup/fight-club-dark-secrets-of-florida-juvenile-justice/2340656/.

[54] *See* Why Youth Incarceration Fails.

instance, a 2015 study found that incarceration in a juvenile facility led to lower wages, less total work experience by age 39 and reduced levels of highest education attained.[55]

In all, the Commission's proposed amendment eliminating the impact of youthful convictions on future sentencing recognizes that youthful incarceration often leads to exposure to abuse, violence, mental health problems,and ultimately, recidivism or rearrest. Furthermore, the Commission's proposed amendment allowing expanded judicial discretion for age-related downward departures will reduce youthful incarceration and the subsequent harm to youthful individuals.

B. *Federal Courts' Recent Experience Shows that the Commission Can Reduce Sentencing Exposure without Compromising Public Safety*

The federal courts' recent experience with reducing criminal history calculations reinforces the conclusion that the Commission can reduce exposure to lengthy sentences without jeopardizing public safety. The Commission's own research on the impact of retroactive application of the Drugs Minus Two, Crack Minus Two, and FSA Guideline Amendments is particularly instructive. In each case, the Commission evaluated whether the retroactive application of the changes to the Guidelines impacted recidivism, and in each case the Commission reached the same conclusion: there was no statistically significant difference between the recidivism rates of people who received a sentence reduction and those who had served their full sentence before the changes became effective.[56]

The Commission recently released information on the current recidivism rates of people who would be impacted by the Youthful Individuals Amendment.[57] While these numbers may appear concerning at first glance, they reflect a lack of appropriate comparison groups. Though individuals with criminal history points from juvenile adjudications have higher average rearrest rates than those without any juvenile criminal history points, this difference is almost certainly due to the difference in age in the comparison groups. Individuals with criminal history points from adult convictions were likely older when they were charged, convicted, and released from

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[55] Haeil Jung, "The Long-Term Impact of Incarceration During the Teens and 20s on the Wages and Employment of Men." Journal of Offender Rehabilitation, 54:317–337, May 2015 (cited in Why Youth Incarceration Fails), available at https://www.tandfonline.com/doi/full/10.1080/10509674.2015.1043480.

[56] U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, p. 1 (2020), avaialble at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[57] U.S. Sentencing Commission, "Rearrest Data Individuals With Criminal History Points Under §4A1.2(d)," Feb. 2024, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_YSI-Supplemental-Rearrest-Data.pdf.

federal prison.[58] The well-known age-crime curve[59] means that this group has overall lower recidivism rates, not because people adjudicated as juveniles have higher recidivism, but because they are further along in their life course. In the one instance where the Commission's research attempts to compare a similarly aged-group, there is a much smaller difference in rearrest rates and *no difference at all in violent rearrest rates* between the groups.

A meta-analysis of 116 studies shows that young people experience some of the most significant criminogenic effects of prison, meaning that spending time behind bars makes them more likely, rather than less likely, to commit crime in the future.[60] The proper public safety response to higher recidivism rates in younger people is not to keep them locked up longer, but to pursue alternatives that will actually lower their recidivism.

IV. Recommendations: Reducing Youth Incarceration while Advancing Public Safety

For all these reasons, FWD.us makes the following recommendations:

A. *Part A - The Commission Should Adopt Option 3*

The Commission has proposed three alternative approaches for Part A:

- **Option 1** would assign one criminal history point for all scored juvenile adjudications, regardless of the sentence imposed
- **Option 2** would eliminate criminal history points for all juvenile adjudications, but leave points in place for adult convictions
- **Option 3** would eliminate criminal history points for all juvenile adjudications *and* adult convictions for offenses committed before a person turned 18

While Options 1 and 2 reduce criminal history points assessed for youthful offenses, each attempts to parse convictions based on whether the person was prosecuted as an "adult" or as a "juvenile." Our understanding of young people's lack of neurobiological maturity, however, makes such procedural distinctions untenable. But, more importantly, assessing any criminal history points for offenses committed before a person reached neurobiological maturity is fundamentally incompatible with our understanding of young people's diminished capacity.

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[58] Average age by group is not provided, but the fact that one of the comparison groups controls by age suggests that the other comparison groups may have very different ages.
[59] *See* Michael Rocque, Chad Posick, and Justin Hoyle, "Age and Crime," The Encyclopedia of Crime and Punishment, W.G. Jennings (Ed.), 2015, available at https://doi.org/10.1002/9781118519639.wbecpx275.
[60] Damon M. Petrich, et al., "Custodial Sanctions and Reoffending: A Meta-Analytic Review," Crime and Justice, Sept. 2021, available at https://www.journals.uchicago.edu/doi/abs/10.1086/715100?journalCode=cj.

Even if the science were not clear that a young person's conduct under the age of 18 should be understood as the action of an immature brain, a cursory survey of state criminal and youth justice systems across the country makes clear that whether a young person is prosecuted as an adult or as a child is haphazard and arbitrary. As such, counting adult convictions but not juvenile adjudications does not provide the sentencing court with any clear information on the seriousness of an offense committed before the age of 18. Moreover, state youth justice systems are rife with racial disparities, from arrests and charging decisions to convictions/adjudications and sentencing. Continuing to assess criminal history points for youthful convictions or adjudications would continue to perpetuate and exacerbate the racial disparities that largely define our national patchwork of youth justice systems.

For these reasons, ***FWD.us strongly urges the Commission to adopt Option 3***, eliminating criminal history points for offenses committed before a person turned 18.[61] Option 3 will better align the Guidelines with our understanding of adolescent brain development without compromising public safety.

B. *Part B - The Commission Should Adopt Part B*

The same reasoning compels our support for Part B of the Commission's proposed Youthful Individuals Amendment, which would simplify the process and rules for taking age into account at sentencing. If adopted, the first sentence of §5H1.1 would provide that "[a]ge may be relevant in determining whether a departure is warranted," deleting the requirement that youth-based downward departures be limited to "unusual" circumstances. The change would also add the following language: "A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing." Finally, the amendment would instruct judges specifically to consider studies of adolescent brain development as well as research "showing a correlation between age and rearrest rates."

The Commission's own data indicates that a lower proportion of youthful individuals (23.2%) receives downward departures than the overall proportion of sentenced individuals who receive downward departures irrespective of age (24.2%).[62] Given what we know about the adolescent brain, we would expect youthful individuals to be *more likel*y to receive a downward departure, not less. Because, as the adolescent brain science tells us, young people have not reached neurobiological maturity, judges should be given wide discretion to take a person's youth into account at sentencing to ensure that any sanction serves the underlying purposes of punishment and takes seriously both a young person's "diminished culpability" and their capacity for change and rehabilitation. However, because the research shows that incarceration

[61] In keeping with the Massachusetts' SJC decision in *Mattis*, the Commission should explore expanding this to convictions obtained before the age of 21.
[62] U.S. Sentencing Commission, "Public Data Presentation: Proposed Amendment on Youthful Individuals," Jan. 2024.

is particularly criminogenic for young people, judges should *not* be invited to consider research "showing a correlation between age and rearrest rates," as such an instruction may, contrary to the evidence, encourage judges to impose lengthier, counterproductive sentences that actually increase the likelihood of recidivism.

For these reasons, **we strongly urge the Commission to adopt Part B of the Youthful Individuals Amendment, striking the consideration of research "showing a correlation between age and rearrest rates."**

Taken as a whole, the research shows that our system of youth justice is badly broken. It relies too heavily on confinement and incarceration, fails to take full account of advances in our understanding of brain development, and is administered unevenly across jurisdictions, exacerbating existing racial disparities and undermining faith in the resulting adjudications and convictions. The Youthful Individuals Amendment represents an important data-driven step toward correcting course.

V. Consideration of Acquitted Conduct at Sentencing Conflicts with Basic Constitutional Guarantees and Undermines Data-Driven Sentencing Policy

The 6th Amendment's guarantees of a public trial, notice of the charges, witness confrontation, and trial by jury, combined with the 14th Amendment's due process right, not only reflect a commitment to basic democratic principles, but also serve as the foundation of a criminal justice system rooted in transparency and internal system accountability. Together, these rights stand for the promise that a person cannot be punished by the state unless and until they have been given a full and fair chance to challenge the factual allegations against them and a jury has found them guilty. As Justice Sotomayor recently noted, "Juries are democratic institutions called upon to represent the community as a bulwark between the State and the accused, and their verdicts are the tools by which they do so."[63] At its most basic, consideration of acquitted conduct at sentencing allows a court to punish a person for conduct that a factfinder (judge or jury) has determined did not meet the constitutional standard for guilt. In so doing, it severs the connection between a constitutionally obtained verdict and any subsequent sentence, raising serious questions of basic fairness.[64]

Moreover, relying on acquitted conduct to enhance a person's sentence results in gratuitous sentences—that is, sentences that do not serve the underlying purposes of punishment[65]— and, importantly, conflicts with the Commission's mission of advancing fact- and data-driven

[63] *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., concurring in denial of certiorari) (internal quotation and citation omitted). Justice Sotomayor went on to call on the Commission to resolve the issue. *Id.* at 2403 ("If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.").
[64] *Id.* at 2402-03 ("acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system").
[65] In this way, the consideration of acquitted conduct violates the parsimony principle. *See supra* note 38.

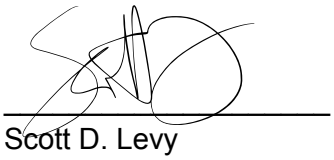
sentencing policy. Formulating data-driven sentencing policy requires reliable and consistent data in the first instance in order to determine whether a sentencing range is appropriate for any particular conviction. The consideration of acquitted conduction as part of the relevant conduct muddies the waters and makes comparative analysis virtually impossible. There is simply no way to know whether a sentence based, in part, on acquitted conduct serves the underlying purposes of punishment.

For these reasons, FWD.us urges the Commission to adopt the Acquitted Conduct Amendment, Option 1, which would amend §1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range.

VI. Conclusion

We thank the Commission for its thoughtful and deliberate consideration of the current amendment proposals. The Commission's effort to reduce the impact of youthful convictions in criminal history calculations and to simplify the process for taking age into account at sentencing represents a critical step forward in fixing the country's youth justice system. And eliminating the consideration of acquitted conduct at sentencing will help align the Federal Sentencing Guidelines with our basic constitutional promises and advance the Commission's commitment to data-driven sentencing policy. We look forward to working with the Commission in future amendment cycles to identify data-driven changes that will safely reduce our national reliance on incarceration and eliminate racial disparities in the system.

Sincerely,



Scott D. Levy
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Comments on the U.S. Sentencing Commission's Proposed 2023-2024 Amendments to Federal Sentencing Guidelines

Human Rights for Kids (HRFK) is a non-profit organization dedicated to the promotion and protection of the human rights of children. We incorporate research and public education, coalition building and grassroots mobilization, as well as policy advocacy and strategic litigation, to advance critical human rights on behalf of children. A central focus of our work is advocating in state legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child.

HRFK is pleased to offer these comments on the U.S. Sentencing Commission's Proposed 2023-2024 Amendments to its sentencing guidelines, policy statements and commentary. Our comments address paragraph 2 ("Youthful Individuals") that proposes amendments to the Commission's guideline §4A1.2 covering criminal history calculations based on offenses committed before the age of 18 and §5H1.1 addressing youth sentencing practices. In accordance with the Commission's suggestions, we have compiled a list of studies we recommend the Commission consult in its decision-making process. Highlights of the research covered in these reports are included in the accompanying narrative supporting our comments and proposals.

I. Part (A) Computing Criminal History Category for Offenses Committed Prior to Age Eighteen, U.S. Sent'g Comm'n, Guidelines Manual §4A1.2 (Proposed Amendment)

Recommendation:

The Commission should adopt Option 3 barring consideration of either juvenile adjudications or adult convictions prior to the age of 18 in compiling the criminal history category (CHC) of an individual subject to sanctions for subsequent federal offenses.

1) Juvenile conduct resulting from transient cognitive immaturity should not form the basis of permanent designation as a criminal.

As evolving neurophysiological and behavioral research demonstrates, and as the Commission has recognized,[1] children's brains do not reach cognitive maturity until they are in their mid-20's.[2] In the wake of these ongoing studies, state legislatures are increasingly investigating whether to raise the age of adult criminal responsibility above the current 18 year-old threshold.[3] Courts in Washington, Illinois and Massachusetts have, in fact, recognized the

[1] U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts at 25. https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20231222_fr-proposed-amdts.pdf

[2] "Together, … behavioral and brain imaging findings suggest that brain function and cognitive capacity vary as a function of emotional and social contexts and that full adult capacity in these contexts is not observed until the early twenties." B.J. Casey, C. Simmons, L.H. Somerville, and A. Baskin-Sommers, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, Annu. Rev. Criminol. 2022. 5:321–43, at 331(hereinafter cited as the Casey Report). https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030920-113250; Leah Somerville, *Searching for Signatures of Brain Maturity: What Are We Searching For?*, 92 Neuron 1164, 1164-67 (2016)https://pubmed.ncbi.nlm.nih.gov/28009272/; Francis X. Shen, et al., *Justice for Emerging Adults after* Jones: *The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. Rev. at 104 (May 2022)(citing BJ Casey, Kim Taylor-Thompson, Estée Rubien-Thomas, Maria Robbins & Arielle Baskin-Sommers, *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 ANN. REV. L. & SOC. SCI. 203, 212–15(2020)))https://www.nyulawreview.org/wp-content/uploads/2022/05/NYULawReview-Volume-97-Shen.pdf *See* Center for Law, Brain & Behavior (CLBB) at Massachusetts General Hospital, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27, 2022) (hereinafter cited as CLBB White Paper). https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf

[3] *See* Shen et al, *Justice for Emerging Adults after* Jones, *supra* note 2, at 116-119. "In 2018, Vermont passed legislation that would extend juvenile courts' jurisdiction for qualifying crimes through age 19 by 2022. Lawmakers in Connecticut, Massachusetts, New York, Illinois, and California pushed to do the same. Such efforts have successfully raised juvenile jurisdiction through age 18 in New York, as well as in Michigan. A Department of Justice research committee has recommended raising the minimum age of criminal court jurisdiction to age 21 or age 24." *Id.* at 119 (citations omitted).

ongoing cognitive development of youth in the 18-21 year old age bracket -- particularly where individuals participating in the same criminal offense range from under 18 to 21-- to justify application of the same discretionary sentencing techniques required for those under 18 to these older adolescents.[4] At the same time, juvenile justice reformers are turning their attention to prevention, recognizing the external factors over which youth generally have no control,[5] but which are major factors contributing to their criminality,[6] and promoting alternatives to imprisonment including community-based support programs.[7] Because this empirical evidence and experimentation have not been uniformly adopted and implemented by state courts and legislative bodies, [8] serious sentencing disparities exist across these jurisdictions. Fundamental fairness dictates that federal law must incorporate this evolving empirical evidence and strive to eliminate these jurisdictional disparities to the extent possible when calculating the criminal history category (CHC) of individuals subsequently charged with violations of federal law.[9]

[4] *See In re Monschke & Bartholomew*, 482 P.3d 276, 279, 288 (Wash. 2021)("Just as courts must exercise discretion before sentencing a 17- year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old."); People v. Ruiz, 165 N.E.3d 36, 41 (Ill. App. Ct. 1st Dist. 2020); People v. Johnson, 170 N.E.3d 1027, 1030 (Ill. App. Ct. 1st Dist. 2020); Commonwealth v. Watt, 146 N.E.3d 414, 428 (Mass. 2020).
[5] *See Miller v. Alabama*, 567 U.S. 460, 477 (2012) In the context of a challenge to mandatory life without parole for a child, the Court held that this mandatory sentence prevents the sentencing authority from "taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.")
[6] *See* CLBB White Paper, *supra* note 2, at 17-20.
[7] Shen et al, *Justice for Emerging Adults after* Jones, *supra* note 2, at 119-120 ("[R]eforms within the criminal legal system alone will not be sufficient. A recent review of the literature on emerging adults suggests the importance of community-based resources to help at-risk and justice-involved emerging adults achieve employment, education, housing stability, and healthy relationships. The Juvenile Law Center similarly emphasizes the need for other systems of support beyond the criminal legal system. The Justice Policy Institute also looks beyond the traditional criminal legal system, and finds that an 'improved approach to young adults should be community-based, collaborative, and draw on the strengths of young adults, their families, and their communities.'" *Id.* (citations omitted).
[8] The same lack of uniformity applies across tribal, territorial, and local jurisdictions as well as in the District of Columbia, contributing to the disparity in sentencing procedures across these jurisdictions as well.
[9] *See* USSG §4A1.2

In a series of cases from 2005-2016, the Supreme Court embraced the general principle that ongoing cognitive development renders kids different from adults for sentencing purposes.[10] The Court explicitly recognized that: 1) Children are less culpable than adults because their brains are not fully developed, 2) this diminished culpability undermines the penological justifications underlying criminal sentencing schemes, and 3) without consideration of this diminished culpability and the mitigating qualities of youth certain sanctions are disproportionate in their effects on children and thus violate the prohibition against cruel and unusual punishment under the Eighth Amendment.[11]

In what has become known as the *Miller* test, the relevant inquiry in juvenile sentencing determinations includes consideration of all the "mitigating factors of youth" including those associated with the biologically based "transient immaturity" of youth. Neurophysiological and behavioral studies undertaken since *Miller* confirm this necessity: "[t]he majority of adolescents who commit crime desist as they mature into adulthood.[12] In other words, most children will "age out" of criminal behavior. "[D]evelopment of the prefrontal cortex is accompanied by improvements in self-control and decision-making that are reflected in desistance of misconduct, diminished impulsivity and risk-taking, and long-term planning goals."[13] Studies further show that:

> Violent crime peaks at ages 17-19 and decreases in the early twenties. While counterintuitive, a robust body of research indicates that committing a violent crime before age 20 is not a strong predictor of a persistent criminal trajectory. While there are no research studies involving solely adolescents, research indicates that early and middle adolescents who commit homicides have similar rates of desistance from misconduct to

[10] *See Roper v. Simmons*, 543 U.S. 551, 574 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460, 460 (2012); and *Montgomery v. Louisiana*, 575 U.S. 190 (2016).
[11] *See, e.g.*, *Miller v. Alabama*, 567 U.S. at 477-78; *Montgomery v. Louisiana*, 577 U.S. at 195, 207-08.
[12] The Casey Report, supra note 2, at 332 (citation omitted)
[13] CLBB White Paper, *supra* note 2 at 39.

> youth who commit other kinds of less serious offenses, and committing a homicide in adolescence is not itself a predictor of either future violent or non-violent recidivism.[14]

Most importantly for purposes of applying the *Miller* analysis: "Converging research from psychological science simply does not support a view that most youth offenders are incorrigible." [15] While "it is not currently possible to reliably identify the "rare" juvenile who will fail at rehabilitation efforts over the course of a lifetime," "[t]here is certainly no basis in science to reliably determine that an individual youth at the time of sentencing in adolescence is incapable of rehabilitation (or even unlikely to achieve it) over the course of a lifetime."[16] In light of this undisputed scientific evidence, any determination of permanent incorrigibility at age 18, and indeed through one's early twenties, regardless of the nature of the offense, cannot be supported by current scientific evidence.

As compilation of an individual's CHC under federal law results in a permanent designation based on prior conduct, only those acts committed with cognitive maturity,[17] can fairly be considered in making this calculation. To act otherwise is to belie science and potentially saddle children with career criminal status even before they reach adulthood. The Armed Career Criminals Act's (ACCA) mandatory 15-year enhancement provision has, in fact, been applied in cases where *all* of the predicate offenses were committed by a juvenile offender.[18] The ACCA does not allow for consideration of age or other mitigating factors of

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[14] *Id.* at 38 (footnotes omitted).
[15] *Id.* at 40 (citing B. J. Casey et al, *Development of the Emotional Brain*, 29 Neurosci. Letters 693, (2019)).
[16] CLBB White Paper, *supra* note 2, at 3.
[17] While the brain continues to develop over one's lifetime, different structures mature at different rates and at different times. The structures, connections and functions related to "decision-making, self-control and emotional processing" and executive functioning, which is responsible for regulating and controlling behavior, continue to develop through one's twenties. *Id.* at 2 citing Leah Somerville, *Searching for Signatures of Brain Maturity: What Are We Searching For?*, 92 Neuron 1164, 1164–67 (2016).
[18] *United States v. Chappel*, 801 Fed. App'x 379, 383 (6th Cir. 2020) (finding the application of ACCA permissible under the Eighth Amendment where the defendant had a long rap sheet, including the predicate offenses, all committed as a juvenile). *United States v. Orona*, 724 F.3d 1297, 1309-10 (10th Cir. 2013) ("We accordingly hold

youth in calculating predicate offenses triggering its application.[19] Yet, under the current federal sentencing guidelines an individual who is subject to the ACCA is accorded a CHC ranging from Category IV to VI,[20] which represent the most serious of the offender designations, and which in combination with the nature of the offense, yield the most onerous sentences.[21] Sentences imposed on juveniles are also considered predicate offenses under the Commission's sentencing guidelines in establishing "career offender" status.[22] "A career offender's criminal history category in every case under this subsection shall be Category VI," the most serious category. Moreover, "although the sentencing guidelines are discretionary, a district court may not disregard a minimum sentence required by statute."[23]

Equating a child's transient, and physiologically based, poor decision-making, with perpetual and irredeemable criminality as expressed through a CHC determination based directly or indirectly on offenses committed prior to age 18, is irreconcilable and fundamentally unfair. Indeed, the Diagnostic and Statistical Manual of Mental Disorders prohibits psychiatrists from diagnosing patients under 18 with antisocial personality disorder - which has many symptoms

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that the use of Orona's juvenile adjudication as a predicate offense for ACCA purposes does not violate the Eighth Amendment's ban on cruel and unusual punishment.").

[19] *United States v. Jamison*, No. 22-1840 at *10 (6th Cir. Oct. 26, 2023) ("[T]he ACCA's plain language explicitly allows for the inclusion of predicate juvenile offenses to enhance firearms possession penalties. *See* 18 U.S.C. § 924(e)(2)(B).") .

[20] *See* USSG §4B1.4(c).

[21] USSG Chapter 5, Part A- Sentencing Table

[22] USSG §4B1.1. CAREER OFFENDER (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. *See United States v. Manley*, No. 20-2517 at *1 (7th Cir. June 30, 2021) (rejecting a challenge to counting a conviction for aggravated robbery at age 16 as a predicate offense under U.S.S.G. §4B1.1).

[23] *United States v. Moody*, 770 F.3d 577, 580 (7th Cir. 2014).

consistent with career criminal status –because of the transient nature of juvenile brains and personalities.[24]

2. Differences among jurisdictions in determining juvenile status and prosecuting the offenses they commit, in combination with the lack of comprehensive due process protections in juvenile proceedings and racial disparities in sentencing procedures, mandate excluding offenses committed before one's 18th birthday in calculating an individual's CHC under federal law.

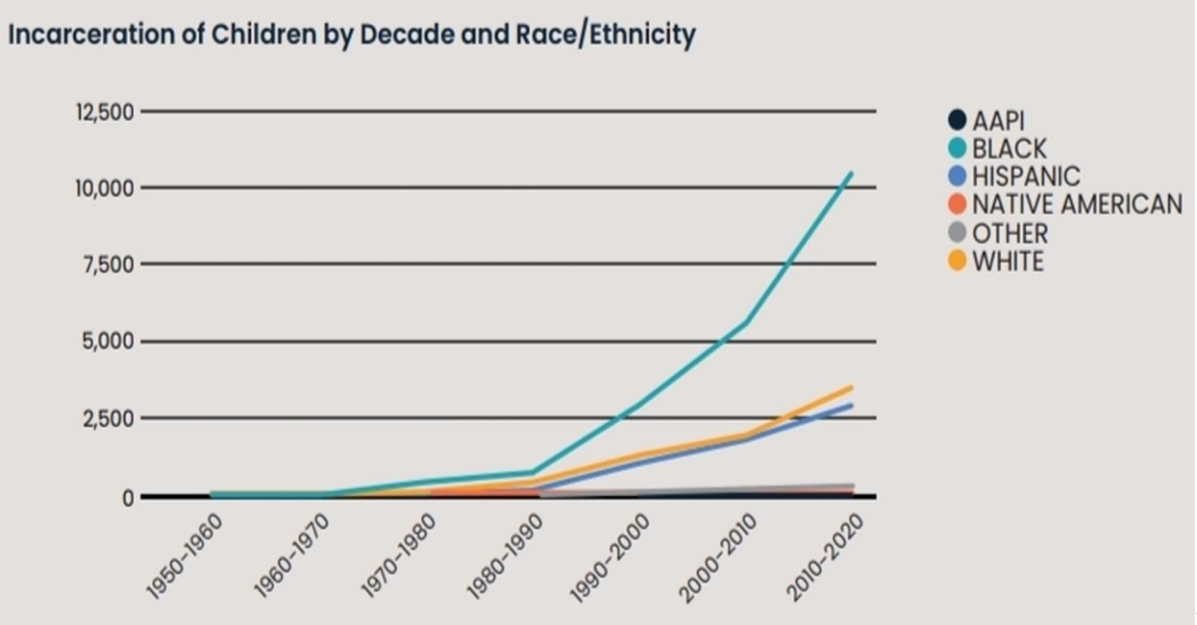
Despite the Court's holding in *Miller,* the conditions triggering its application vary across jurisdictions. As the Commission has noted, standards differ substantially from one state to another.[25] HRFK's research shows wide variability in the following parameters: 1) determination of juvenile status;[26] 2) the age and conditions under which a child is subject to the jurisdiction of the juvenile, family, or adult court systems; [27] 3) the crimes triggering transfer;[28] the use of mandatory minimums and enhancement provisions based on habitual offender status;[29] application of the felony murder rule;[30] and use of life without parole (LWOP) sentences.[31] This

[24] "Long term studies show that symptoms of antisocial personality disorder typically lessen as individuals age." *See* https://www.psychiatry.org/News-room/APA-Blogs/Antisocial-Personality-Disorder-Often-Overlooked
[25] U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts, *supra* note 1, at 24.
[26] Human Rights for Kids, 2023 National State Ratings Report, *Minimum and Maximum Age for Juvenile Court* at 18 (Oct. 23, 2023). https://humanrightsforkids.org/publication/2023-national-state-ratings-report/
[27] *Id.* at 22-23. "[L]aws about transfer to adult court vary wildly between crimes and between states, with no minimum age for some states. Consequently, children as young as 10 have been prosecuted and sentenced to death as adults in the United States (Streib 1987). This variability in age at which a juvenile may be charged as an adult raises the question of whether these age boundaries contradict or reflect the science on psychological and human brain development." The Casey Report, supra note 2, 326
[28] *Id. State Ratings Chart* at 14-15 (Oct. 23, 2023).
[29] *Id.* at 24-25. *United States v. Orona*, 724 F.3d 1297, 1301-1305 (10th Cir. 2013) ("'[T]he mixed-bag of jurisdictions' policies and practices on using juvenile-age convictions for recidivism purposes demonstrates the lack of a national consensus regarding this particular sentencing regime.' Christopher Walsh, Note, *Out of the Strike Zone: Why Graham v. Florida Makes It Unconstitutional To Use Juvenile–Age Adjudications as Strikes To Mandate Life Without Parole under § 841(b)(1)(A),* 61 Am. U.L.Rev. 165, 187 (2011).") "[F]orty-one states had habitual offender statutes. Of those states, California and Texas were the only states which permitted a juvenile adjudication to qualify as a strike. Nineteen states explicitly prohibited the use of juvenile adjudications as a strike, five by statute, and fourteen through judicial determination. In the remaining twenty states that were silent on the issue, each contained language in its criminal statutes indicating that prior juvenile adjudications may not be used towards adult criminal sentences. Joseph I. Goldstein–Breyer, Note, *Calling Strikes before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used To Enhance Adult Sentences,* 15 Berkeley J.Crim. L. 65, 88 (2010)." *Id.*
[30] Human Rights for Kids, 2023 National State Ratings Report, supra note 26, at 26-27.
[31] *Id.* at 28-31.

disparity in classification and treatment of juveniles is exacerbated by the different procedural protections afforded in juvenile proceedings as compared with adult court. As noted by the Commission, due process protections in juvenile court are limited and, for example, do not include the right to a trial by jury and certain privacy considerations.[32] Moreover, the proffered due process protections in juvenile court are not consistent across jurisdictions.[33]

Sentencing disparities reflecting racial bias also disproportionately affect children.[34] HRFK's Report on the Mass Incarceration of Children found that the U.S. practice of prosecuting and incarcerating children as adults has a disparate impact on children of color. Of the approximate 32,359 individuals in our prisons for crimes they committed as children, 25,784 of them, nearly 80%, are people of color.[35] "Their prosecution as adults was facilitated through policy changes in the 1980's and 90's that were brought about through a deliberate and sustained media campaign aimed at dehumanizing children of color, particularly Black children, who bore the brunt of this assault on human rights."[36] Indeed, "Black children are the majority of youth tried, sentenced, and incarcerated as adults at every age."[37]

[32] U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts, *supra* note 1, at 22-23. https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20231222_fr-proposed-amdts.pdf
[33] Human Rights for Kids, 2023 National State Ratings Report, *Due Process Chart*, *supra* note *26*, at 16.
[34] *See* Human Rights for Kids, *Crimes Against Humanity: The mass incarceration of children in the United States* at 11.The report includes a state by state comparison of: 1) the number of inmates convicted of crimes committed as juveniles, their percentage of the total prison population, and the annual costs of their confinement; 2) a breakdown by age and race of the prison populations for inmates convicted of crimes as children; 3) the imposition of LWOP and de facto LWOP sentences for juveniles; and 4) the average length of sentences imposed on children convicted in adult court. https://humanrightsforkids.org/wp-content/uploads/Human-Rights-For-Kids-Crimes-Against-Humanity-The-Mass-Incarceration-of-Children-in-the-US.pdf
[35] *Id*. at 33.
[36] *Id*. at 11.
[37] *Id*. at 36.



[38]

The chart above details the rate of incarceration of children broken down by race and decade. A notable increase for Black youth can be seen in the mid-1990's which coincides with the Super Predator Era.

HRFK's report further found that children of color are sentenced to longer prison terms than White children when given numbered sentences. The average longest sentence was almost 60 years greater for Black children than White children."[39] "Almost 40% of the individuals serving the longest prison sentences in the United States were incarcerated before age 25, and 56% of those serving the longest sentences are Black."[40] The report further found that '[e]very state, with the exception of Maine and Wyoming, tried, sentenced, and incarcerated Black children as adults at a greater rate than their percentage in the overall state population."[41]

[38] *Id*. at 42.
[39] *Id*. at 35.
[40] CLBB White Paper, *supra* note 2, at 8 (citation omitted).
[41] Human Rights for Kids, *Crimes Against Humanity*, *supra* note 34, at 60-61.

Figure 9: Race/Ethnicity of Incarcerated Boys

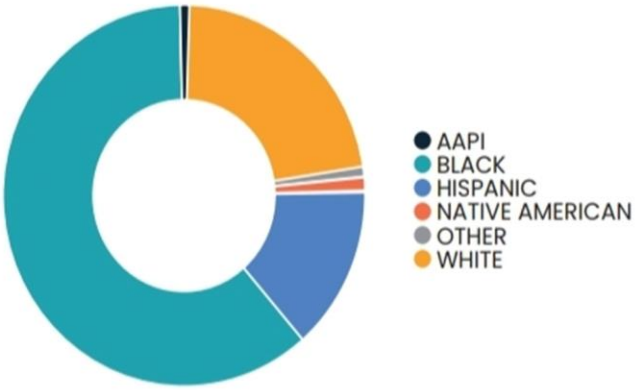


Figure 10: Race/Ethnicity of Incarcerated Girls

GENDER/ SEX	AAPI	BLACK	HISPANIC	NATIVE	OTHER	WHITE
BOYS	0.7%	61.6%	13.4%	1.1%	0.7%	22.4%
GIRLS	0.4%	41.6%	15.9%	1.1%	1.0%	40.0%

Note: Data for gender of incarcerated children not provided for California, Hawaii, Maryland, New Mexico, and North Carolina.

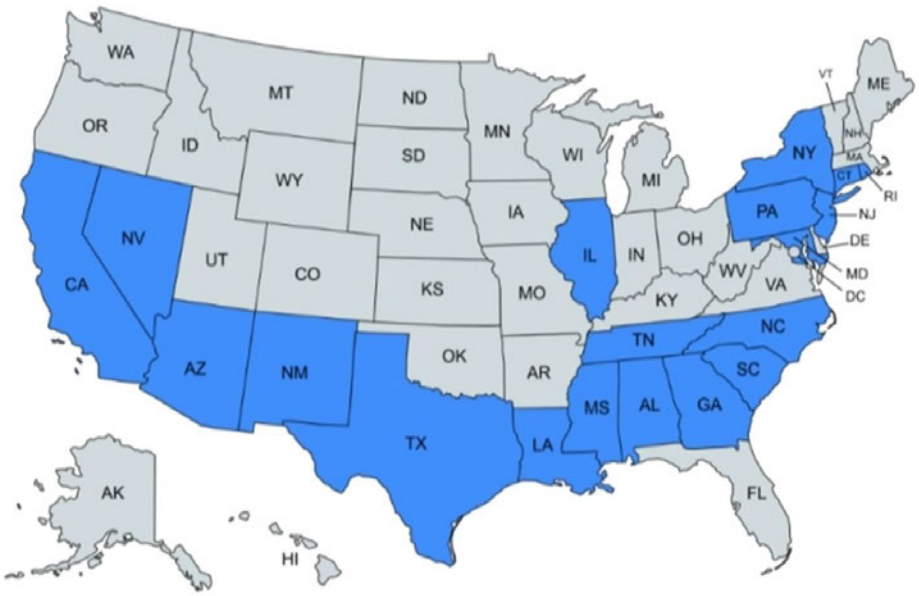
[42]

The report further exposed great variation across the states in their sentencing of children of color; with children in some states faring far worse than in others.[43] In nineteen states, more than 80% of the prison population incarcerated since childhood are racial minorities.[44] Twenty-one states disproportionately tried, sentenced, and incarcerated Hispanic children as adults,[45] while statistics from eleven states showed disproportionate treatment of Native children along the same metrics.[46] White children, by contrast, were sentenced and incarcerated at rates lower than their representation in the state population in every state with the exception of Maine.[47] As these statistics support, and the Casey Report concludes: "Sentencing decisions based largely on

[42] *Id.* at 39.
[43] *Id.* at 44.
[44] *Id.* at 12, 20-21; Chart showing state by state comparison of percentage of incarcerated children of color, at 56.
[45] *Id.* at 64-65.
[46] *Id.* at 66-67.
[47] *Id.* at 68-69.

past behavior further open a door to subjective bias reflecting stigmas associated with extreme behaviors and traits as well as racial disparities that permeate the US criminal justice system."[48]

In nineteen states, 80% or more of the people incarcerated since childhood are racial minorities.



[49]

The foregoing differences alone render use of both juvenile adjudications and adult court convictions improper for determining one's permanent criminal history. A further impediment to relying on these statistics, as the Commission has noted, is the differing state procedures and eligibility requirements for sealing or expunging juvenile records.[50] These disparate practices render accurate counting of prior "convictions" nearly impossible, contributing to further disparities in treatment of individuals who have committed the same infractions but in different locales.[51] More importantly, because the touchstone for determining culpability is *cognitive*

[48] The Casey Report, *supra* note 2, at 337.
[49] Human Rights for Kids, *Crimes Against Humanity*, *supra* note 34, at 12.
[50] U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts, *supra* note 1 at 23.
[51] *Id.*

maturity, variability in state procedures or access to state recordkeeping should never be used as a criterion in computing an individual's CHC.

The fundamental unfairness of saddling one child with more points than another for the same conduct, leading to differing CHC designations, depending upon the forum in which they were prosecuted -- with its attendant negative, lifelong consequences -- cannot be overstated. Texas, Wisconsin, and Georgia, for example, exclude 17-year-olds from juvenile court altogether.[52] If adult court convictions for juveniles were included in federal CHC calculations, while juvenile adjudications were not, kids in these three outlier states would receive higher scores for the same conduct undertaken by their peers in the remaining 47 states. Similar disparities in treatment across jurisdictions result from different sentencing parameters. Courts[53] and legislatures[54] in some states have accorded judges the absolute discretion to depart from mandatory minimums, standard sentencing ranges, and sentencing enhancements, when youthful offenders are involved, regardless of the crime. As the Washington Supreme Court held in "*State v. Houston-Sconiers*, the Eighth Amendment requires "[t]rial courts …to consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements."[55] Youth should not be

[52] HRFK, 2020 State Ratings Report on Human Rights Protections for Children in the U.S. Justice System, *supra* note 26, at 14-15.

[53] *See State v. Lyle*, 854 N.W.2d 378, 381 (Iowa 2014)(The diminished culpability of juveniles discussed in the context of death and life without parole "also applies, perhaps more so, in the context of lesser penalties as well."); *Commonwealth v. Perez*, 80 N.E.3d 967, 975 (Mass. 2017); *State v. Houston-Sconiers*, 188 Wash. 2d 1 (Wash. 2017); *In re Ali*, 196 Wash. 2d 220, 474 P.3d 507 (Wash. 2020); State v. Link , 297 Or.App. 126, 441 P.3d 664, 682 (2019) (determining the imposition of a mandatory minimum sentence of life with the possibility of parole on a juvenile homicide offender without an individualized sentencing hearing was unconstitutional under the Eighth Amendment)

[54] *See, e.g.*, West Virginia H.B. 4210, 81st Leg., Reg. Sess. (2014) (requiring an individualized Miller sentencing hearing for every child sentenced as an adult); Nevada AB 218, A.B. 218, 79th Leg., Gen. Sess. (2017) (requiring courts to consider the "diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth" and authorizing judges to "reduce any mandatory minimum period of incarceration . . ."); District of Columbia Comprehensive Youth Justice Amendment Act, D.C. Law 21-238 (2016) (eliminating all mandatory minimum sentences for child offenders prosecuted in the adult criminal system).

[55] *State v. Houston-Sconiers*,188 Wash. 2d at 21.

permanently branded with career criminal status at the federal level simply because they were prosecuted and sentenced for the same conduct in jurisdictions with less expansive interpretations of *Miller's* requirements.

Fundamental fairness demands the adoption of a federal standard for calculating an individual's CHC that eliminates as much of this jurisdictional disparity as possible. As the Commission itself has noted these jurisdictional and due process differences lead to disparities in treatment of individuals solely dependent upon the venue in which they have been prosecuted.[56] "The variability of the state responses has resulted in a patchwork of 'justice by geography' with disparate outcomes for similarly situated cases."[57] While the states are free, within constitutional limitations, to set their own procedures for enforcing state law, the federal government must take these differences into account in establishing a universal standard of criminal culpability applicable to *all* individuals charged with federal crimes.

For the foregoing reasons, the Commission should adopt Option 3, eliminating consideration of either juvenile or adult sentences incurred prior to age 18 when calculating an individuals' CHC. The bracketed language of the proposed amendment should also be rejected. Any convictions or adjudications obtained before the age of 18 should not be considered for an upward departure from a sentence under §4A1.3.[58] The same considerations barring use of these adolescent offenses in calculating one's CHC bar their use in augmenting any adult sentence. Children's cognitive development limitations must be recognized in all sentencing situations. These handicaps do not appear and disappear according to the nature or severity of the offense. Accordingly, there is no principled argument for restricting consideration of the "transient

[56] U.S. Sent'g Comm'n, Sentencing Guidelines for United States Courts, *supra* note 1, at 22-24.
[57] CLBB White Paper, *supra* note 2, at 42.
[58] The proposed amendment includes this option: **"**but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))**]**."

immaturity" of youth to only the most serious crimes or those that carry mandatory minimums. This developmental factor must be considered whenever a child is subject to sentencing in adult court.

II. Part (B) Sentencing of Youthful Individuals Proposed Amendment. U.S. SENT'G COMM'N, GUIDELINES MANUAL §5H1.1 (Policy Statement).

1. The touchstone of proportional sentencing of juveniles under the 8th Amendment requires consideration of all the mitigating factors of youth that explain both their diminished culpability *and* their capacity for reform.

The Eighth Amendment's prohibition against cruel and unusual punishment "'flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense.'"[59] As the Supreme Court has recognized in the juvenile sentencing context, this requires consideration of the transient immaturity of youth, a consideration which eliminates all but the penological goal of rehabilitation as appropriate for youthful offenders.[60] Informed by recent developments in juvenile neurological research, relevant expert opinion, and international norms, state legislative bodies are increasingly revising their sentencing schemes to reflect this evolving understanding of children's diminished culpability and their capacity for reform.[61] But they are not uniform in either acceptance or application of these principles to the continuing dismay of child development experts: "Whether at the state or federal level, and whether in courts or legislatures, the record should contain the most accurate and applicable neuroscience."[62] While the states are in various stages of

[59] *Miller v. Alabama*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting Weems v. U.S., 217 U.S. 349, 367 (1910))).
[60] *Id.* at 472-73, 478 (quoting *Graham v. Florida*, 560 U.S. at 74. "Plasticity," or the brain's ability to learn from experience, is prolonged during adolescence through young adulthood, thus providing the neurophysiological basis for rehabilitation. Surjeet Mastwal et al, *Phasic Dopamine Neuron Activity Elicits Unique Mesofrontal Plasticity in Adolescence*, 34 J. Neuroscience 9484 (2014). Vishnu Murty, Finnegan Calabro & Beatriz Luna, *The Role of Experience in Adolescent Cognitive Development: Integration of Executive, Memory, and Mesolimbic Systems*, 70 Neurosci. & Biobehavioral Rev. 46 (2016).
[61] *See* footnote 51, *supra*.
[62] Shen et al, *Justice for Emerging Adults After* Jones, *supra* note 2, at 102.

incorporating this advice, federal sentencing practices must adopt a uniform standard that adequately takes into account this developmental limitation in considering *all* of the mitigating factors of youth.

This neurophysiological impediment must, at a minimum, disqualify any mandatory minimums as appropriate sanctions for juveniles as the practice explicitly precludes consideration of any of the mitigating factors of youth. As the *Miller* majority concluded in holding unconstitutional a sentence of life without parole for juvenile homicide offenders:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.[63]

Moreover, as Chief Justice Roberts noted in his dissent in *Miller*: "The principle in today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. . . There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[64]

As previously discussed, a number of state courts and legislatures have adopted this reasoning in expressly authorizing judges to impose sentences below statutory minimums, including enhancement provisions, when juveniles are sentenced in adult court.[65] The same considerations also apply to discretionary sentences. The empirically supported, mitigating qualities of youth must be addressed in determining whether any punishment satisfies the 8th

[63] *Miller v. Alabama*, 567 U.S. at 476-77.
[64] *Id.* at 501 (C.J. Roberts dissent).
[65] *See* footnote 50, *supra*.

Amendment prohibition. As the identified infirmities of youth attach to the offender, precisely because of their age and experience, and not to the crime itself,[66] the factors evincing transient immaturity must be considered whenever a juvenile is sentenced. Absent an individualized sentencing hearing where youth and its attendant circumstances are thoroughly considered by the court, the imposition of any adult sentence is presumptively disproportionate and constitutes cruel and unusual punishment. Furthermore, the sentencing guidelines should encourage courts to depart from the sentencing guidelines whenever a child is being sentenced as an adult. This not only comports with established juvenile brain and behavioral development science, but also emerging national jurisprudence and international human rights law which unequivocally bars sentencing children by the same standards used for adults.

2. The *Miller* test remains the appropriate vehicle for assessing the effects of a youth's "transient immaturity" when making juvenile sentencing determinations.

While in *Jones v. Mississippi*, the Court held that a sentencing judge need not make an explicit finding of a child's "permanent incorrigibility" nor provide any explanation on the record for their decision to impose an adult sentence on a child, it did not abandon use of the *Miller* test in addressing the transient immaturity concern.[67] In the wake of *Miller* and the ongoing research into adolescent's brain development, neurophysiologists and behavioral scientists have explicitly endorsed the parameters identified in *Miller* as "key to articulating the "transient" nature of adolescence generally and applying those factors in the individual case before the court."[68] In its "White Paper on the Science of Late Adolescence: A Guide for Judges,

[66] "[N]one of what … [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller v. Alabama*, 567 U.S. at 473.
[67] *Jones v. Mississippi*, 141 S. Ct. 1307, 1311, 1313, 1316 (2021).
[68] CLBB White Paper, *supra* note 2, at 3, 44.

Attorneys and Policy Makers," for example, the Center for Law, Brain & Behavior (CLBB),[69] documented the consequences and interplay of this physiologically based, developmental limitation in the context of the five factors enumerated in *Miller*: immaturity, impetuosity and risk-taking; family and home life; peer influence; understanding of legal proceedings; and greater potential for rehabilitation.[70] In offering guidance to judges, lawyers, and policymakers in making sentencing determinations, the White Paper concludes that "[t]here is certainly no basis in science to reliably determine that an individual youth at the time of sentencing in adolescence is incapable of rehabilitation (or even unlikely to achieve it) over the course of a lifetime."[71]

HRFK endorses the CLBB's research and the conclusions of its White Paper and encourages the Commission to adopt the CLBB's recommendations in amending its §5H1.1 guidelines. In summary, consideration of all the mitigating factors of youth requires more than mere recognition of an individual's age. It mandates incorporation of data from juvenile brain studies and behavioral research in general, as well as consideration of the individual's particular circumstances, e.g., family and home life, the effects of peer pressure, and any involvement in the child welfare system. Investigation into the individual youth's past experiences and current situation, including any exposure to Adverse Childhood Experiences (ACEs) and childhood trauma, must also be included ,[72] as many of these negative experiences not only affect conduct, but also physiologically modify certain brain structures that can hinder cognitive development.[73]

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[69] The CLBB is a partnership between Massachusetts General Hospital and Harvard Medical School.
[70] *Id.* at 10-41.
[71] *Id.* at 3.
[72] *See* Human Rights for Kids, *Crimes Against Humanity: The mass incarceration of children in the United States, supra* note 34, at 123; CLBB White Paper, *supra* note 2, at 20-21.
[73] CLBB White Paper, *supra* note 2, at 17-20. ("Neurobiological changes during adolescence enhance vulnerability to the maladaptive effects of stress and adversity, and these effects can influence cognitive processes such as emotion regulation, impulsivity, and executive function. Early life stress can impact the development of emotional regions, including the amygdala and striatum, and self-control regions, such as the prefrontal cortex. Exposure to early adversity is also associated with impaired reward processing, and youth who report early life adversity exhibit differences in the brain's structural connections that are important for learning from rewards.") *Id.* at 18.

Studies have shown that the overwhelming majority of youth who engage in delinquent or criminal behavior have histories of ACEs and early childhood trauma. Pediatric imaging studies demonstrate that both cerebral and cerebellar volumes are smaller in abused and neglected youth compared to non-maltreated youth.[74] Smaller cerebral volumes are significantly associated with earlier onset of PTSD trauma which has been linked to adverse brain development in areas responsible for executive functioning.[75] Thus, childhood trauma can have detrimental effects on the brain networks that establish an individual's ability to think, and regulate their sense of self, motivations, and behaviors.[76]

The timing of a traumatic experience is also important given that youth who experience trauma early in life are more likely to experience other types of trauma and the experience of multiple trauma types is associated with increased post-traumatic stress reactions, difficulties in emotion regulation, and internalizing problems.[77] In one study of justice-system involved youth, the most frequently reported trauma included loss and bereavement (61.2%), having an impaired caregiver (51.7%), domestic violence (51.6%), emotional maltreatment/abuse (49.4%), physical maltreatment/abuse (38.6%), and community violence (34%).[78] The confluence of multiple experiences of emotional, physical, or sexual abuse, and emotional or physical neglect at an early age is known as complex trauma, which is exacerbated within pathogenic environments such as poverty, community violence, and household dysfunctions.[79] Exposure to community violence

[74] Michael D. De Bellis, Abigail Zisk, The Biological Effects of Childhood Trauma, Child and Adolescent Psychiatric Clinics of North America, Volume 23, Issue 2, 2014, Pages 185-222.
[75] *Id.*
[76] *Id.*
[77] Carly B. Dierkhising, Susan J. Ko, Briana Woods-Jaeger, Ernestine C. Briggs, Robert Lee & Robert S. Pynoos (2013) Trauma histories among justice-involved youth: findings from the National Child Traumatic Stress Network, European Journal of Psychotraumatology, 4:1, 20274, DOI: 10.3402/ejpt.v4i0.20274.
[78] *Id.*
[79] Yearwood K, Vliegen N, Chau C, Corveleyn J, Luyten P. Prevalence of Exposure to Complex Trauma and Community Violence and Their Associations With Internalizing and Externalizing Symptoms. Journal of Interpersonal Violence. 2021;36(1-2):843-861. doi:10.1177/0886260517731788.

during childhood and adolescence has been linked to internalizing and externalizing problems, PTSD, low school engagement, problematic peer relationships, substance abuse, and sexual risk behaviors.[80] Studies suggest that the combination of complex trauma and community violence on externalizing symptoms like rule-breaking and aggressive behaviors creates a "cycle of violence, where the harsh environment constantly interacts with these children, leading to the possibility of their engagement in gangs, criminal activities, and violent behaviors."[81] Other forms of trauma exposure, beyond child maltreatment, have also been linked to delinquency and justice-system involvement, such as community violence, domestic violence, and traumatic loss.[82] The impact of ACEs and exposure to community violence on child brain development cannot be overstated. The cumulative effect of these traumas on children and their associated consequences (drug use, etc.), coupled with the fact that children's brains are not fully developed, counsel in favor of a standard downward departure anytime a child is being sentenced as an adult.

The Commission has recognized the need for courts to consider studies on brain development and the psychosocial development of kids when sentencing children.[83] Implementing the recommendations of the CLBB, requiring use of the ACEs test, and considering an individual's involvement in the child welfare system are the requisite tools for achieving that objective.

Enumerating these specific, youth-related factors in sentencing manuals helps judges undertake this analysis in a systematic and comprehensive manner. The Judicial Benchcard HRFK helped develop for Virginia judges' use in this setting is one example. It sets forth express criteria a court *must* consider including: 1) the existence of any ACEs; 2) reduced culpability of

[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] U.S. Sentencing Commission proposed amendments, *supra* note 1, at 43.

juveniles because of cognitive immaturity; 3) involvement in the child welfare system; 4) influence of peers; 5) history of trauma; and 6) unintentional biases the judge may have that might factor into their analysis, e.g., race, gender, socio-economic status or disability. Finally, the court is also directed to make certain the sentence is both developmentally appropriate and constitutionally proportionate, protecting the public while ensuring that the child receives the most rehabilitative services possible. [84] The Commission should consider publication of a similar guide for the federal bench.

In addition, to make certain the *Miller* inquiry is actually undertaken, the federal sentencing guidelines should further direct the court to include a discussion of its *Miller* analysis in its required statement explaining its decision.[85] Despite the *Jones* Court's conclusion that "if the sentencer has discretion to consider the defendant's youth, the sentence necessarily *will* consider the defendant's youth,"[86] without any accountability measures in place, its bare assertion is optimistic at best and subject to abuse, at worst. As Justice Sotomayor notes in her dissent, *Miller* requires that: "A sentencer must actually 'mak[e] the judgement.'" [87] "[J]udges must weigh the circumstances and make subjective evaluations of the juvenile's culpability … on a case-by-case basis."[88] This is particularly important to minimize existing racial bias as [t]he extent of subjectivity in …[current] decisions is seen in disproportionately harsher sentencing of Black and Brown youth relative to White youth in the United States….

[84] https://humanrightsforkids.org/publication/judicial-bench-card-virginia/ Appendix B hereto.
[85] *See* USSG § 4A1.3(c).
[86] *Jones v. Mississippi*, 141 S. Ct. at 1319.
[87] *Id.* at 1328 (Sotomayor dissent).
[88] The Casey Report, *supra* note 2, at 323.

[T]he recognition of differences between youths and adults in *Miller* … is not applied equally to all young people."[89]

3. Diversionary programs, including community service, should be the preferred sentencing option for juveniles, as involvement in the criminal justice system precipitates recidivism in youthful offenders.

Neurophysiologists and behavioral scientists focusing on juvenile cognitive development have specifically embraced the *Miller* factors "as a framework for organizing and explaining [their] … research and as a means for accounting for the hallmarks of youthful immaturity, the circumstances of their offenses, and their greater prospects for self-desistance with maturation alone or with the support of *empirically-based interventions*."[90] They report that "the science exists to guide policy and individual case practice (for judges and probation officers, prosecutors and defense counsel, and others) towards *proportional* and *developmentally aligned* accountability for middle and late adolescent offenders."[91] And they further emphasize that while "extreme criminal behaviors and traits decrease with age from adolescence into adulthood … [they do] even more so with effective treatments."[92]

In providing guidance on developmentally appropriate juvenile sentencing options, these experts have specifically addressed concerns about juvenile recidivism statistics, correlating the data showing higher re-arrest rates of youthful offenders throughout their 20's with their still maturing brains. They caution that there is no "dispositive 'bright line' drawn at age 18 for imposing accountability through the adult criminal legal system…The neuroscience and social-behavioral science …indicates there is no solid basis in science for a line drawn at age 18 for

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[89] *Id.*
[90] CLBB White Paper, *supra* note 2, at 7 (emphasis added). *See Miller v. Alabama*, 567 U.S. at 477 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.")
[91] CLBB White Paper, *supra* note 2, at 44.
[92] The Casey Report, *supra* note 2, at 335.

criminal jurisdiction."[93] While cognitive developmental issues continue to plague youth through their mid-20's, kids do "age out" of this behavior. Indeed, the data in the 2017 recidivism study reported by the Commission supports the science. In that study, 72.5% of those youths incarcerated between the ages of 18-21 were rearrested, but these rearrests all occurred in the individuals' twenties as the study only covered conduct for the eight years following initial release.[94] Moreover, "[o]ne-half of offenders in that age group were rearrested before one year had elapsed following their release," placing them in their early 20s at the oldest.[95] The study further found that while the "youngest offenders had the highest recidivism rates, …those rates steadily declined with age." While nearly three-quarters of under-21 offenders were rearrested during the study period, the statistics significantly declined for the 21-29 age group (64.4%) and even further for the 30-group (54.1%).[96]

Neurophysiological and behavioral research thus explains why these statistics show a higher rate of recidivism for juveniles, defined as those under 18 who reoffend in their 20's, than for individuals first arrested as adults. Researchers further caution that our "continuing traditional supervision and sentencing practices inadvertently tend to increase recidivism, [and]

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[93] CLBB White Paper, *supra* note 2, at 42. Shen et al, *Justice for Emerging Adults after* Jones, *supra* note 2, at 106, fn. 31, 32 citing: Leah H. Somerville, *Searching for Signatures of Brain Maturity: What Are We Searching For?*, 92 NEURON 1164 (2016) (discussing evidence of continued neurobiological maturation throughout adolescence); *see, e.g., id.* at 1165 ("These findings provide convergent evidence for continued neurodevelopment during the 18- to 21-year-old window."); Alexandra O. Cohen, Kaitlyn Breiner, Laurence Steinberg, Richard J. Bonnie, Elizabeth S. Scott, Kim A. Taylor-Thompson, Marc D. Rudolph, Jason Chein, Jennifer A. Richeson, Aaron S. Heller, Melanie R. Silverman, Danielle V. Dellarco, Damien A. Fair, Adriana Galván & BJ Casey, *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCH. SCI. 549, 559 (2016) ("[T]hese findings suggest that young adulthood is a time when cognitive control is still vulnerable to negative emotional influences, in part as a result of continued development of lateral and medial prefrontal circuitry."); Laurence Steinberg et al, *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 DEV. SCI. 1, 1–2 (2017) ("Consistent with the dual systems model, sensation seeking increased between preadolescence and late adolescence, peaked at age 19, and declined thereafter, whereas self-regulation increased steadily from preadolescence into young adulthood, reaching a plateau between ages 23 and 26.").

[94] Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism of Federal Offenders Released in 2010* (2021) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf

[95] *Id.* at 24.

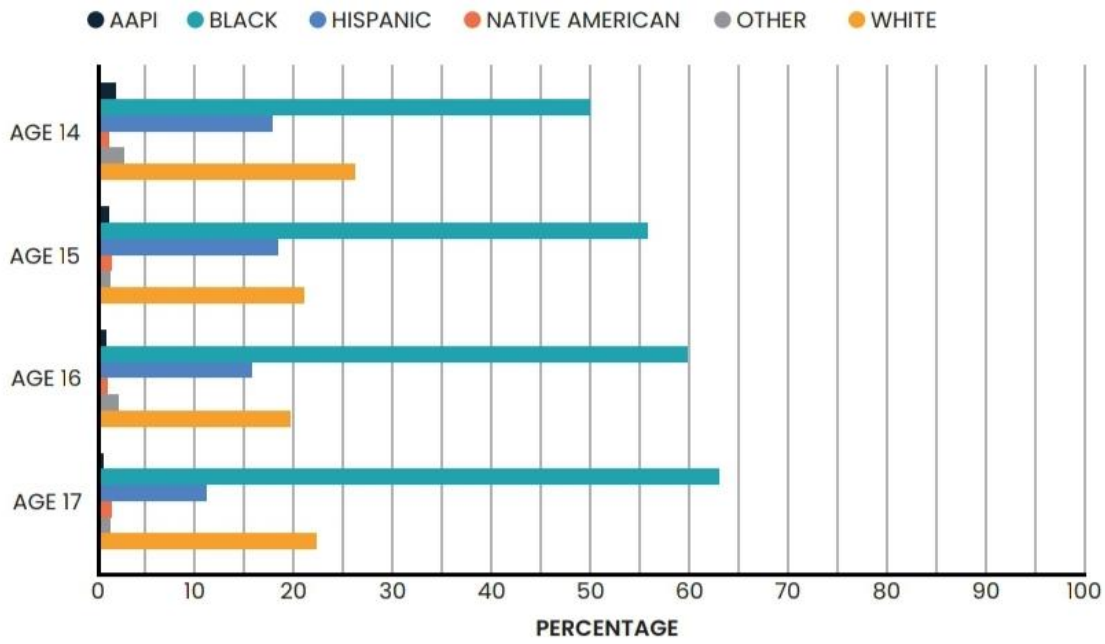
[96] *Id.* at 25.

fail to foster diversion from unwarranted penetration into the criminal justice system. . . ."[97] "Although there is no gold standard for measuring intervention effectiveness, … interventions must do no harm. According to this criterion, incarceration as a means of deterrence or even rehabilitation would be considered unequivocally ineffective. Incarceration promotes antisocial behavior and ensnares youth in trajectories of chronic offending."[98]As the Casey Report concludes: "Sentencing youthful offenders to prison for extensive periods of time with few opportunities for growth only stifles their potential to change, adds to an already overcrowded prison system in the United States, and increases the economic burden on society."[99]

Moreover, these practices "continue the pattern of disproportionate entanglement of young persons of color."[100] Indeed, as HRFK has documented:

> Black children are the majority of youth tried, sentenced, and incarcerated as adults at every age. This trend increases as youth get older where 60% of individuals incarcerated for crimes committed at 16 or 17 years old are Black. Overall children of color make up between 73% and 80% of this incarcerated population across all age ranges.[101]

[97] *Id.*
[98] Arielle Baskin-Sommers et al, *Towards Targeted Interventions: Examining the Science Behind Interventions for Youth Who Offend.* 5 Ann. Rev. Criminology, 2022. 5:345–69, 361 (citing Gatti U, Tremblay RE, Vitaro F. Iatrogenic effect of juvenile justice. *J. Child Psychol. Psychiatry* 50:991–98 (2009)). https://modlab.yale.edu/sites/default/files/files/annurev-criminol-BaskinSommers_2022.pdf
[99] The Casey Report, supra note 2, at 335.
[100] *Id.*
[101] Human Rights for Kids, *Crimes Against Humanity: The mass incarceration of children in the United States*, *supra* note 34, at 36.



The chart above reflects the age of entry and racial demographic of people who entered state prisons for offenses committed as children.

The Commission's 2005 recidivism study further confirms the disproportionate impact on Black and other racial minorities of current sentencing practices on recidivism rates. "Black offenders had the highest re-arrest rate overall, starting with 72.7 % in the youngest age cohort [under 21], which is the *highest* recidivism rate among all categories. The other racial category, which includes American Indians, Alaskan Natives, and Asians, had the second highest overall re-arrest rate, starting with 65.1 percent re-arrest rate in the youngest age cohort before declining."[102] Moreover, studies confirm that targeted interventions and diversion programs, including community service,[103] reduce the chances of repeat offending.[104] By contrast, rather than

[102] Kim Steven Hunt & Billy Easley II, U.S. Sent'g Comm'n, The Effects of Aging on Recidivism among federal Offenders at 23 (2017). https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf

[103] Gordon Bazemore, Measuring What Really Matters in Juvenile Justice," (2006) https://www.ojp.gov/pdffiles1/ojjdp/grants/216394.pdf

[104] *See footnote 7*, supra; Arielle Baskin-Sommers et al, *supra* note 86, ("Several studies demonstrate that FFT [reduces the onset of offending, nonviolent and violent recidivism, and substance use (Alexander et al. 2000, Barton et al. 1985, Gordon et al. 1995, Sexton & Turner 2010). In one analysis, recidivism rates for felony crimes were approximately 40% lower for youth in FFT [family focused therapy] compared to a treatment-as-usual group (Wash. State Inst. Public Policy 2019b)." *Id.* at 350.

decreasing recidivism, juvenile court intervention has been found to increase both violent and non-violent future crimes.[105] A Canadian study found that "male adolescents processed in juvenile court… had three times the odds of being convicted of an adult criminal offense by age 25, and committed close to twice as many violent and non-violent adult offenses, compared with matched peers who were arrested by the police, but not sent to court."[106] The Commission's 2005 recidivism study further supports the conclusion that incarceration is the worst sanction for preventing recidivism. It found that individuals in their twenties sentenced to prison alone, had higher rates of recidivism (68.6%) than those sentenced to split sentences (53.6%), probation and confinement (55.4%), probation alone or a fine (51.5%).[107]

Researchers explain this youthful recidivism as stemming from the current failure to consider the continuum of cognitive development extending through one's mid-20s, the "peak period of offending," [108] when sentencing children. Failure to provide developmentally appropriate diversion and community support programs for youthful offenders "results in youth encountering the criminal justice system in their twenties just before the time when they are neurologically likely to self-desist" in engaging in criminal behavior."[109]

> From a public policy perspective, this means that young offenders highly likely to desist with maturation—especially if provided with meaningful non-criminal opportunities—will instead accrue the collateral consequences of criminal justice involvement (e.g., criminal records, social labeling, forced affiliation with adult criminals if in prolonged detention or incarcerated). These collateral consequences over time actually *increase* risk of criminal recidivism among young offenders who with maturation are otherwise highly likely desist from continuing criminal misconduct."[110]

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[105] A. Petitclerc, et al, "Effects of juvenile court exposure on crime in young adulthood, J. of Child Psychology and Psychiatry 54:3, 291-297 at 291 (2013).https://perma.cc/XMQ5-UVZA
[106] *Id.*
[107] Hunt & Easley, U.S. Sent'g Comm'n, The Effects of Aging on Recidivism among federal Offenders, *supra* note 90, at 26.
[108] CLBB White Paper at 44.
[109] *Id.* at 43.
[110] *Id. See* Pettitclerc et al, *supra* note 93, at 295 (Analysis of the experiences of a number of different juvenile justice systems "indicates that increased judicial contact has no deterrent or rehabilitative effect on young offenders

These experts further conclude: "Our currently worrisome rates of recidivism among younger offenders can be lowered—thereby contributing to community safety—by adopting a developmentally-informed approach to young offenders."[111] Accordingly, these practitioners argue that corrections policies should be reformed to:

> [Adopt] evidence-based models used in the United States and elsewhere which improve recidivism outcomes by separating younger offenders from older adult offenders, placing them into their own units with developmentally aligned programming, and using developmentally-trained correctional, educational, pre-vocational, and behavioral health staff to utilize less punitive approaches and support positive community re-entry, thus increasing the likelihood of avoiding future criminal involvement.[112]

These programs should also be offered for older youth, those 18-21 years of age, because of their continuing cognitive development trajectory. "[O]ur currently dismal criminal justice outcomes could be improved for this age cohort by designing and implementing evidence-based processes for diversion, preventing unwarranted penetration (including pre-trial detention and avoiding harsh sentencing), and resourcing developmentally specialized intervention for late adolescent offenders which supports prosocial activities (including non-criminal social networks, education, and jobs). Data in the Commission's 2017 report on recidivism, in fact, shows the positive impact of increasing levels of education on recidivism rates. "Education level influenced recidivism rates across almost all categories. For example, among offenders under age 30 at the time of release, college graduates had a substantially lower re-arrest rate (27%) than offenders who did not complete high school (74.4%)."[113]

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and may actually increase reoffending (Farrington, 1977; Huizinga et al, 2004; McAra & McVie, 2007; Petrosino et al, 2010)").

[111] CLBB White paper, *supra* note 2, at 43.

[112] *Id.* at 43-44.

[113] Hunt & Easley, U.S. Sent'g Comm'n, The Effects of Aging on Recidivism Among federal Offenders, *supra* note 90, at 3.

One model program which provides a developmentally tailored program is provided by the Mendota Juvenile Treatment Center (MJTC). This secure mental health treatment facility works with boys designated as serious and violent offenders who have not responded to the rehabilitation services offered by Wisconsin's youth correctional facility. As opposed to a sanctions-based approach, the Center addresses a "youth's resistance and opposition to conventional behaviors and lifestyles" through intensive therapy that breaks the cycle of "bad behavior triggering punishment leading to more bad behavior." Over time, this process encourages trust and results in "more acceptable choices and personal esteem and autonomy" for the child. "Research studies show young people treated at MJTC committed significantly fewer crimes after being released when compared to similar youth who did not have access to MJTC."[114]

Judges can support local implementation of these kinds of policy measures while also informing themselves about the relevant brain and developmental science, considering science offered in briefs and expert testimony, encouraging processes (including plea agreements) which take the developmental status of younger offenders into account, and taking into account the inadvertent consequences of harsh sentencing or more punitive supervision practices. Judges may also look to emerging court-based models of deferred sentencing or innovative sentencing that may be adaptable to the local circumstances and resources of their jurisdiction.[115]

[114] Caldwell MF, Skeem JL, Salekin RL, Van Rybroek GJ. Treatment response of adolescent offenders with psychopathy features: A two-year follow-up. *Criminal Justice & Behavior.* 2006;33:571–596.
[115] CLBB White Paper, supra note 2, at 44.

4. Proposed revisions to USSG §5H1.1. Sentencing of Youthful Individuals (Policy Statement)

In light of the foregoing, HRFK recommends the following changes to the Commission's proposed amendments to USSG §5H1.1.

1) Incorporation of a presumption of diversion for youthful offenders that must be rebutted by proof beyond a reasonable doubt before an adult sentence can be imposed on a child.

2) Incorporation of a presumption of downward departure from any standard sentence, where divergence is not supported, that must be refuted by proof beyond a reasonable doubt, before an adult sentence can be imposed on a child.

3) USSG §5H1.12 should be repealed. Alternatively, it should be revised to incorporate consideration of a youth's background and current situation as evinced by such factors as trauma, ACEs scores, involvement in a child welfare system and peer influence.

4) The proposed language of the Policy Statement should be revised as follows:

(B) Sentencing of Youthful Individuals §5H1.1. Age (Policy Statement)

Age shall be relevant in sentencing youthful offenders. Diversion is the presumptive sentence that must be rebutted by proof beyond a reasonable doubt before any adult sentence can be imposed upon a child. Where diversion is not supported, there is a presumption of downward departure from any standard sentence that must be refuted by proof beyond a reasonable doubt before an adult sentence can be imposed on a child. The prohibitions of USSG §4A1.3(b)(2) and (3) limiting the extent of downward departure are not applicable to youthful offenders. In determining the extent of a departure, the court should consider the following:

(1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision- making, and resistance to peer pressure, is generally not developed until the mid-20s.

(2) The youth's ACEs score.

(3) Any involvement of the youth in a child welfare system

(4) Peer influence

(5) History of trauma

(6) Research explaining the correlation between age and re-arrest rates, and specifically why younger individuals are rearrested at higher rates and sooner after release than older individuals.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

Lack of Guidance as a Youth and Similar Circumstances (Policy Statement) at §5H1.12. is repealed.

SELECTED BIBLIOGRAPHY

Arielle Baskin-Sommers et al, *Towards Targeted Interventions: Examining the Science Behind Interventions for Youth Who Offend.* 5 Ann. Rev. Criminology, 2022. 5:345–69 (2009)). https://modlab.yale.edu/sites/default/files/files/annurev-criminol-BaskinSommers_2022.pdf

Gordon Bazemore, Measuring What Really Matters in Juvenile Justice," (2006) https://www.ojp.gov/pdffiles1/ojjdp/grants/216394.pdf

B.J. Casey, C. Simmons, L.H. Somerville, and A. Baskin-Sommers, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, Annu. Rev. Criminol. 2022. 5:321–43, at 331. https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030920-113250

Center for Law, Brain & Behavior (CLBB) at Massachusetts General Hospital, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27, 2022). https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf

Human Rights for Kids, *Crimes Against Humanity: The mass incarceration of children in the United States* https://humanrightsforkids.org/wp-content/uploads/Human-Rights-For-Kids-Crimes-Against-Humanity-The-Mass-Incarceration-of-Children-in-the-US.pdf

Human Rights for Kids, 2023 National State Ratings Report, *Minimum and Maximum Age for Juvenile Court* (Oct. 23, 2023). https://humanrightsforkids.org/publication/2023-national-state-ratings-report/

A. Petitclerc, et al, "Effects of juvenile court exposure on crime in young adulthood, J. of Child Psychology and Psychiatry 54:3, 291-297 at 291 (2013).https://perma.cc/XMQ5-UVZA

Francis X. Shen, et al., *Justice for Emerging Adults after* Jones: *The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. Rev. at 104 (May 2022)https://www.nyulawreview.org/wp-content/uploads/2022/05/NYULawReview-Volume-97-Shen.pdf

Leah H. Somerville, *Searching for Signatures of Brain Maturity: What Are We Searching For?*, 92 NEURON 1164 (2016)https://pubmed.ncbi.nlm.nih.gov/28009272/

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Hygieia Inc

Topics:

Youthful Individuals

Comments:

We would like you to approve OPT 3 for youthful individuals. 4A1.2 "d" No criminal history before the age of 18 should be considered. We, 73 people in our organization support this strongly. Please pass OPT 3, 4A1.2 "d"
Thank you

Submitted on: February 22, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

L'chaim! Jews Against the Death Penalty

Topics:

Miscellaneous

Comments:

We, the 3,000+ members of the group "L'chaim! Jews Against the Death Penalty" have become aware that the U.S.S.C has on their website proposed changes to the sentencing codes related to acquitted conduct, juvenile convictions and other issues. Like the death penalty, the use of acquitted conduct and juvenile convictions as part of sentencing is an abject abomination and flaunting of the very essence of human rights. We urge the commission to consider replacing all forms of retributive justice with restorative justice systems, which would require the elimination of the consideration of acquitted and juvenile conduct - as well as the option of the death penalty - when sentencing. Thank you for your commitment to public safety, which we desperately need. May it be balance by a commitment to human rights. L'shalom uL'chaim - for Peace and for Life, Cantor/Chaplain Michael Zoosman, MSM, BCC Former Jewish Prison Chaplain, Co-Founder of "L'chaim! Jews Against the Death Penalty"

Submitted on: January 5, 2024

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LOYOLA LAW SCHOOL | LOS ANGELES

CENTER for JUVENILE LAW & POLICY
LOYOLA LAW SCHOOL | LOS ANGELES

February 22, 2024

United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Public Comment on Youthful Offender Guidelines

Dear U.S. Sentencing Commission,

The Center for Juvenile Law and Policy at LMU/Loyola Law School represents at-risk youth pro bono in delinquency proceedings, transfer hearings, educational proceedings, and post-conviction re-sentencings of juveniles sentenced as adults. As practitioners holistically representing Los Angeles youth in one of the largest juvenile justice systems in the nation, we appreciate the opportunity to comment on the proposed amendment to the youthful offender guidelines. We urge the Commission to adopt option 3 of the proposed amendment to Guideline § 4A1.2(d).

Prior to joining Loyola's Center for Juvenile Law and Policy, I was a career federal public defender in the Central District of California—one of the busiest federal districts in the U.S. During my transition from FPD work to juvenile justice representation, I quickly learned how different juvenile court is from a traditional criminal court. California juveniles do not have a right to bail or to a jury trial. Because there are no jury trials, many public defender offices and indigent defense panels use juvenile court as a training ground for their less experienced lawyers. Because in most circumstances juveniles receive no credit for time served in juvenile hall during the pendency of their adjudication, they too often rush to admit an offense without sufficient investigation and research so they can begin serving their disposition-sentence as soon as possible.

Moreover, the focus of juvenile proceedings is almost always on suitable placement in an appropriate foster-care facility, school attendance, earning a high school diploma, and obtaining educational and therapeutic support. As a result, there is enormous pressure on juveniles to admit an offense so they will be eligible to receive services or a suitable placement that are only available to youth already adjudicated as having committed an offense. Treating these adjudication-dispositions the same as adult criminal convictions ignores the reality of how fundamentally different juvenile court is from ordinary adult criminal court.

While juveniles transferred from juvenile court to criminal court receive more conventional legal representation, their "adult" convictions should still not be counted because the legal fiction does not change the reality that their offense was committed prior to age 18. Mainstream neuroscience has demonstrated that adolescent brain development continues through the mid-20s. Youthful offenders with ongoing brain development are more impulsive, more susceptible to peer pressure, more prone to be manipulated by adults, and more capable of rehabilitation. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs., 417, 421-23 (2000) (arguing adolescents are greater risk takers and discussing studies supporting the theory); Lucy C. Ferguson, *The Implications*

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of Developmental Cognitive Research on the "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles, 54 Am. U. L. Rev. 441, 457 (2004) (stating that adolescents "lack realistic risk-assessment abilities, and are not as future-oriented as are adults"); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 626-34 (2005) (discussing study finding that peer influence has a much greater effect on the risky behavior of adolescents and young adults than it does on mature adults). These differences between adolescents and adults prompted the United States Supreme Court to conclude that "children are constitutionally different than adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (emphasizing that "children cannot be viewed simply as miniature adults"). Assigning points for offenses committed prior to age 18 ignores the realities of adolescent brain development acknowledged in *Miller.*

The statistics in California regarding the transfer of teenagers from juvenile court to prosecution as an adult in criminal court have long revealed stark racial disparities that raise serious questions about structural racism and implicit bias. "Black youth are 'adultified' by police, prosecutors, probation officers, and courts." Samantha Buckingham, *Abolishing Juvenile Interrogation*, 101 N.C. L. Rev.1015, 1028 (2023). An influential 2000 study, funded by the California Wellness Foundation, concluded that people of color accounted for 95% of the cases where youth were found "unfit" for juvenile court and transferred to adult court. Mike Males, PhD, and Dan Macallaire, MPA, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California* (2000), available at https://www.cjcj.org/media/import/documents/coj.pdf. The same study found that in Los Angeles County "Hispanic youth are 6 times more likely, African American youth are 12 times more likely, and Asian/other youth are 3 times more likely than white youth to be found unfit for juvenile court in Los Angeles County." *Id.* More recent studies suggest that little progress has been made on this front. Human Rights Watch, *Futures Denied: Why California Should Not Prosecute 14- and 15-Year-Olds as Adults* (2018), available at https://www.hrw.org/news/2018/08/21/futures-denied. Human Rights Watch concluded that "Black youth are more than 11 times as likely, and Latino youth are nearly five times as likely to face adult court prosecution." *Id.*at 14. The Commission should mitigate this longstanding systemic injustice regarding juvenile transfer by abolishing the assignment of points for all offenses committed prior to age 18.

Respectfully,

Sean K. Kennedy
Kaplan Feldman Executive Director and Clinical Professor
Center for Juvenile Law and Policy
LMU/Loyola Law School

(MEMORADUM OF UNDERSTANDING (MOU)

FROM: **MASS INC**.

TO: UNITED STATES SENTENCING COMMISSION

Legislators

Congress

United States Attorney General

United States Office of Inspector General

Department of Justice

United Government Accountability Office

The White House Judicial Branch

Judge Jesse Furman

United States Attorney General

Human Right Committee

The Catholic Archdiocese ‘

The-Inter-American Courts

The International Court of Justice

Nelson Mandela Foundation

RE: MY SON IN **“*UNITED STATES V. ISAIAH THOMAS*”** CASE#22CR.34 (JMF)SDNY DECLARATION OF RESTORATION: RE-ENACT YOUTH CORRECTION ACT IN CASE STUDY

DATED: 2/22/2024

“***Constitutional principles, like the Eighth Amendment’s ban on cruel and unusual punishment, precludes courts from treating juveniles in the same fashion that they treat adults”.***

TITLED:

“FIVE PAGE THESIS in Support to Restoration”

THE YOUTH CORRECTION ACT REPEAL DOCTRINE SHOULD BE RE-ENACTED

Introduction:

This Thesis is compiled to inspire discussion about implementing federal Youth Correction Act providing youthful offenders, those deem eligible an alternative to imprisonment. The assumption is that these words may be heard to be understood on the basis of the broad pessimistic powers of the United States Sentencing Commission to convince the Commission (USCC) to recommend into 2024 Congressional session, a proposal to restore the "Youth Correction Act" the most powerful tool in sentencing, created by Congress in response to discriminatory sentencing disparities, accompanied by horrid prison conditions, prison overcrowding, lack of mental health care services for inmates as describe in New York Times article written by honorable Judge Jesse Furman, clearly, exemplifies the need for sentencing reform and the restoration of the Youth Correction Act . Judge Refuses to Send Defendant in Drug Case to Troubled Brooklyn Jail - The New York Times (nytimes.com)

In response to mass incarceration crisis there should be no delay with immediately recommending re-enacting the Youth Correction Act". In the name of public well fare its clear implications for society need for effectively adopting evidence base measures that addresses prison conditions, mental health care and create rehabilitative options. Many juvenile offenders as Isaiah Thomas, lack the maturity and have "an undeveloped sense of responsibility" during their participation in criminal conduct that deemed and label them as gang members. Many of the current challenges in the criminal justice system, including prison overcrowding, inadequate mental health care services, and other disparities in sentencing adversely impact youthful offender without knowledge of their vested constitutional rights.

This report examines illustrated disapproval of the USSC repealing of the Youth Correction Act, including its original purpose, its historical roots, key provisions, or share similar context. With good work and human action prospective application of Youth Correction Act can deem successful in this case before you-*Isaiah Thomas. Both to expand the awareness and advocates for policies that prioritize prevention, rehabilitation and community-based intervention over punitive measures. I have gotten a lot of support to restore this historic iconic body of legislation. Today an overwhelming amount of public appreciation must be given to "Youth Correction Act", a standing ovation, I stand to lead by the highest laws of the land, not by man discretions, but by –The Constitution.

Restoring the Youth Probation Act may be effective in addressing issues such as rehabilitating youth offenders, it's not too late, in United States v. Isaiah Thomas, not only was he an aspiring, architect, he is also a young father, this case demonstrates a unique view, gives an extraordinary perspective and tells a compelling background story of a young men seeking a second chance to rebuild his life, if given an opportunity , as you take the time to review his public Federal RICO prosecution; while he's awaiting harsh sentencing, in the Southern District of New York. This case provides public, stake holder, prosecutors, community leader and other subjects to participate in transforming youthful offenders into college graduates or abiding tax paying citizens. opportunity to formulate a new approach to the growing youthful incarceration crisis.

Thomas success can be seen upon the lenses of restoring of the Youth Correction Act as explained in this memorandum of understanding. Ultimately, the body of laws codified by Congress in 1950 may become a beacon of light for all jurisdiction to following, if given an opportunity, in hopes of resolving the sweeping Federal RICO prosecution facing the many jurisdictions, noteworthy the Southern District of New York.

All can agree juvenile offenders present a unique challenge that they will face within the criminal justice system. Youth Correction Act will reduce mass incarceration, while reducing excessive prison sentencing resulting into releasing talented youth from prison and decreasing youthful offender's minimum exposures. Every parent knows teens tends to more susceptible to negative influence, peer pressure, such influence will continue while youthful offenders are classified with career criminals during incarceration.

Every case is different, but the solutions is the same, proposal of specific recommendation for restoring and Re-enacting the Youth Correction Act, taking into consideration the character of a juvenile is not well formed as that of adult, providing the opportunity for meaningful pilot program in response to imprisonment of youthful offenders. In the name of public safety, we advocate for restorations that give judges similar to Jesse Furman, mentioned above greater discretion in sentencing juvenile offender like Isaiah, to consider such factors as age, maturity, potential benefits for rehabilitations when determining sentencing pursuant to 18 U.S. Code § 3553 - Imposition of a sentence

In the name of public interest, it's important to reiterate the recommendations to implement the Youth Correction Act and rehabilitation-focused approaches including alternative release or compassionate release provisions, a reasonable strategy that must be shared to comeback the errors promulgated in sentencings guidelines that can give "qualified" youthful offenders a second chance. The current sentencing schemes must be disrupted and they must be carefully examined resulting in the explosion of mass incarceration. The sentencing schemes directly contradicts case laws, Supra, and Congress intentions to provide rehabilitative solutions to youthful offenders and further supervision if warranted...

Furthermore, the *Graham,* and *Miller,* Court also emphasized that juveniles are more likely to reform than adult offenders, and that most should be given a meaningful opportunity to demonstrate that they have done so. The discriminatory complex sentencing scheme in written by uncleans hands failed to take into consideration at first, that juveniles has a diminish capacity in comparisons to adult's criminals and still continue to do so, can be seen in a published report titled" Youthful Offender in the Federal System. 20170525_youthful-offenders.pdf (ussc.gov). The bad faith decisions made by unclean, deceptive, hands (USCC) are unconscionable, it disproportionally, negatively cause economic disparities in low income communities and cost tax payers billions of dollars.

These findings announce a powerful constitutional principle—that "children are different" for purposes of criminal punishment. The suggestions are thoughtful, thought provoking and gleams a generous contributions of time made to revisit and reintroduce one of the most effective piece of legislation repealed specifically to provide an alternative in sentencing other than incarcerating our juveniles to life without parole (JLWOP). Most importantly youthful offender can benefit from rehabilitative treatment, they are not predators as stated in 1993 C-Span meeting, then was pinned to political rhetoric made by the Democratic Party in the respect

to Republican Party whistle blowers. Joe Biden in 1993 speech warned of 'predators on our streets' | CNN Politics.

To the extent of building a convincing argument to declare restoration of the Youth Correction Act, in favor of youthful offenders with non-violent and other eligible offenses, similar to Thomas is pivotal. For a matter of fact, most youthful offenders lack education, parental or economic standing to advocate for appropriate sentencing and recommendation. Isaiah is very fortunate to have a mother with a passion for law, she is a legal researcher, in response to his indictment she started a grassroots organization called Moms Against Mass Incarceration (Mass Inc.). She is also the author of this paper, aim at outlining the framework, presenting, announcing and introducing a proposal to re-enact Youth Probation by an emergency order. Isaiah Thomas currently contribute to her efforts as a staff writer, his legal journey is well documented through such efforts.

A heavy focus is placed on the egregious sentencing schemes organized by the currently defunct, misguided government funded organization (USCC), that American Tax payer do not know about, their false presence and further judges now have discretions to depart from previously misguided schemes. I've tried to bring clear and concise points in hopes of convincing key stakeholder to consider other alternative to sentencing for eligible youthful offender in doing so, I have reveal abuse on the part of the sentencing officials in their official capacity, but several trusted sources, have done so too. Trump Nominates Man Who Called for Abolishing U.S. Sentencing Commission to U.S. Sentencing Commission (reason.com)

The judgement upon Thomas is certain, it must be said he's worthy of a second look, second chance, second life, not life behind bars. As a well equip community partner, I have started a mission to give youth like my son Isaiah, the opportunity to live in accordance with the laws and order, contribute to society and give back to those less fortunate. All those who truly knows Thomas can attest he is not a threat to the public or others, he is stellar brother a creative soul that filled with optimism for life, love, and understanding of his natural rights as a young man.

The sentencing commission false sentencing schemes cannot be the only authority since they failed to take into consideration the newly favorable discovered neuroscience evidence in favor youthful offenders. This sample case intersecting with controlling case coupled with new changes in hopes of creating new guidelines detailing how youthful offenders should be classified or treated during pending Federal criminal justice litigations. Isaiah convictions give us a new beginning to old law

In addition, the unreported negative effects and consequence to juveniles during an era of mass incarceration proves to be adverbial and are extraordinary, many incarcerated young offender face death, serious injuries battery. etc. In a this case Isaiah sent an op-ed letter to his mother dated January 24, 2024 describing being beaten and tortured by C/O, statements are attached https://www.reddit.com/user/YouthCorrectionAct24/comments/1av04hx/reenact_youth_correction_act/?utm_source=share&utm_medium=web3x&utm_name=web3xcss&utm_term=1&utm_content=share_button. His statements are heartfelt, he clearly has come to terms with paying the prices for this criminal conducts and request mental health care, due to ideations of suicide.

Congressional silent partners (USSC), intentionally and deliberately ignore or subvert Supreme Court's rulings, holdings, and decisions in a post Booker era resulting in outburst of youthful offenders idling in prisons systems, some being tortured, while other die from overdoses. Disagreement between pre-Booker and post-Booker, retroactive applications fell into outrage by

inmates pending release after serving long sentences. The complaints are not new, especially since elected leaders, executive stakeholders fail to act by taking a backseat on declaring mass incarceration a public health crisis and by not establishing emergency decrees to address the so called problem.

Thus creating another modern day holocaust as written in Judge Bennett dissent. A 'Holocaust in Slow Motion?' America's Mass Incarceration and the Role of Discretion by Mark William Osler, Mark W. Bennett :: SSRN. I am fascinated with restoring, adopting, preventing, treating and fostering support to youth offender through mindful safe approaches, consequently, creating a real community instead of broken or loss member from our communities.

The value of repair is recovery. Creating safe community and healing facilitators can help with building equity and real community restorative initiatives. More attentions need to be vested in healing vulnerable communities by helping to stop violence and the harm. For a matter of fact from Georgia to New York, attorney Generals sole responsibilities are to use their office and duties to prosecute fraudulent litigations or Federal RICO against former President Donald Trump, instead of watchdogging and protecting public safety interest. Judge dismisses claims against Ivanka Trump in New York AG's $250M suit against Trump Organization - ABC News (go.com). In a name of public policy, a call for legislative reforms in criminal justice should be prioritize that provides for punitive measures and a pathway for second chance for those who deserve them.

YOUTH CORRECTION ACT

When one reads the Youth Corrections Act as a whole in combination with 18 U.S.C. §§ 3651 and 3653, it would seem that Congress intended the very flexibility used in this case with respect to a Section 50 10(a) . While I recognize that the need for judicial flexibility in sentencing does not of itself spell out or support an argument as to a particular Congressional intent, nevertheless district judges are in need of this flexibility in fashioning a hopefully enlightened sentence. Thomas is keeping up with this principle to Re-Enact Youth Correction Act.

Keep in mind it must be noted that the establishment of the United States Sentencing Commission sentencing guidelines consequently, created a separation of law, manifested grave insidious sentencing errors and misconduct; all while abolishing the parole board and repealing the Youth Correction Act of 1950, the same year of its creation in 1984- an abusive political binding authority. The Youth Correction Act is the most historic body of law created to reduce recidivism, can benefit youthful offenders like Isaiah's, giving him a second chance and so many others.

In reality, this historical position, time honored articulation of exactly 20 years, of the unimaginable secret society called the United States Sentencing Commission, its misfortunes, egregious activities should not be taken lightly; instead taken into consideration the criticisms of silent voices, contradictions and conflicts in relation to the agency roles and duties that it was carefully established to negatively impact poor communities. Its discriminatory disparity in sentencing served death sentences against black, brown criminal involved or first times offenders that can be heard by the voices of formerly incarcerated, those left behind, the loved one of the deceases, those who died during the war against crack v. cocaine sentencing era and describe throughout newsletters titled "Twenty Years of Unjust Crack Cocaine Laws". Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law | American Civil Liberties Union (aclu.org)

The use of restoration of Youth Correction Act is rarely applied, youthful offender like Thomas, a casebook study mention above in United States v. Boss Terrell; *United Stated v. Isaiah Thomas #22CR.343 (SDNY) JMF and many other nameless youths deserving a second chance for senseless mistakes they made years prior; but now as Thomas demonstrates accountability, responsibility, remorse and resentment for his participation in criminal misconducts can benefit from restorative options. The likelihood of Thomas returning to prison is unlikely, as he describes his twisted faith in a 10-page letter sent to his mother articulating his tortures, strangulations, gang riots, being deprived of basic necessities, humiliations, isolation, beaten while shackled by prison staff, deemed to protect inmates from being harm-The death squad.

Many if not most juvenile offenders, if given the chance want to make amends with victims, will participate in the restoration procedure first being responsible for criminal conduct, accountable for effects on victims and eventually taking action to demonstrate repairing the harm done towards the unknown victims including others unknown person. Isaiah wants to move forward with paying restitution to victims, he know the cost of making progress by starting to lay the foundation of healing, a duty he owe to many. He desperately share the desire to heal broken bonds, right his wrongs once and for all, establish himself as a good citizens, with assistant from compassionate community supportive stake holders, if given the chance.

It's encouraging, impressive, my honor to participate in this public comment in relation to Juvenile Delinquency crisis across the nation, although statistic show juvenile crimes are decreasing. In a report titled" Federal Youthful Sentencing" published by the USCC in 2106, it must be noted of the 86,309 offenders the majority (57.8%) of youthful offenders are Hispanic, that number is expected to triple due to the migrant crisis in sanctuary cities across America. In fact undocumented immigrant crisis will ultimately results in Federal Detention of numerous undocumented asylum seekers, causing the prison populations to inflate to all-time highs.

The ideas I share, is that executive stakeholders must be able to examine past, recent and controlling case laws to overturn previous incompatible legislation passed. Moreover, in an another article titled" Pay No Attention to that Corporation Behind the Curtain - The Flaw "it's a known little secret that corporate greed plays a crucial role in the incarceration of youthful offenders residing in targeted communities as stated by commenters. New restorative guidelines must be established "the first priority in reducing crime should be given to juvenile delinquency" under the Constitution to clear up misconception in sentencing of youthful accused.

Repealing of the Youth Correction Act of 1950, a key piece of legislation adversely affects juvenile youthful offenders pending convictions of first time federal offenses, in violations of Federal RICO statues. In my research and opinions, I will argue to re-enact this general rule of thumb written down in one single document codified to demonstrated sound constitutional conventions and its significant in providing alternative to legal authority to various different juvenile criminal issues.

18 U.S.C 4205 (g) was repealed effective 1987, but remains the controlling law for inmates whose offenses occurred prior to that date, despite the new applicable statue is 18 U.S.C. 3582(c)(1)(A), procedures for compassionate release of an inmate. It's the public understanding that the schemes in sentencing, regulatory guidelines or sentencing recommendation are unconstitutional post United States V. Booker. In the public views the USSC is a government private public trust committee not defined under definitions of the intelligence community, as

defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)), who have exceed or abuse its authority and used its position to continuously fail the youth of America.

In three strongly worded opinions, the Court held that imposing harsh criminal sentences on juvenile offenders violates the Eighth Amendment prohibition against cruel and unusual punishment. In combination, these cases create a special status for juveniles under Eighth Amendment doctrine as a category of offenders whose culpability is mitigated by their youth and immaturity, even for the most serious offense and offenders the sentencing guidelines are Incompatibility of current existing ideas of sentencing youthful offenders with harden career criminal and is in conflict of constitutional violations. Moreover, Constitutional principles, like the Eighth Amendment's ban on cruel and unusual punishment, precludes courts from treating juveniles in the same fashion that they treat adults.

The abuse in sentencing authority, are horrendous, now acceptable which is outlined, practiced and seemingly incompatible with Congress intentions, public policy, Interest, Justices, safety and regularly cause irreparable harm, damages, and injuries without proper justification as seen in the "War on Drug" era. It's disgraceful not to implement the Youth Correction Act, it's a foul act not to complain to re-enact restoration justice programs similar to those in New Zealand. This memo of outstanding should be accepted as good faith, the first steps to implementing innovative cutting edge approach in sentencing, now discretionary power can be a way of life.

The arbitrary and abuses exercise by (USCC) authority that is inconsistent with the mission of the public interest, safety and well fare of youthful citizens, should be closely examine-a bubble up from the obvious. In this attack on public officials, abuse of public trust, needing to put good works in its rightful place, especially due to the sentencing commission contributions to shape modern sentencing guidelines. This comment provides a rare opportunity to confront the conflict and disconnect between sentencing as it stands, infamously known for putting high level criminals to life in prisons.

Undoubtingly, the Youth Correction act is amongst the most important tool to successful rehabilitate youth offenders, its implementation should be discussed, be inline, interpreted, compatible with any further sentencing guidelines. The USCC seems not to remit any authority and should not have any authority above the law, but such ideas as yet grown in sum. Let get it right, now is the time to act, if an effective rehabilitative pilot program can be recommended in an independent case study as Isaiah's, he is a low lying fruit, forcing us to confront systemic racism, sentencing disparity, he is looking for alternative to imprisonment, creating safety net for everyone.

The American tax payers should not be subjected to substantial challenges levied against the abuse of questionable advisory guidelines promulgated with implication to broadly negatively impact black, brown, first-time offender or criminal involved citizens post Booker FanFan era. The USSC receives funding from tax payer dollars, it should reserve oversight over the emerging migrant's crisis plaguing City's across America. Asylum seeker accused of killing another at migrant shelter on Randall's Island - ABC7 New York (abc7ny.com). Tax payer dollars should be used to counsel, educate, and therapy inmates making sure the public would not be endangered by them being released

This report advocate for key recommendations on criminal justice reforms, and work toward creating a more just Courts and legislation under constitutional regime and provides guidance

based on the Supreme Court's Eighth Amendment analysis and on the principles the Court has articulated. Especially, given that the United States Sentence Commission current unconstitutional position, the missing quorum needed to functions; Kenjani Jackson, (the newly confirmed Supreme Court Justice), positions are yet to be filled, the later, created a void not yet abolish, but some kind on defunct on the United States Sentencing Commission part to participate into creating new sentencing guidelines, putting courts in a quite an uncomfortable position.

The Booker Courts brings up critical issues surrounding the constitutionality of United States Sentencing Commission guidelines, as well as the disproportionate sentencing of black and brown youthful offender in federal prison. Here is list of key points develop though community building partnerships.

1. In the name of Public interest, we declare community building solutions in response to the over representation of black and brown youthful offenders in federal prisons . How Restorative Justice Could End Mass Incarceration – The Centre for Restoration (tcrindia.org). The Booker court choose ethical legal pathway with clear lines of governance and accountability to sentencing, but prosecutors, judges use the same practices and are just as responsible for the over incarceration of our youthful populations.

2. In the name of Justice providing clear process to justice post Booker era has led to the guidelines becoming advisory rather than mandatory, providing judges with more discretion in sentencing than ever before.

3. In the name of public well fare creating more successful restorative justice programs and initiatives that have been implemented in communities across the country, emphasizing their potential to reduce recidivism and promote healing.

4. In the name of public policy issue an emergency order, decree, memorandum detailing a promise to correct the errors in sentencing guidelines as follows:

WHEREFORE, In the name of Public interest, the tax payer of America demands a prospective restorative approach is the allege abuse and hypocrisies committed by the USSC over the last 20 years, of its establishment. A call for action from the United States Sentencing Commission to recommend the restoration of the Youth Correction Act.

WHEREFORE, In the name of Public Safety adopting the practices of restoration justice instead of punishment of imprisonment while protecting American the citizens.

WHEREFORE, In the name of Public Policy, creating a new mechanism in systematic sentencing for youthful offenders urging a comprehensive examination of the factors contributing to mass incarceration, including the role of Congress, the United States Sentencing Commission, federal prosecutors, and judges and other interested party.

WHEREFORE, In the name of Public Trust, with all the long standing grievance, it's time for the USCC to take responsibility in relation to contributing to explosion of the mass incarceration of black and brown young man, like Isaiah by listening to the people most impacted and designing solutions we can all agree instead of oppressing reformation as they frequently do.

WHEREFORE, In the name of Public Trust, mandating the United State Sentencing Commission to protect, adopt, restore, youthful offenders protected rights vested in the Constitution through bi-partisan, emergency, executive or presidential orders declaring mass incarceration prison condition is a public health crisis.

WHEREFORE, Isaiah Thomas take responsibility for his participation in criminal misconduct resulting in harm, loss, and emotional pain to unknown victims and wants to circumvent a long imprisonment by actively participate in this public conviction, sentencing, commentary and potential imprisonment. He asks for an interpretation of his Federal RICO charges in a public forum, after accepting a plea deal on January 11, 2024.

WHEREFORE, All those situated in similar situations or position classified as a youthful offender declares to be sentenced using a restorative justice approach to promotes a meaningful way to collectively address harm caused to victims and others affected negatively through over incarceration a human rights crisis.

WHEREFORE, An emergency declaration to Department of Justice to cease and desist unlawful Federal RICO prosecution against black and brown youthful offenders .

References:

1. Pay No Attention to that Corporation Behind the Curtain - The Flaw
2. Probation under the Federal Youth Corrections Act (iit.edu) Id. at 60. (Remarks of Chief Judge Phillips) "Sociologists and psychiatrists tell us that special causations which occur in the period between adolescence and manhood are, in a large measure, responsible for antisocial conduct trends manifest by persons in that age group." See Lamar, Sentencing Under the Federal Youth Corrections Act: The Need For An Explicit Finding And A Statement of Reasons, 53 B.U.L. REV. 1070, 1077 (1973).
3. 20170525_youthful-offenders.pdf (ussc.gov). Criticism made upon The United States Commission 71 page report [ST1]"THERE IS LITTLE INFORMATION PUBLISHED ABOUT THEM" on page seven of the introduction, such statements undermines the agency mistakes, failure, oversights and continuous avoidance of a protected class. In addition, the currently defunct organization, that American Tax payer do not know about, failed to provide newly discovered evidence in favorable of youthful offender, that are (1) easy influence by peers (2)with under developed frontal lobe resulting in diminish executive judgement making skills (3)
4. https://www.reddit.com/user/YouthCorrectionAct24/comments/1av04hx/reenact_youth_correction_act/?utm_source=share&utm_medium=web3x&utm_name=web3xcss&utm_term=1&utm_content=share_button - Isaiah Thomas statement of prison staff abuse, violence, battery, concerning prison condition to his mother seeking medical attention.
5. Judge Refuses to Send Defendant in Drug Case to Troubled Brooklyn Jail - The New York Times (nytimes.com)
6. A 'Holocaust in Slow Motion?' America's Mass Incarceration and the Role of Discretion by Mark William Osler, Mark W. Bennett :: SSRN
7. Joe Biden in 1993 speech warned of 'predators on our streets' | CNN Politics
8. Asylum seeker accused of killing another at migrant shelter on Randall's Island - ABC7 New York (abc7ny.com)
9. Trump Nominates Man Who Called for Abolishing U.S. Sentencing Commission to U.S. Sentencing Commission (reason.com)

TABLE OF CASE LAW

1. United States v. Booker, 543 U.S. 220 (2005)
2. Rita v. United States, 127 S. Ct. 2456 (2007
3. Gall v. United States, 128 S. Ct. 586 (2007
4. Kimbrough v. United States, supra
5. United States v. Boss Terrell, #22CR.343(SDNY)JMF
6. United Stated v. Isaiah Thomas #22CR.343 (SDNY) JMF
7. UNITED STATES v. TURKETTE, 452 U.S. 576 (1981)

TABLE OF LAWS

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2. Youth Correction Act of 1950
3. 18 U.S. Code § 3553 - Imposition of a sentence
4. 18 U.S.C. 3582(c)(1)(A
5. 18 U.S.C 4205 (g)
6. First Step Act
7. Compassion Release Act
8. Human Rights of 1998

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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: Proposed 2023-2024 Amendments to the *Federal Sentencing Guidelines Manual* and Issues for Comment on Youthful Individuals and Acquitted Conduct

Dear Judge Reeves:

Founded in 1940 by Thurgood Marshall, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization.[1] LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system—as both counsel of record and amicus curiae—urging courts to acknowledge and combat convictions and sentences plagued by such discrimination.[2] Within this history, LDF has also focused on increasing the protections for youth in the criminal legal system. We have joined as amici in many of the landmark juvenile justice cases over the last few decades, including in *Roper v. Simmons*,[3] *Graham v. Florida*,[4] *Miller v. Alabama*,[5] and *Jones v. Mississippi*.[6] In addition to our work as amici, LDF continues to work to obtain parole for individuals who were previously sentenced to juvenile life without parole sentences. LDF's mission has always been to be transformative: to achieve racial justice, equality, and an inclusive society.

[1] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.
[2] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); McCleskey v. Kemp, 481 U.S. 279 (1987); Banks v. Dretke, 540 U.S. 668 (2004); Buck v. Davis, 580 U.S. 100 (2017); Reed v. Goertz, 598 U.S. 230 (2023) (as amicus); United States v. Flores-González, 86 F. 4th 399 (1st Cir. 2023) (same); Commonwealth v. Dew, 492 Mass. 254 (2023) (same); Commonwealth v. Gelin, No. SJC-13433 (Mass., argued Dec. 4, 2023) (same); People v. Paredes, No. SC-166129 (Mich., filed Dec. 12, 2023) (same).
[3] 543 U.S. 551 (2005).
[4] 560 U.S. 48 (2010).
[5] 567 U.S. 460 (2012).
[6] 593 U.S. 98 (2021).

On behalf of LDF, we submit the following comment in response to the U.S. Sentencing Commission's ("Commission") Proposed Amendments Two (Youthful Individuals) and Three (Acquitted Conduct) to the *Federal Sentencing Guidelines Manual* ("*Guidelines*").[7] Unfortunately, the *Guidelines*' current treatment of youthful individuals and acquitted conduct can lead to disproportionately severe punishment for Black individuals due to persistent anti-Black bias in the criminal legal system. The proposed amendments are thus necessary to address the impact of such biases embedded in the *Guidelines*.

We commend the Commission for prioritizing efforts to change the *Guidelines'* treatment of youthful offenders and offenses involving youths and its commitment to modernizing this treatment to align with evolving legal and scientific literature relating to the impact of brain development and age on youthful criminal behavior. The *Guidelines*' current treatment of youthful offenders and offenses involving youths does not reflect the "juvenile sentencing revolution" set off by the U.S. Supreme Court in its landmark decision in *Roper v. Simmons*.[8] Proposed Amendment Two offers critical opportunities for long-overdue change necessary to eliminate the tension between the *Guidelines* and the Court's "juveniles-are-different" jurisprudence by clarifying how certain prior offenses committed during youth will be counted for criminal history calculations. We respectfully urge the Commission to adopt Option 3 of Part A of the proposed amendment (addressing the computation of criminal history points for offenses committed prior to age eighteen) and adopt Part B (addressing the sentencing of youthful individuals), with the important caveat that the factors presented are not exclusive of other considerations.

We also applaud the Commission for renewing its efforts to amend the *Guidelines* to prohibit the use of acquitted conduct in sentencing to address the longstanding debate over the proper extent of its application. Consideration of acquitted conduct for sentencing purposes runs antithetical to the Commission's statutory goal of providing "certainty and fairness" in sentencing[9] and contributes to the unwarranted sentencing disparities it was created to avoid.[10] We strongly recommend that the Commission adopt Option 1 of Proposed Amendment Three to exclude acquitted conduct from the definition of relevant conduct for purposes of determining the guideline range.

I. The Commission should exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score and eliminate the exception for consideration in departures (Option 3 of Proposed Amendment Two, Part A).

[7] 88 Fed. Reg. 89142 (proposed Dec. 26, 2023).
[8] 543 U.S. 551 (2005).
[9] 28 U.S.C. § 991(b)(1)(B). The Guidelines must give "particular attention" to these requirements. *See* 28 U.S.C. § 994(f).
[10] *See* Letter from Michael Caruso, Federal Defender Sentencing Guidelines Committee Chair, Federal Defenders, to Judge Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Sept. 14, 2022), https://src.fd.org/sites/src/files/blog/2022-10/20220914%20-%20Defender%20Proposed%20Priorities%20Letter.pdf [hereinafter *September Defender Letter*].

The Commission has proposed three options for amending §4A1.2(d). Each option would decrease, to varying degrees, the impact of certain juvenile sentences on criminal history calculations.[11] We urge the Commission to adopt Option 3, which would exclude all sentences resulting from offenses committed prior to age eighteen from criminal history score calculation, including adult and juvenile offenses, and strike the bracketed language providing that any offense committed prior to age eighteen may be considered for purposes of an upward departure under §4A1.3. Option 3 is the optimal choice for three reasons: First, it modernizes the treatment of youthful individuals in the criminal legal system to align with evolving research on brain development and age. Second, it promotes uniformity in sentencing and mitigates the disproportionate impact of these provisions on Black individuals by neutralizing the effects of implicit racial biases in the treatment of youthful criminal conduct. Third, it furthers statutory goals without threatening increased rates of recidivism. For these same reasons, the Commission should also strike the bracketed provision in Option 3, as allowing sentencing judges to consider these offenses for purposes of upward departure would undermine these goals.

A. Current understandings of youth development demonstrate that youth are less culpable for offenses than adults.

The Commission should amend the text of §41A.2(d) to reflect modern research on and societal understanding of the impact of brain development on youthful behavior. As the Proposed Amendment correctly highlights, §4A1.2(d) has remained unchanged since the original passage of the *Guidelines* in 1987.[12] As a result, the current text of this provision—which allows for sentencing enhancements for certain youth offenses and adult convictions based on conduct committed before age eighteen—is rooted in largely outdated research and stale perceptions of youthful criminal behavior. The Sentencing Reform Act of 1984 ("SRA") mandates the Commission to oversee the *Guidelines* based on "congressional awareness that sentencing is a dynamic field that requires continuing review […] as more is learned about what motivates and controls criminal behavior."[13] In the intervening decades since the *Guidelines*' enactment, a wealth of innovative research emerged demonstrating the developmental immaturity of adolescents. Accordingly, the Commission has the opportunity to fulfill this mandate by amending the *Guidelines*' treatment of youthful offenses to account for recent research demonstrating the lack of capacity—and consequently, criminal culpability—of youth.

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[11] Option 1 would exclude juvenile sentences from receiving two criminal history points, notwithstanding the length of the sentence imposed, such that juvenile sentences would receive, at most, one point. This option would not impact three-point offenses for "adult convictions," defined as offenses committed under age eighteen but charged in adult criminal court. Option 2 would exclude all juvenile sentences from criminal history calculations but would clarify that such sentences may still be considered for purposes of upward departure. As with Option 1, Option 2 would have no effect on three-point offenses for adult convictions. Option 3 would exclude all sentences resulting from offenses committed prior to age eighteen from criminal history score calculation, including adult and juvenile offenses. This option also provides that such sentences may still be considered for purposes of upward departure. 88 Fed. Reg. 89142, 89146-47.

[12] *Id.* at 89145.

[13] U.S. SENT'G GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2023).

The Commission promulgated its current *Guidelines* on the treatment of youthful offenses in the mid-1980s amidst the rise of the juvenile "super predator" myth.[14] This harsh—and, as we now know, inaccurate—view of youthful offenses drove a series of policy changes that led to harsher sentences for youthful offenses. Along with establishing the Sentencing Commission and the promulgation of the *Guidelines*, the SRA repealed the Federal Youth Corrections Act,[15] a statute enacted in 1950 which emphasized rehabilitative treatment for youth in facilities separate from adults where possible and expanded the options available for sentencing for young individuals up to age twenty-six.[16] This critical repeal, coupled with the *Guidelines*' newly enacted provisions providing for sentencing enhancements based on certain instances of youth offenses, illustrates a larger shift in the national attitude towards increasing the severity of punishment for youth.

Almost two decades after the Commission promulgated the *Guidelines*, an influential article in 2003 relied on then-emerging behavioral studies and neuroscience evidence studying the impact of brain development on youthful behavior to argue that youth are not as culpable as adults and should not, as a result, be held to the same standard of criminal liability.[17] Heavily influenced by these novel discoveries, the Supreme Court cited this article throughout its landmark decision in *Roper v. Simmons*[18] to conclude that youth are different and, as such, deserve different treatment in our criminal legal system. This case sparked a paradigmatic shift in the treatment and perception of youthful offenders. In *Roper*, the Court issued three crucial observations about the nature of youth that marked the beginning of a cultural and legal shift in the treatment of youth offenders: first, young people tended to "lack maturity" and exhibit an "underdeveloped sense of responsibility"; second, they tended to be more susceptible to negative influences and peer pressure due, in part, to the fact that they "have less control, or less experience with control, over their own environment"; and third, their character is "not as well formed as that of an adult."[19] Subsequent decisions following *Roper* continued to reiterate this point that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders."[20] In the years following *Roper,* the scientific and social research and literature

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[14] Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1002 (2017) [hereinafter *Mending the Sentencing Guidelines*]. *See also* Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, ABA (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/ ("In the 1970s and 1980s, media reports began highlighting an upward trend in violent crime rates, which in turn shifted the political emphasis to being 'tough on crime.' As a result, sweeping reforms were passed in many states to make it easier to try juveniles in adult criminal courts, and more punitive juvenile justice laws were passed.").

[15] Ch. 1115, 64 Stat. 1089 (1950) (codified as amended at 18 U.S.C. §§ 5005–5026 (1976)) (repealed 1984).

[16] *Id.*

[17] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1009 (2003).

[18] 543 U.S. 551 (2005).

[19] *Id.* at 569-70.

[20] Miller v. Alabama, 567 U.S. 460, 472 (2012).

corroborating these conclusions has continued to grow.[21] The Commission must update the *Guidelines* accordingly to accurately reflect this evolving knowledge.

Our current understanding of neuroscience calls into question whether offenses committed by young people should be treated the same as offenses committed by adults.[22] For example, researchers have found that our cognitive capacity for logical reasoning and systematic deliberation reaches maturity around age sixteen; our psychosocial capacity to exert mature levels of self-control in emotionally arousing situations, however, does not fully develop until as late as our mid-twenties.[23] One experimental study found that the same group of adolescent participants exhibited levels of impulse control and brain activity more similar to younger teens when subjected to emotionally arousing conditions than previously thought.[24] Given the high-stress and emotionally triggering environments generally associated with engaging in criminalized behavior in adolescence, psychologists have categorized these decisions to engage in criminal behavior as instances invoking psychosocial maturity.[25] Thus, the scientific and psychosocial realities of adolescent brain development provide strong support for excluding offenses committed before age eighteen, if not older,[26] from the same treatment as prior adult criminal behavior in the application of sentencing enhancements for recidivist behavior.

B. Because Black people, including Black youth, are disproportionately targeted at every stage of the criminal legal system, sentencing systems that rely on past contact with the criminal legal system exacerbate racial bias.

The *Guidelines* were first drafted and promulgated amidst a "sentencing revolution"[27] driven by the belief that unconstrained judicial discretion led to extreme disparities in sentencing, running afoul of one of the primary goals of the SRA: to avoid "unwarranted sentencing

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[21] *See* Graham v. Florida, 560 U.S. 48, 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds…"); *Miller*, 567 U.S. at 472 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

[22] Vanessa F. Hernandez Levin, *Children Sentenced as Adults,* NOTRE DAME J. OF L ETHICS & PUB. POL'Y (2023), https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ndlep37&section=6.

[23] Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 ANN. REV. OF DEVELOPMENTAL PSYCH. 21, 29 (2019); Nicholas Pugliese, The Kids Are Not Alright: Ending the Unconstitutional Reliance on Juvenile Conduct to Enhance Federal Criminal Sentences 38-39 (April 27, 2023) (unpublished comment), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18369/Pugliese%20SAW%20Final%20Draft_YLS%20Prize%20Submission.pdf?sequence=4. In fact, the demanding and emotionally charged settings associated with criminal conduct engage brain structures and systems that research has shown do not fully mature until well beyond the age of eighteen. *Id.* at 39-41.

[24] Steinberg & Icenogle, *supra* note 23, at 32.

[25] Pugliese, *supra* note 23, at 39-41.

[26] *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

[27] James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 127-28 (2009).

disparities."[28] In practice, however, the *Guidelines*' current approach to youthful criminal conduct creates considerable disparities due to factors like geography and race that do not relate to culpability nor the other goals of federal sentencing. Thus, the *Guidelines* risk inconsistent treatment of defendants for conduct they committed before age eighteen and for which they are not as blameworthy as adults who commit similar behavior. To achieve its goal of uniformity in sentencing, the Commission must exclude all pre-eighteen offenses from criminal history calculation to remove any reliance on factors irrelevant to sentencing, such as the influence of racial bias.

Large swaths of research and literature have been dedicated to studying the explanations for the racially disparate treatment Black individuals experience in all aspects of our criminal legal system.[29] Even before charging decisions are made, disproportionate police stops and arrests of Black people play an influential role in what, if any, charges a prosecutor decides to bring against an individual.[30] While one of the least studied aspects of the criminal legal system, a prosecutor's decision to bring charges—and if so, which charges—has the power to prompt unwarranted sentencing disparities. Indeed, empirical data finds that prosecutors are more likely to charge Black people with crimes and subsequently prosecute those cases more fully than white people.[31] They are also substantially more likely to file felony charges against Black people than white people.[32] A prosecutor's own implicit biases may contribute to the differences in charging practices, as charging decisions are wholly under the prosecutor's purview.[33] For example, with respect to mandatory minimum sentences, "prosecutors appear to be nearly twice as likely to use the laws

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[28] 28 U.S.C. § 991(b)(1)(B) (2023); *see also* 28 U.S.C. § 994(f) (2023) ("The Commission … shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.").

[29] *See, e.g.*, Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 166 (2016) (noting that Black people are disproportionately exposed to law enforcement); Drew DeSilver et al., *10 things we know about race and policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/ ("Black adults are about five times as likely as whites to say they've been unfairly stopped by police because of their race or ethnicity."); Ben Poston & Cindy Chang, *LAPD searches blacks and Latinos more. But they're less likely to have contraband than whites*, L.A. TIMES (Oct. 8, 2019, 3:52 PM PT), https://www.latimes.com/local/lanow/la-me-lapd-searches-20190605-story.html (revealing data from the Los Angeles Police Department shows that a "black person in a vehicle was more than four times as likely to be searched by police as a white person," even though white people were more likely to be found with illegal items); *Table of Arrest rates by offense and race in 2019 (all ages)*, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2&selYrs=2019&rdoGroups=1&rdoData=r (last visited Feb. 21, 2024) (reporting that the arrest rate for Black people and white people is 5,723.3 and 2,750.4 per 100,000, respectively); *U.S. Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited June 21, 2022) (noting that the incarceration rate for Black people and white people is 2,306 and 450 per 100,000, respectively).

[30] CASSIA SPOHN, OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION: RACIAL DISPARITIES IN PROSECUTION, SENTENCING, AND PUNISHMENT 175 (2014).

[31] *Id*. at 171-72 ("If arrest decisions reflect systematic racial/ethnic disparities, the sample of cases presented to the prosecutor will incorporate these biases, making it difficult to interpret findings of discrimination.").

[32] *Id.* at 173.

[33] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging & Its Sentencing Consequences* 25-26 (U. Mich. L. & Econ. Working Paper, Paper No. 12-002, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377.

against [B]lack defendants when doing so is a discretionary choice."[34] These discretionary—and often racially disparate—choices that prosecutors make are a major contributing factor behind persisting racial inequalities in the criminal legal system. In fact, one study found that "prosecutors' charging decisions are at least as important a source of racial disparity as judicial sentencing decisions are, if not more so."[35]

As a result of disparate treatment in policing, charging, and sentencing, a disproportionate number of all persons arrested, convicted, and incarcerated in this country are Black.[36] A 2014 examination of over 3,500 police departments found that officers are more likely to arrest Black individuals in almost every city for almost every type of crime.[37] Indeed, the study revealed at least 70 police departments arrested Black people at ten times the rate of non-Black people.[38] The racial disparities compound when taking into account sentencing systems that rely on past contact with the criminal legal system.[39] A race-based analysis of career offender designations illustrates this concept: for example, an empirical study of federal defendants in 2021 found that while Black individuals made up 23 percent of all federal defendants, they accounted for 37 percent of those in the top three criminal history categories and 58 percent of those with career offender status.[40] This overrepresentation of Black people in the criminal legal system is not explained by racial differences in participation in criminalized behavior, but rather by structural discrimination at the root of the criminal legal system.[41] While Black and Latinx people use drugs at similar rates as

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[34] *Id.*

[35] *Id.* at 25.

[36] Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System March 2018; Univ. of Maryland College of Behavioral & Social Sciences, *Study: Nearly Half of Black Males, 40 Percent of White Males Arrested by 23* (last visited Dec. 21, 2022), https://bsos.umd.edu/featured-content/study-nearly-half-black-males (finding that nearly half of Black men will be arrested by age 23); Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5996985/#:~:text=We%20estimate%20that%203%20%25%20of,African%20American%20adult%20male%20population (finding that 33 percent of Black men have a felony conviction, compared to 8 percent of all adults); Prison Pol'y Initiative, *Race and Ethnicity*, https://www.prisonpolicy.org/research/race_and_ethnicity/ (last visited Dec. 20, 2022) (Black people make up 13 percent of the U.S. population, but 30 percent of the people on probation or parole and 38% of the incarcerated population).

[37] Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY (Nov. 19, 2014), http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

[38] *Id.*

[39] Decades of research show that the career offender guideline produces a clear racial disparity in application. *See*, U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 133-34 (2004).

[40] Pugliese, *supra* note 23, at 54.

[41] *See, e.g.,* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (July 2020), https://www.nature.com/articles/s41562-020-0858-1 (analyzing data showing that police search Black and Hispanic drivers more often than white drivers, but are less likely to turn up contraband during searches of Black and Hispanic drivers compared to searches of White drivers, who are more likely to possess contraband); SUSAN NEMBARD & LILY ROBIN, URBAN INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES (2021) (citing multiple studies showing that the racial disparities in the criminal justice system cannot be explained by

white people,[42] nearly 80 percent of people in federal prison and almost 60 percent of people in state prison for drug offenses are Black or Latinx[43] while making up only 31 percent of the population.[44]

Black youth and youth of color are overrepresented at every stage of the juvenile justice system,[45] and in the population of young people who are transferred to the adult system for offenses committed below the upper age boundary of juvenile jurisdiction. For example, a study in Florida found that in 2014, 51 percent of all youth transfers to the adult system were Black, although they only comprised about 27 percent of youth arrested.[46] Empirical research revealed similar trends in California, where Black youth aged fourteen to seventeen comprised 5 percent of the state's population for that age group but accounted for 27 percent of cases filed directly in adult court.[47] Recent data from the 2020-2021 school year released by the U.S. Department of Education's Civil Rights Data Collection confirmed similar trends for young Black male students, who accounted for 18 percent of law enforcement referrals and 22 percent of those subject to school-related arrests, despite representing only 15 percent of total K-12 enrollment.[48] A 2017 analysis by the Education Week Research Center found that Black students were arrested at disproportionately high levels in 43 states and the District of Columbia and that Black boys were three times more likely to be arrested at school than their white male peers.[49]

C. The Commission should adopt Option 3 in order to acknowledge the diminished culpability of youthful offenders and reduce racial disparities.

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differences in criminality between racial groups, but instead can be explained by racial bias); A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM, AM. C.L. UNION (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf (citing data showing that Black people are 3.6 times as likely to get arrested for marijuana possession than white people, despite similar usage rates).

[42] *See* DIANE WHITMORE SCHANZENBACH ET AL., THE HAMILTON PROJECT, INCARCERATION AND PRISONER REENTRY (2016), https://www.hamiltonproject.org/assets/files/12_facts_about_incarceration_prisoner_reentry.pdf.

[43] DRUG POLICY ALLIANCE, THE DRUG WAR, MASS INCARCERATION & RACE (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf.

[44] U.S. Census Bureau, *2020 Census Illuminates Racial and Ethnic Composition of the Country* (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

[45] *See, e.g.*, RICHARD A. MENDEL, DIVERSION: A HIDDEN KEY TO COMBATING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE 1-2, SENT'G PROJECT (2022) (reporting that youth of color are more likely to be arrested and less likely to be diverted than their white peers); *September Defender Letter*, *supra* note 10.

[46] ALBA MORALES, BRANDED FOR LIFE: FLORIDA'S PROSECUTION OF CHILDREN AS ADULTS UNDER ITS "DIRECT FILE" STATUTE, HUM. RTS. WATCH 29-32 (April 2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf.

[47] Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47, 59 (2016).

[48] *Data on Equal Access to Education*, OFF. FOR C.R., U.S. DEP'T OF EDUC., https://civilrightsdata.ed.gov/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[49] Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, EDUC. WK. (Jan. 24, 2017), https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01.

The Commission should adopt Option 3 of Proposed Amendment Two, Part A, to modernize the *Guidelines'* treatment of youthful conduct before age eighteen in recognition of the evolving research on the scientific and psychosocial realities of adolescent brain development. Accepting this relevant research, it would be illogical to enhance the severity of an adult sentence for criminal conduct committed before the developmental maturity requisite for culpability. Allowing past youthful criminal conduct to influence present sentencing outcomes equates less blameworthy behavior with prior adult criminal actions, standing in direct tension with modern research and the Supreme Court's view that offenses committed by adolescents warrant distinct treatment in sentencing compared to those committed by adults.[50] Endorsing this practice would thus frustrate the Commission's statutory goals of revising the *Guidelines* to reflect evolving views.[51]

Option 3 would also most comprehensively address the anti-Black biases endemic in our criminal legal system that compound disparities in sentencing involving youth conduct and further infuse arbitrariness in sentencing outcomes. Given the significant disparities in arrests, prosecutions, convictions, and sentences for Black people at all ages, enhancement schemes based on prior criminal legal contact can exacerbate racial bias rather than function as an accurate measure of culpability or the need for punishment, rehabilitation, or other form of supervision. Accordingly, excluding the consideration of prior sentences for offenses committed during youth would advance the Commission's objective of promoting uniformity in sentencing.[52]

D. The Commission should strike the language allowing judges to consider the conduct underlying offenses committed before age eighteen for purposes of upward departure.

In adopting Option 3, the Commission should strike the bracketed language providing that conduct underlying offenses committed before age eighteen may still be considered for purposes of upward departure pursuant to §4A1.3. Judges should not have the ability to exacerbate sentences for the instant offense based on prior, unrelated conduct committed at a time of developmental immaturity. To do so would run counter to the very reasons why this Commission has rightly recognized the need for rehauling the *Guidelines'* approach to youthful conduct to begin with. The *Guidelines* should reflect strong support for the widely accepted modern understanding of the diminished culpability of youth and prohibit its use in consideration for any type of sentencing enhancement, whether through criminal history score or upward departure.

The theory underlying the policy permitting upward departures is that criminal history categories are "unlikely to take into account all the variations in seriousness of criminal history that may occur" and may "not adequately reflect the seriousness of a defendant's criminal history

[50] *Id.* at 599 (O'Connor, J., dissenting) ("It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability.").
[51] U.S. SENT'G GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2023) (stating that the Commission "expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines…").
[52] *Id.*

or likelihood of recidivism."[53] The *Guidelines* note that while this may occur only in limited circumstances, it may be "particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants."[54] Allowing upward departures, however, could introduce the concerning possibility of judges acting on their own implicit racial biases, potentially exacerbating disparities in sentencing outcomes. The Commission should amend this comment to exclude its reference to young people and the implication that more lenient treatment of youthful criminal conduct could cause a heightened risk of future reoffending. On the contrary, research shows that incarcerating youth substantially increases odds that they will recidivate in the future.[55] Moreover, sentencing recidivist individuals more severely through increased criminal history points, enhanced base offense levels, or career offender designation may in turn increase recidivism rates due to longer periods of incarceration.[56]

II. The Commission should add language providing for downward departures in cases where a defendant was youthful at the time of the offense, eliminate the second proposed factor for consideration, and clarify that the factors listed are not exclusive (Proposed Amendment Two, Part B).

We also propose that the Commission adopt the amendments to §5H1.1 presented in Part B of Amendment Two, which would add language specifically providing for a downward departure in cases where a defendant was youthful at the time of the offense and clarify that the factors presented are not exclusive. Chapter Five of the *Guidelines* addresses the relevance of certain specific offender characteristics in sentencing. In its Introductory Commentary, the *Guidelines* notes that these provisions are meant to further the Commission's goal of ensuring the *Guidelines* and policy statements are "entirely neutral" as to race, among other protected characteristics, and continuously evolve with contemporary research, experience, and analysis. As described in Section I, the dramatic evolution in our legal system's treatment of youthful offenders warrants a thorough revision of the *Guidelines* with respect to all provisions involving youth.

Section 5H1.1 currently provides an example where downward departures may be necessary in the case of elderly and infirm defendants.[57] It does not, however, provide a similar example of when such a departure may be warranted due to a defendant's youthfulness at the time of the offense. The amendment proposed in Part B importantly adds this language to this policy statement and acknowledges that there may be cases in which non-carceral forms of punishment may be more appropriate.[58] Although the *Guidelines* are no longer mandatory,[59] empirical

[53] U.S. SENT'G GUIDELINES MANUAL §4A1.3 cmt. Background (U.S. SENT'G COMM'N 2023).
[54] *Id.*
[55] RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE, SENT'G PROJECT (Mar. 2023), https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/.
[56] Malcolm Coffman, *The Neurological Imprint of Incarceration and its Effect on Recidivism,* NOTRE DAME J. OF L ETHICS & PUB. POL'Y (2023), http://www.antoniocasella.eu/dnlaw/Coffman_2023.pdf.
[57] U.S. SENT'G GUIDELINES MANUAL § 5H1.1 (U.S. SENT'G COMM'N 2023).
[58] 88 Fed. Reg. 89142, 89149.
[59] *See* United States v. Booker, 543 U.S. 220 (2005).

evidence shows that they continue to hold considerable sway and influence over sentencing decisions.[60] As such, we urge the Commission to adopt this amendment to include the suggestion for courts to consider non-carceral forms of punishment in the treatment of youth.

Part B includes two factors for courts to consider in determining whether a departure based on youth may be warranted and, if so, to what extent. We urge the Commission to include language clarifying that courts should not feel constrained by the factors listed alone, and that other appropriate factors should be permitted for consideration. Additionally, the Commission should strike the second proposed factor, which states: "(2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals." This proposed factor is problematic because it does not take into account the variety of factors beyond age that can affect whether someone will reoffend post-release, such as the availability of or access to rehabilitative resources while incarcerated, or even the type of system youth are prosecuted in.[61] Moreover, it does not take into account the harms and abuse youth suffer while incarcerated that studies have found to be the driving factors of reoffending upon release in the first place.[62]

III. The Commission should prohibit all uses of acquitted conduct for purposes of determining a sentence (Option 1 of Proposed Amendment Three).

We commend the Commission for proposing *Guidelines* amendments that would limit the use of acquitted conduct in sentencing. Currently, the *Guidelines* permit judges to use acquitted conduct to determine the *Guidelines* range, to decide on a sentence within a *Guidelines* range, and to upwardly or downwardly depart from the *Guidelines* range. Acquitted conduct sentencing has been described by courts as "Kafka-esque,"[63] "repugnant,"[64] and a "dubious infringement of the

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[60] *See* Pugliese, *supra* note 23, at 13.

[61] *See* Scialabba, *supra* note 14 ("A summary of six studies found that there was greater overall recidivism for juveniles prosecuted in adult court than juveniles whose crimes 'matched' in juvenile court. Juveniles in adult court also recidivated sooner and more frequently. These higher rates of recidivism can be attributed to a variety of reasons, including lack of access to rehabilitative resources in the adult corrections system, problems when housed with adult criminals, and direct and indirect effects of a criminal conviction on the life chances of a juvenile.").

[62] Ian Lambie & Isabel Randell, *The impact of incarceration on juvenile offenders,* CLINICAL PSYCH. REV. (2013), https://www.sciencedirect.com/science/article/abs/pii/S027273581300010X (describing a 2013 review of the impact of incarceration on youth confirms that incarceration often results in negative behavioral and mental health consequences, which can contribute to future contact with the criminal legal system); Coffman, *supra* note 56 (noting that young people have a heightened risk of experiencing trauma and stress while incarcerated, which can ultimately increase the risk of future criminalization); Chelsea Dunn, *Condemning Our Youth to Lives as Criminals: Incarcerated Children as Adults,* RICHMOND J. OF L. & PUB. INT. (2008), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1141&context=pilr (noting that incarceration can have a criminogenic effect for younger individuals because they are exposed to a culture of violence and aggressive behavior, as well as heightened exposure to and increased socialization with other people who have been criminalized and may be deprived of contact with positive social influences outside of correctional facilities).

[63] 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 (2014).

[64] United States v. Watts, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.").

rights to due process and to a jury trial."[65] Public views similarly condemn this practice and view it to be "fundamentally unfair."[66] In response to these concerns, the Commission has proposed three options: Option 1 would codify the definition of "acquitted conduct" and clearly exclude it from consideration for determining the applicable *Guidelines* range. It also brackets possible language to exclude from consideration any conduct either "underlying" the acquitted conduct or "constituting an element" of the charge for which the defendant was previously acquitted. Option 2 would continue to permit judges to rely on acquitted conduct to set the *Guidelines* range but amend the Commentary to §1B1.3 to provide that downward departures based on acquitted conduct "may be warranted if the acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction."[67] Option 3 would similarly allow judges to continue relying acquitted conduct to set the *Guidelines* range but amend §6A1.3 to provide that acquitted conduct may not be used to resolve disputes involving sentencing factors unless the conduct is established by clear and convincing evidence, a higher standard of proof than the *Guidelines* currently require.

We urge the Commission to adopt Option 1 and prohibit judges from considering acquitted conduct at any point in determining a sentence. The use of acquitted conduct sentencing has been criticized as rife with uncertainty and subjectivity at best, and unconstitutional at worst, a debate which several Justices on the Supreme Court have indicated is one that should be primarily resolved by this Commission.[68] Option 1 is the optimal choice for three reasons: First, it mitigates the disproportionate impact of the use of acquitted conduct sentencing on Black defendants. Second, it reaffirms the critical and historical role of the jury in our criminal legal system. And finally, it promotes the Commission's stated goals of achieving certainty, fairness, and uniformity in sentencing. Options 2 and 3 fall short of addressing these concerns.

A. Sentencing enhancements based on acquitted conduct disproportionately impacts Black defendants.

Despite the facially neutral policy of acquitted conduct sentencing, this practice produces significant racial disparities in its application and particularly impacts Black defendants. A critical analysis of this practice revealed that sentencing enhancements based on acquitted conduct has been used at higher rates against Black defendants than against white defendants, suggesting that acquitted conduct may be used as a proxy for race.[69]

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[65] United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).
[66] United States v. Martinez, 769 F. App'x 12, 17 (2d Cir. 2019) (Pooler, J., concurring); *see also* United States v. Canania, 532 F.3d 764, 778, n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a juror's letter to sentencing court); United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008) ("To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence. . . .").
[67] 88 Fed. Reg. 89142, 89150-51.
[68] *Id.* at 5 (statement of Sotomayor, J., respecting the denial of certiorari).
[69] Yalinçak, *supra* note 63, at 706-09.

As noted above, Black people face unequal treatment at almost every level of the United States criminal legal system by almost every category of actor involved: Black people are stopped and arrested by law enforcement, prosecuted to fuller extents, and sentenced to incarceration by judges at rates higher than any other races in the country.[70] The confluence of implicit and structural anti-Black biases giving rise to the disproportionate rates at which Black people are charged for crimes sets the foundation for similarly uneven rates in acquitted conduct. An analysis of data published by the Bureau of Justice Statistics found stronger trends in jury acquittals for Black defendants than for white defendants.[71] In an examination of over 50,000 state court felony cases across 75 of the largest counties in the country in May 1992, jurors acquitted 83 percent of Black defendants charged with rape and 22 percent of those charged with murder, as compared to 24 percent and zero percent of white defendants charged with those crimes, respectively.[72]

Indeed, disproportionately high rates of charges brought against Black individuals, driven in part by prosecutorial bias,[73] could lead to higher rates of acquittals. Yet due to persistent implicit biases inherent in all human beings, there is a risk that judges would nevertheless rely on acquitted conduct in sentencing and mete out harsher penalties for Black defendants.

B. The Proposed Amendment correctly values the critical role of the jury in our criminal legal system.

Judges are susceptible to implicit biases just as any other human being, notwithstanding their oath of neutrality.[74] Judges tend to rely on intuition which can by influenced by automatic judgements that do not safeguard against underlying prejudice as much as careful deliberation can.[75] Studies have shown that judges—particularly white judges—tended to reveal preferences for whiteness and were more likely to impose harsher punishments on defendants when primed with words associated with Black people.[76]

Since the founding, juries have historically served as a critical check on the judiciary and the government's authority to punish individuals.[77] Several Justices have reiterated this point, questioning the legitimacy of a practice that permits unchecked jury nullification.[78] When

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[70] RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, THURGOOD MARSHALL INST., LEGAL DEF. FUND, BARRED FROM WORK: THE DISCRIMINATORY IMPACTS OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 4 (Apr. 2023), https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf.

[71] *Blacks Acquitted More Than Whites*, DESERET NEWS (Oct. 10, 1996), https://www.deseret.com/1996/10/10/19270773/blacks-acquitted-more-than-whites#:~:text=Jurors%20acquitted%2083%20percent%20of%20blacks%20charged%20with,by%20juries%2C%20compared%20with%2022%20percent%20of%20whites.

[72] *Id.*

[73] *See supra* notes 30-35 and accompanying text.

[74] 28 U.S.C. § 453.

[75] Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 44 (2014).

[76] *Id.*

[77] McClinton v. United States, 600 U.S. ___, 2 (2023) (statement of Sotomayor, J., respecting the denial of certiorari).

[78] Dave S. Sidhu & Rosemary W. Gardey, *The Use of Acquitted Conduct to Enhance Federal Sentences*, CONG. RSCH. SERV. (Sept. 8, 2023) ("Then-Justices John Paul Stevens and Anthony Kennedy dissented in Watts, arguing that

individuals are judged by a jury of their peers, people are more likely to believe that the decision is based on the Constitution, the law, and the specific facts of the case, leading to increased perceptions of fairness in the criminal legal system.[79] Given the critical importance of this system, judges should not hold the individual power to swiftly undercut a jury's collective, deliberative decision and enhance a punishment based on acquitted conduct. Permitting this practice creates particularly fertile ground for a judge's implicit biases to play out in sentencing determinations, usurping the role of the jury based on their own view of the defendant's culpability.

C. Option 1 promotes the Commission's goals of achieving certainty, fairness, and uniformity in sentencing.

In light of these concerns, the Commission should prohibit the use of acquitted conduct for purposes of determining guidelines ranges in order to ensure certainty, fairness, and uniformity in sentencing. Both courts and the public alike have condemned this controversial practice as "fundamentally unfair,"[80] raising concerns about the public's perception that justice is truly being served, "a concern that is vital to the legitimacy of the criminal justice system."[81] The inescapable role that implicit racial bias plays in courts' unfettered sentencing determinations further compounds racial disparate outcomes. The Commission should prohibit this controversial practice to promote fairness and infuse broader legitimacy in the sentencing process.

Prohibiting acquitted conduct sentencing will also further the Commission's purposes of achieving certainty and uniformity in sentencing. Using evidence of acquitted conduct to enhance punishment requires courts to look beyond the instant offense of conviction. Accordingly, this approach creates unwarranted sentencing disparities that are neither certain nor consistent.[82] Disparities continue to compound in courts that choose not to rely on acquitted conduct for sentencing purposes. Depending on the judge before whom a defendant appears—and, crucially,

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acquitted conduct undermines the jury's verdict of acquittal. Then-Justice Antonin Scalia (joined by then-Justice Ruth Bader Ginsburg and Justice Clarence Thomas) dissented from the denial of certiorari in [*Jones v. United States*, 135 S. Ct. 8 (2014)], contending that 'any fact necessary to prevent a sentence from being substantively unreasonable . . . is an element that must be either admitted by the defendant or found by the jury.' Likewise, Justice Neil Gorsuch wrote while serving on the Tenth Circuit that it is 'far from certain' whether the Constitution allows a court to increase a defendant's sentence 'based on facts the judge finds without the aid of a jury or the defendant's consent,' citing then-Justice Scalia's dissent. Similarly, Justice Brett Kavanaugh, while sitting on the D.C. Circuit, commented that '[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.'").

[79] STATE OF THE STATE COURTS: 2022 POLL 13, NAT'L COUNC. FOR STATE CTS. (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf.

[80] United States v. Martinez, 769 F. App'x 12, 17 (2d Cir. 2019) (Pooler, J., concurring); *see also* United States v. Canania, 532 F.3d 764, 778, n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a juror's letter to sentencing court); United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008) ("To be sure, we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence. . . .").

[81] *McClinton*, 600 U.S. (statement of Sotomayor, J., respecting the denial of certiorari).

[82] *September Defender Letter*, *supra* note 10, at 7 ("By looking beyond the offense of conviction, the approach treats people "who have been found guilty of similar criminal conduct" differently. And it treats people acquitted of criminal conduct the same as if they were convicted.").

whether that judge practices acquitted conduct sentencing—the resultant sentence could range from a few years to a few decades.[83] This outcome is wholly opposite from the *Guidelines'* goal.

IV. Conclusion

We applaud the Commission for proposing revisions that would promote stronger and more fair sentencing policies with respect to enhancement mechanisms that, in practice, perpetuate racial biases and uncertain outcomes. Modernizing the *Guidelines* to align with contemporary research and legal precedent involving youthful offenses would not only fulfill the Commission's statutory mandates to update the *Guidelines* and increase uniformity in sentencing, but it would also mitigate the sharp racial disparities in sentencing related to youthful offenses that disproportionately punish Black individuals. Amending the *Guidelines* to prohibit the controversial practice of acquitted conduct sentencing will further help to neutralize the implicit and structural racial biases contributing to unfair sentencing of Black defendants. We urge the Commission to adopt Option 3 of Proposed Amendment Two and Option 1 of Proposed Amendment Three and make clear that youthful conduct and acquitted conduct should never be considered in determining sentencing ranges.

Thank you for the opportunity to comment. If you have any questions, please contact Sarah Seo, Policy Fellow, at sseo@naacpldf.org, or Amalea Smirniotopoulos, Senior Policy Counsel, at asmirniotopoulos@naacpldf.org.

Sincerely,

Sarah Seo, Policy Fellow
Amalea Smirniotopoulos, Senior Policy Counsel
NAACP Legal Defense and Educational Fund, Inc. (LDF)
700 14th Street NW, Suite 600
Washington, D.C. 20005

[83] *See, e.g.*, *McClinton*, 600 U.S. at 1 (2023) (statement of Sotomayor, J. respecting the denial of certiorari) ("McClinton's Guidelines range had initially been approximately five to six years. Yet taking into account the killing[, for which the jury unanimously acquitted him of,] the judge sentenced McClinton to 19 years in prison.").

NAAUSA
National Association of Assistant U.S. Attorneys

February 22, 2023

Chair Judge Carlton W. Reeves
U.S. Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Written Comments on the Proposed 2024 Amendments to the Federal Sentencing Guidelines

Dear Chair Judge Carlton W. Reeves, Vice Chairs, and Commissioners:

On behalf of the National Association of Assistant United States Attorneys (NAAUSA)—representing the interests of over 6,000 Assistant U.S. Attorneys (AUSAs) working in the 94 U.S. Attorney Offices—I write to provides comments on the Proposed 2024 Amendments to the Federal Sentencing Guidelines.

AUSAs are dutifully committed to defending the innocent and prosecuting the guilty through our federal criminal justice system. The system relies on public trust to succeed. The U.S. Sentencing Guidelines foster this trust by promoting the predictable and fair application of the law. While individualized determinations are necessary, the guidelines are designed to encourage a degree of uniformity among similarly situated offenders. This uniformity ensures offenders across the country, regardless of in which jurisdiction they are prosecuted, can understand their sentence and feel their sentence is fair compared to other offenders.

The uniformity the U.S. Sentencing Guidelines provide also guard against other potential ills. When the guidelines are clear and well-structured, there is less room for personal bias in decision-making. Offenders from Mississippi to California can look to the guidelines and know their sentence was imposed objectively. For these reasons, we encourage judges to heed the guidelines and encourage the Commission to adopt our recommendations below.

I. Rules for Calculating Losses

NAAUSA does not have substantive comments regarding this proposal, however, we appreciate the Commission for acknowledging the ongoing debate regarding the amount of deference afforded to various guideline commentary provisions. Due to this, the Commission's effort to move general rules from the commentary to the guidelines makes sense.

To this extent that this change reduces inconsistencies across the circuits, NAAUSA supports this effort.

II. Youthful Offenders

NAAUSA opposes the proposed amendment impacting youthful offenders. The existing guidelines for counting convictions for offenders sustained before the age of 18 strike the proper balance.

Prior criminal conduct continues to be a major predictor of future recidivism. The Commission has found that "younger offenders were more likely to be rearrested than older offenders, were rearrested faster than older offenders, and committed more serious offenses after they were released than older offenders."[1] Indeed, the Commission's research shows that the "younger than 30 age group" had the highest rearrest rate at 64.8%.[2] Given this, it is important that the criminal convictions by younger offenders, including those juvenile convictions currently counted under the Guidelines, are factored into the criminal history calculation.

Additionally, after decades of decline, juvenile crime is on the rise across the nation. Homicides committed by juveniles acting alone rose 30% in 2020 from 2019 while those committed by multiple juveniles increased 66%.[3] The impact is most acute in cities. For example, New York City reported 124 juveniles committed shootings in 2022, more than double the number from 2020.[4] Similarly in Washington D.C. there were 214 firearm-related arrests of minors in 2022, a higher count than each of the prior three years, and in Philadelphia there were 117, up from only 43 in 2019.[5] These numbers represent a startling trend that can only be solved with community intervention before a crime is committed, not leniency after a crime is committed, particularly when many victims are youths themselves.

The surge in juvenile crime in many jurisdictions makes it even more imperative that juvenile convictions under the current Guidelines continue to count towards the criminal history calculation. The Guidelines currently allow for judges to consider factors to allow for a downward departure—such as if the criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will reoffend. This scheme provides the correct balance between the need for justice, punishment, judicial discretion and protection of public safety.

III. Acquitted Conduct

NAAUSA opposes the proposed options related to acquitted conduct. Currently, a judge may consider conduct proved by a preponderance of evidence when determining an appropriate sentence for a convicted individual. Judicial discretion to consider "acquitted conduct" acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual. Protections are already in place to ensure individuals are not improperly connected to unrelated conduct during sentencing. Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea or which has been found not to be proven by a jury beyond a reasonable doubt ensures the court has a full picture of the individual's conduct.

The proposed amendments adopt a more modest definition of "acquitted conduct" limiting it to "conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure." As noted, courts are currently able to consider a variety of conduct proved by a preponderance of evidence that is often (perhaps improperly) termed 'acquitted conduct.'

[1] The Effects of Aging on Recidivism Among Federal Offenders (ussc.gov)
[2] Id.
[3] Juvenile Crime Surges, Reversing Long Decline. 'It's Just Kids Killing Kids.' - WSJ
[4] Id.
[5] Id.

The proposed amendments essentially adopt a carve out for conduct constituting an element of] a charge of which the defendant has been acquitted. This will only cause confusion in the courts, resulting in mini trials during sentencing to determine if conduct is close enough to constitute an element of a charge of which the defendant has been acquitted. Ultimately, the proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing a sentence under 18 U.S.C. § 3553(a) and constitutes a bridge to the eventual elimination of consideration of relevant conduct at sentencing.

Further, it is important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term refers to any conduct that was determined by the factfinder to not have been proven beyond a reasonable doubt. Judges are more than capable of appropriately exercising their discretion when deciding to consider acquitted conduct or conduct not otherwise admitted to by the defendant at sentencing. Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence to even be considered. This burden of proof ensures the defendant is not held responsible for conduct based on insufficient evidence, while at the same time enabling the court to understand the full scope of the defendant's criminal activity.

This proposal would essentially bar the court from considering any evidence not resulting in a guilty verdict at trial or admitted at a plea. This severely and unfairly limits the court's view of the defendant's conduct. Given the frequent overlapping nature of evidence applicable to different offenses charged within a single case, there is a significant likelihood that the proposed amendment will generate massive amounts of litigation, disparate results among similarly situated offenders, and a lack of predictability at sentencing.

The proposed Guideline would also result in illogical and unjust outcomes. For example, consider the case of a defendant who is charged with five counts of being a felon in possession of a firearm for being in constructive possession of five firearms found in his vehicle. The defendant could be acquitted of all but one count, because there was DNA found on only one gun; however, under the proposed amendment, the court could not consider the four additional firearms recovered from the defendant's vehicle for purposes of enhancing the defendant's base offense level because he was acquitted of possessing the four other firearms. Such a result nullifies provisions related to accounting for relevant conduct that exist throughout the Sentencing Guidelines.

Finally, this proposal seems to rely on misconceptions about the role of conduct history in charging, plea bargaining and sentencing.

Charging and plea bargaining are distinct steps in the criminal justice process from sentencing. During the sentencing phase, the prosecution seeks to achieve a variety of objectives, such as seeking imposition of punishment, restoration to victims, facilitating rehabilitation, and deterring unlawful conduct. While charging is crime-specific, the unique goals of sentencing require a fuller picture of an individual's past conduct, including all aspects of an offender's characteristics, background and offense conduct. Conduct that can be proved by a preponderance of evidence is critical to this picture, even if the individual was acquitted of certain offenses or did not specifically admit guilt to certain facts as part of a plea.

The proposed amendment does nothing more than allow defendants to cherry pick those facts that reflect positively on the offender at sentencing while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

IV. Circuit Conflicts

(a) *Circuit Conflict Concerning §2K2.1(b)(4)(B)(iii)*

NAAUSA supports option two based on the reasoning of the Fourth, Fifth, Ninth, and Eleventh Circuits. The subsection provides an enhancement for a firearm with an "altered or obliterated serial number." As the Fourth Circuit correctly held "a serial number that is made less legible is made different and therefore is altered for purposes of the enhancement."[6] This interpretation aligns with the common sense understanding of the term "altered." It is not broad enough to cover incidental damage, but also is not so narrow enough to allow a defendant to avoid enhancement by merely making sure the serial is somewhat readable.

Conversely, the Second, Sixth, and Ninth Circuit add an extra-statutory requirement that the firearm's serial number be altered to the point that it is no longer legible. This undermines what is otherwise a straightforward and commonsense application of the enhancement.

(b) *Circuit Conflict Concerning the Interaction Between § 2K2.4 and § 3D1.2(c)*

NAAUSA does not have substantive feedback on the proposal concerning the interaction between § 2K2.4 and § 3D1.2(c). We write only to note that the Seventh Circuit in *Sinclair* admitted that the usual analysis normally requires grouping. However, the court went on to find "the usual analysis is incomplete in the specific circumstances of this case."[7] The court ultimately held that "in the specific circumstances of Sinclair's case, the grouping rule of § 3D1.2(c) does not apply."[8] Thus, the Seventh Circuit's analysis may be viewed as an outlier that does not reflect the traditional understanding of grouping as outlined in the Sixth, Eighth, and Eleventh Circuits.

We applaud the Commission for working to resolve the circuit split and bring clarity to this area in the law.

V. Simplification of Three Step Process

NAAUSA opposes the proposed amendment related to the three step process pending additional study and consideration.

As an initial matter, it is not clear whether the Commission has the authority to enact this change. Congress has taken affirmative action to alter the court's consideration of policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence. For example, in the PROTECT Act (Public Law No: 108-21), Congress restricted a court's authority to provide downward departures at step two in child pornography cases.

The Department of Justice made clear in its factsheet celebrating the Act's passage that Congress was concerned about judges sentencing criminal defendants to less time in jail than the Sentencing Guidelines permit:

> For years, downward departures in child pornography possession cases have ranged between 25% and 29% nationwide.

[6] United States v. Harris, 720 F.3d 499, 501 (4th Cir. 2013).
[7] United States v. Sinclair, 770 F.3d 1148, 1157 (7th Cir. 2014).
[8] Id. at 1159.

> One judge, for example, granted a 50% downward departure to a 5'11", 190-lb. child pornography defendant - who had accessed over 1,300 child pornography pictures and begun an Internet correspondence with a 15-year-old girl in another state - in part due to his concern that the defendant would be "unusually susceptible to abuse in prison." United States v. Parish, 308 F.3d 1025 (9th Cir. 2002) (rejecting Government's appeal and affirming the sentence).
> The bill provides the judiciary with less authority to give reduced prison sentences, by eliminating much-abused grounds of departure such as "diminished capacity," aberrant behavior," and "family and community ties."[9]

It is a long-understood canon of statutory interpretation that Congressional action in one area implies a lack of executive authority to unilaterally do the same or contrary action. Here, Congress has affirmatively acted to provide or remove offense specific departures. The Commission's proposal essentially rewrites the guidelines as they relate to these departures.

In addition, it is not clear that this proposal is merely a content, neutral technical correction that would simplify the three step process. This proposal will likely have an effect and that effect will be a less clear and complete sentencing record.

While this may simplify a judge's process for granting departures, it also enables judge's to be vaguer at sentencing about their reason for departing from the guidelines. As a result, it will be less clear at the appellate level how sentencing decisions were made. Ultimately, this may lead to less transparency and more confusion.

We urge the Commission to conduct a study on (1) the magnitude of the proposed change, (2) the authority under which the Commission may enact the change, and (3) the change's potential impact on sentencing. Until this clarity is provided, we urge the Commission to reject this proposal.

Thank you for considering NAAUSA's perspective. Please contact NAAUSA's Washington Representative Natalia Castro (ncastro@shawbransford.com) if you have any additional questions.

Sincerely,

Steven Wasserman
NAAUSA President

[9] #266: 04-30-03 FACT SHEET PROTECT ACT (justice.gov)

February 22, 2024

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

Re: Proposed Amendments to the Sentencing Guidelines

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on these important proposed amendments.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

I. Proposed Amendment 1: Rules for Calculating Loss

The Commission seeks comment on whether it should adopt the proposed amendment to Application Note 3(A) of the Commentary to § 2B1.1 to address the Third Circuit's decision in *United States v. Banks*, 55 F.4th 246 (3rd Cir. 2022) during this amendment cycle, or whether it should defer making changes to § 2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of § 2B1.1. NACDL does not support the proposed amendment being adopted during this cycle and requests that the Commission delay any changes to § 2B1.1.

The proposed amendment, which merely moves Application Note 3(A) of § 2B1.1 from the Commentary to the text of the guideline, does nothing to ameliorate the long-standing criticisms of § 2B1.1 shared by NACDL and other stakeholders. As NACDL has previously

informed the Commission, it supports a wholesale reevaluation of § 2B1.1 to address issues such as overlapping enhancements, the existence of a loss chart, and the problematic use of "intended loss" in lieu of "actual loss."[1] NACDL also believes a complete modification of § 2B1.1, similar to the example presented by the American Bar Association and submitted to the Commission for consideration in 2014, is needed.[2]

As a part of a comprehensive examination of § 2B1.1, NACDL believes the Commission should modify § 2B1.1 to reduce the extent to which offense levels are based on loss amount. Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from bench and bar alike.[3] NACDL continues to believe that § 2B1.1 should be re-conceptualized to address these criticisms by reducing the outsized role that loss amount currently plays in sentencing determinations.

Additionally, NACDL has long advocated for the Commission to reconsider the use of "intended loss" in § 2B1.1. The current construction often produces unfair sentencing outcomes for defendants whose offenses have caused little or no losses, as those defendants often face years or decades in prison because of what they purportedly intended but failed to achieve. Along with the unjust result of a sentence so vastly disproportionate to the injury caused by the crime, this approach raises serious questions regarding a court's ability to determine what a defendant intended in the absence of actual harm. NACDL recommends that that the Commission consider decoupling "intended loss" from the loss table and instead treat any disparity between actual and intended loss as grounds for a potential sentence enhancement.

Additionally, NACDL continues to support modifications that would lessen the impact of the loss table for all defendants sentenced under § 2B1.1 who gain little or nothing from their

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[1] *See* NACDL Comments on Proposed Amendments for 2015 Cycle, https://www.nacdl.org/Document/Comments-USSC-2015Amend-03182015, at 8-13 (2015).

[2] American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. (Nov. 10, 2014).

[3] *See*, *e.g.*, *United States v. Gupta*, 904 F.Supp.2d 349, 350 (S.D.N.Y. 2012) (noting that "the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice"); *United States v. Parris*, 573 F.Supp.2d 744, 751 (E.D.N.Y. 2008) ("[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."); *see also* James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED SENT. R. 138, 139 (2010) (describing the current high-loss guidelines as "overkill"); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED SENT. R. 167, 169 (2008) ("In sum, since *Booker*, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high"); Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1648-49 (2007) (discussing how the loss table often overstates the actual harm suffered by the victim).

conduct, and better adhere to the statutory directive in 28 U.S.C. § 994(j) to ensure the Guidelines reflect the appropriateness of a non-custodial sentence for first-time, non- violent, non-serious offenders. Such a revision is required to promote fairness in sentencing for offenses that do not produce pecuniary harm (or that produce less harm than a defendant may arguably have intended).

Accordingly, NACDL submits that any changes to § 2B1.1 be delayed until the Commission can fully address these as well as other fairness and equity concerns through a comprehensive examination of § 2B1.1.

II. Proposed Amendment 2: Youthful Individuals

The Commission's examination of the treatment of youthful individuals and the interplay of youth on calculation of criminal history and age-related sentencing departures is warranted and welcome. Youthful individuals are different – the science of the adolescent brain has told us this for some time. For this reason, NACDL supports promulgation of Part A – Option 3: excluding all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of one's criminal history score. NACDL further supports promulgation of Part B of the proposed amendment: consideration of youth as grounds for a departure is warranted.

In addition to our comments below, we at NACDL have had an opportunity to review the Federal Public and Community Defenders' Comment on Youthful Individuals, and we join in their comments.

Proposed Amendment: Part A

In the Synopsis of its Proposed Amendment, the Commission aptly recognizes that juvenile proceedings vary widely by state: whether juveniles are entitled to trial by jury; whether juvenile proceedings are open to the public; whether juvenile adjudications may be expunged or sealed; or at what age a juvenile may be transferred to criminal court to be prosecuted as an adult. *See* "Proposed Amendment: Youthful Individuals (Juvenile Proceedings in General)," *citing* Charles Puzzanchera *et al.,* Nat'l Ctr. for Juv. Just., *Youth and the Juvenile Justice System: 2022 National Report 93 (2022).* Indeed, it's not just the age at which transfer hearings are possible but the very procedure by which such a life-changing decision is made: is the court a gate-keeper, determining if certain factors have or have not been established to determine whether a juvenile is amenable to treatment in juvenile court or should instead be transferred; or, is the decision one made solely by the prosecution without an external check (e.g., by way of direct filing)?

However, it's not simply the effort to seek parity and avoid the disparities that can result from the differences in juvenile proceedings among the states that supports promulgation of Part A – Option 3. Perhaps of even greater import is the recognition that youthful offenders are

different than adult offenders. Youthful offenders simply aren't the equivalent of adults developmentally, and, thus, their adjudications must not be treated as equivalent to convictions sustained by adults for criminal history purposes.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court banned mandatory life-without-parole sentences for youthful offenders under the age of 18, finding that such punishment is disproportionate for nonviolent offenses; further, in a later ruling, the Court reiterated that even for murder convictions the punishment of life-without-parole should be reserved "for all but the rarest children, those whose crimes reflect irreparable corruption."[4] As recognized by the Supreme Court, the characteristics of youth diminish adolescents' culpability and heighten their potential for change, thus "weaken[ing] rationales for punishment."[5]

Roper and its progeny established a chronological age of 18 as the cutoff point. However, significant advances in social science and developmental psychology have occurred in the ensuing years.[6] Said advances have unequivocally demonstrated that significant brain development supporting greater complexity in brain functions continues to take place well beyond the age of 18 years, leading to a paradigmatic shift in the way that the behavior of adolescents and young adults is understood.[7]

In a 2011 publication, the National Institute of Mental Health detailed research that striking changes in brain development take place during the teen years, altering long-held assumptions about the timing of brain maturation. In significant ways, the brain doesn't look like that of an adult until the early 20s. The parts of the brain responsible for more 'top-down' control, controlling impulses, and planning ahead—the hallmarks of adult behavior—are, in fact, among the last to mature.[8] Additional recent studies indicate that the riskiest behaviors arise from a mismatch between the maturation of networks in the limbic system, which drives emotions and becomes turbo-boosted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses, documenting that the prefrontal cortex – the region of the brain responsible for risk-weighing and

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[4] *Montgomery v. Louisiana*, 577 U.S. 190, 195 (2016) quoting *Miller* 567 U.S. at 479-480.; *see also Roper v. Simmons,* 543 U.S. 551, 573 (2005).

[5] *Miller*, 567 U.S. at 473, 479.

[6] *See, e.g., How Should Justice Policy Treat Young Offenders*? BJ Casey, Richard J. Bonnie, BJ Casey, Andre Davis, David L. Faigman, Morris B. Hoffman, Owen D. Jones, Read Montague, Stephen J. Morse, Marcus E. Raichle, Jennifer A. Richeson, Elizabeth S. Scott, Laurence Steinberg, Kim Taylor-Thompson, Anthony Wagner; *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* (2017).

[7] McCaffrey, R.J., Reynolds, C.R. Neuroscience and Death as a Penalty for Late Adolescents. *J Pediatr Neuropsychol* **7,** 3–8 (2021). https://doi.org/10.1007/s40817-021-00104-y.

[8] The Teen Brain: Still Under Construction, National Institute of Mental Health (2011), p.3. http://www.ncdsv.org/images/NIMH_TeenBrainStillUnderConstruction_2011.pdf.

understanding consequences – continues to change prominently until well into one's twenties.[9] Put simply, the brain is still under construction until age 25:

The development and maturation of the prefrontal cortex occurs primarily during adolescence and is fully accomplished at the age of 25 years. The development of the prefrontal cortex is very important for complex behavioral performance, as this region of the brain helps accomplish executive brain functions.[10]

These findings also explain why a young adult is more susceptible to negative outside influences, further exacerbating the already-existing predisposition to risk-taking and deficiencies in decision making.[11]

Moreover, as discussed in detail by the Federal Public and Community Defenders, racial and ethnic disparities are endemic to the juvenile legal system. Beginning at arrests and running throughout the entire process – from referrals to juvenile court, to diversion out of the system, to the disposition of the petition (and whether or not said disposition is community-based or entails confinement), to the decision to transfer the case to adult court, youth of color are disproportionately represented in the school-to-prison pipeline.[12] As the Defenders aptly note, by using youth priors to enhance guideline ranges, §4A1.2(d) compounds and extends the racial and ethnic disparities that abound in the juvenile legal system – and that alone is reason to amend §4A1.2(d) as proposed in Part A – Option 3.[13]

The Commission acknowledged the research recognizing that youthful offenders have diminished culpability and, thus, are different from adults for purposes of sentencing in its 2017 report, *Youthful Offenders in the Federal System*. It is time to act on this acknowledgement.

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[9] Jay N. Giedd, "The Amazing Teen Brain," SCIENTIFIC AMERICAN (June 2015), Vol. 312, 34; *see also* Arain et al., *Maturation of the Adolescent Brain,* 9 Neuropsychiatric Disease & Treatment 449, 449-450, 453-454 (2013).

[10] *See* Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health (Sept. 2009); National Institute of Mental Health, *The Teen Brain: Still Under Construction* (2011); *see also* Icenogle et al, *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample,* 43 Law & Hum. Behav. 69, 0 (2019).

[11] *See* Gardner & Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision making in Adolescence and Adulthood: An Experimental Study,* 41 Dev. Psychol. 625, 629-634 (2005).

[12] *See, e.g.,* Ellen Marrus & Nadia N. Seeratan*, What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America,* 8 J. Marshall L. J. 437, 439–440, 444 (2015) ("*What's Race Got to Do with It?*"); *see also* U.S. Dep't of Justice, Ofc. of Juvenile Justice & Delinquency Prevention, *Racial and Ethnic Disparity in Juvenile Justice Processing* (Mar. 2022) ("OJJDP Racial and Ethnic Disparities"), http://tinyurl.com/4pzsu84f;NCJJ National Report at 163.

[13] *See* U.S. Sentencing Comm'n, *Public Data Presentation: Proposed Amendments on Youthful Individuals*, at 28 (Jan. 2024), https://www.ussc.gov/education/videos/2024-youthful-individuals-data-briefing (data showing that, of those who received at least one criminal history point for offenses prior to age 18 in FY 2022, 89% were non-white and almost 60% were Black).

Considering the disparity in juvenile rights and processes across the country, the documented science surrounding the adolescent brain, and the disparate impact of the juvenile legal system on children of color, it is time the Commission change its current stance on counting juvenile adjudications and adult convictions sustained prior to the age of 18 when determining an individual's criminal history. The Commission should, as set forth in Part A – Option 3, amend § 4A1.2(d) to exclude all sentences resulting from offenses committed prior to age 18 from being considered in the calculation of the criminal history score.

Proposed Amendment: Part B

For the reasons detailed above, NACDL also urges the Commission to amend the language of § 5H1.1 to specifically provide for a downward departure in instances where the defendant was a youthful offender at the time of the offense. Recognition that a person's age may warrant a mitigated sentence and that age may be considered when determining the sentence to be imposed is welcomed and appropriate.

III. Proposed Amendment 3: Acquitted Conduct

NACDL is pleased that the U.S. Sentencing Commission's Proposed Amendments to the Federal Sentencing Guidelines once again include changes to partially address the unfair practice of allowing acquitted conduct to be considered as relevant conduct under Sentencing Guideline Section 1B1.3. Permitting the use of sentencing based on acquitted conduct violates defendants' due process rights, subverts the crucial role of juries in protecting constitutional rights, and contributes to the trial penalty, which—as the Commission's own statistics[14] prove—has virtually eliminated jury trials in our criminal legal system. Unsurprisingly, acquitted conduct sentencing has been roundly criticized by groups across the political spectrum[15] and is a perennial topic of Supreme Court *certiorari* petitions[16] as defendants seek to challenge this unfair, but unfortunately persistent, practice.

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[14] U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, tbl. 11 (noting that only 2.5% of federal criminal convictions in 2022 were due to guilty verdicts at trial while the other 97.5% were the result of pleas).

[15] *E.g.*, Am. Bar Ass's, *Not Guilty but Might as Well Be: Ending Acquitted Conduct Sentencing*, https://www.americanbar.org/groups/litigation/committees/criminal/articles/2015/fall2015-0915-not-guilty-but-might-well-be-ending-acquitted-conduct-sentencing/ (Sept. 17, 2015); Ams. for Prosperity, *Diverse coalition urges Supreme Court to end acquitted conduct sentencing* (July 9, 2021); Cato Institute, *Addressing the Gross Injustice of Acquitted Conduct Sentencing*, https://www.cato.org/blog/addressing-gross-injustice-acquitted-conduct-sentencing (Sept. 26, 2019); Nat'l Ass'n of Crim. Defense Lawyers, https://www.nacdl.org/search?term=*&activefilter=Acquitted%20Conduct (collecting letters, amicus briefs, and other resources in opposition to acquitted conduct sentencing) (last visited Feb. 6, 2023).

[16] *See, e.g.*, *McClinton v. United States*, No. 21-1557, *cert. denied* (2023); *Osby v. United States*, 142 S. Ct. 97, No. 20-1693, *cert. denied* (2021); *Asaro v. United States*, 140 S. Ct. 1104, No. 19-107, *cert. denied* (2020).

Punishing a defendant for acquitted conduct undermines both the essential role of the jury and the defendant's Sixth Amendment rights. The right to jury trial was sacrosanct to the Constitution's framers and was considered among the most important constitutional bulwarks against tyranny.[17] The right to trial holds a vaunted place in the Constitution itself; it is the only individual right established and guaranteed in both the Constitution's original text and in the Bill of Rights.[18] Permitting the judge to override or nullify a jury's acquittal by sentencing a defendant based on conduct they were acquitted of by the jury undermines this crucial constitutional right.

The right to jury trial is not just important for the defendant. It is also an important part of public oversight of the legal system. Jury participation is a civic obligation and acts as a community check on the power of the government.[19] Sentencing based on acquitted conduct also undermines the legitimacy and public respect for the legal system.[20] It conveys the message to jurors that their carefully considered decision was wrong and that their jury service was inconsequential. It communicates to the jury, the defendant, and the public that the courts are skewed in favor of the prosecution and that verdicts in favor of the accused need not be respected. This understandable sense of unfairness and loss in public confidence is particularly felt in impacted communities.[21] A review of the public comments on acquitted conduct shows

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[17] John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000) ("Representative government and trial by jury are the heart and lungs of liberty.").

[18] U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[19] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 10 (2018), https://nacdl.org/TrialPenaltyReport [hereinafter, NACDL Trial Penalty Report]; *see also* Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Emp. L. Studies 973, 974 (2004) ("In its political aspect, the jury is a 'republican' body that 'places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.").

[20] *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415 (2011) (stating that the "admission of prior acquittals in sentencing undermines the claim of the criminal justice system to be doing justice, and thus its broader legitimacy."); *see also R. v Sussex Justices ex p. McCarthy*, 1 K.B. 256, 259 (1923) (Eng.) (Lord Hewart, C.J.) (Not only must Justice be done; *it must also be seen to be done*.") (emphasis added). The use of acquitted conduct in sentencing, however, is perhaps an even easier case than what was before Lord Hewart. Its use does not merely *seem* unjust; it is unjust.

[21] *See* Tom Tyler, *Why People Obey the Law* (2006) (arguing that the perception that the law is fair is critical to engendering respect for the law, thus promoting public safety).

nearly uniform opposition to the use of acquitted conduct in sentencing[22] and shows that the harms noted above are both understood and felt by the public.

It is not just citizens or even just advocacy groups that have criticized acquitted conduct sentencing. A 2010 survey of over 600 District Judges conducted by the Sentencing Commission found that only 16% believed that acquitted conduct should be considered relevant conduct.[23] This is important for two reasons. First, it indicates widespread concern and opposition to this practice by those who are, of course, responsible for sentencing: roughly every five out of six District Judges oppose the use of acquitted conduct in sentencing. But secondly, the fact that many District Judges would still sentence using acquitted conduct, while many more will not, contributes to the likelihood of unfair disparities in sentencing that sentencing judges are required by federal statute to seek to avoid.

Because it is unjust and causes significant harm to the fairness and legitimacy—both actual and perceived—of the criminal legal system, NACDL categorically opposes any use of acquitted conduct in sentencing. If it is wrong to consider acquitted conduct as relevant conduct in sentencing, as we believe it is, then it is wrong to do so in any context.

For this reason, NACDL does not unreservedly support any of the three options proposed by the Commission for limiting acquitted conduct sentencing. Option 2 is unsatisfactory because it seems unlikely that a judge who has chosen to include acquitted conduct as part of relevant conduct would then decide that its use was "disproportionate" and grant a downward departure. This is particularly true because, as noted above,[24] most district judges already oppose the use of acquitted conduct in sentencing. Option 3 presents only a minor change, a slight strengthening of the evidentiary standard. Again, we doubt this would meaningfully limit the use of acquitted conduct and may introduce confusion by adding a new evidentiary standard that is not otherwise seen in a frequently used Guideline.

Option 1 presents the most favorable out of three suboptimal choices. We do think that prohibiting the use of acquitted conduct to set the Guideline range presents some incremental limitation on its use. We prefer it to the status quo, where acquitted conduct may be used without limitation. However, the fact that it may still be used for upward departures or variances means that the injustice and harms it causes will persist.

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[22] *See, e.g.*, March 2023 Sample of Public Comment Received on Proposed Amendments, 88 Fed. Reg. 7180 (Mar. 14, 2023), https://www.ussc.gov/policymaking/public-comment/public-comment-march-14-2023#acq, Ltr. 1663 (stating that acquitted conduct sentencing has "reduced the dignity of our justice system").

[23] U.S. Sentencing Comm'n, Results of Survey of U.S. District Judges Jan. 2010 to March 2010, at Question 6 (June 2010), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

[24] *See supra* n.23 and accompanying text.

We urge the Commission to take action to amend the relevant conduct Guidelines to prohibit the use of acquitted conduct entirely. We also note that even the complete prohibition of acquitted conduct in sentencing—while deeply important in those cases and for the perception of justice—will not radically transform the system as a whole. As the Commission knows, nearly every person convicted in the federal system is convicted by guilty plea, not at trial.[25] Of the remaining few who do go to trial and are convicted, only 286 in 2022 were acquitted of at least one count and found guilty of at least one count in the same case.[26] While this does not include the also rare possibility prior state or federal acquittals being included, it is clear that the possible universe of cases where acquitted conduct sentencing *could* occur is an extremely small part of the federal system.

We now turn to the four issues for comment regarding acquitted conduct. On issue 1, our position is clear: while we believe option 1 is the best of the three amendments offered, the Guidelines should be amended to prohibit the use of acquitted conduct as relevant conduct for any purpose, be it to determine the Guideline range or any departure or variance.

With respect to issue 2, we favor a bright line rule. Acquittals from other sources—a not guilty verdict before a trier of fact or on motion—or other courts should count the same, and conduct from those acquittals should not be considered relevant conduct in a federal sentencing. This affords the deserved due respect to both acquittals and to our federal system of courts and is also a bright line rule that should be straightforward to administer.

The Commission also requests comment on issue 3, the treatment of overlapping conduct. Where there is overlapping conduct involving acquitted and convicted counts, the principle of not sentencing on acquitted conduct dictates that the benefit should go to the defendant. To hold otherwise creates a back-door mechanism to negate the impact of the acquittal, and the fundamental unfairness of using acquitted conduct at sentencing—and the resulting appearance of unfairness—persists. Where the task of carving out acquitted conduct from convicted conduct is complex in an individual case, the Commission should trust district judges to do a careful analysis in light of the prohibition. And, consistent with its traditional role, the Commission can always revisit the guideline and its commentary in the future in light of experience and feedback.

We also oppose use of acquitted conduct that was admitted by the defendant during a guilty plea colloquy. To the extent this refers to the rare situation where a defendant pleaded guilty to some federal charges but elected to proceed to trial on others, we reiterate our position set forth above that where there is overlapping conduct involving acquitted and convicted counts, the benefit should go to the defendant. The proposed clause could also apply to the more common situation where an individual had pled guilty to related conduct in a state court. A

[25] *See* U.S. Sentencing Comm'n, Sourcebook, *supra* n.14, at tbl. 11.

[26] *See* U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary), at *44 (Dec. 14, 2023).

defendant's statements during a guilty plea colloquy, which unlike a written plea agreement may not have a full opportunity for vetting and review, could be misspoken, misstated, or misinterpreted. This is especially true of guilty pleas made hurriedly in state courts laboring under heavy dockets. For these reasons, statements during a plea colloquy should not override an acquittal.

On issue 4, NACDL opposes any exception for acquittals on the basis of jurisdiction, venue, or statute of limitations. As an initial matter, we disagree with the suggestion that acquittals on these bases are somehow merely procedural or less valid. We respectfully disagree with the characterization that an acquittal on the basis of an expired statute of limitations is "unrelated to the substantive evidence," as decades of jurisprudence makes clear that statutes of limitations, particularly in criminal cases, are intended to avoid wrongful convictions by the bringing of cases where evidence is unreliable or missing.[27] Acquittals based on jurisdiction or venue are also acquittals. It is part of the government's burden in a criminal case to prove that the United States has jurisdiction over the charged conduct and the charged person. For some federal crimes, jurisdiction is even an element that must be proven to the jury beyond a reasonable doubt.[28] In any event, an acquittal on these grounds is still an acquittal, in the eyes of the jury, the defendant, and the public. Additionally, a bright line rule disallowing the use of acquitted conduct in sentencing regardless of the manner of acquittal provides much clearer guidance to prosecutors, defendants, and the public and will be easier for district judges to apply.

IV. Proposed Amendment 7: Simplification of the Three-Step Process

As the Commission notes in explaining Proposed Amendment 7 (Simplification of the Three-Step Sentencing Process), the trend across the country has been for judges to use their variance power more expansively and to use departures with less frequency. This trend is one that NACDL has welcomed, since it is more faithful to the Supreme Court's *Booker* jurisprudence, which, time and again, has admonished courts to recognize their broad power under *Booker* "to 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

[27] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary) (Dec. 14, 2023). Rather, the primary rationale of statutes of limitations is to ensure that fresh evidence is reliable and available. Criminal statutes of limitations, therefore, prevent wrongful convictions. *See* Wayne LaFave et al., 5 Crim. Proc. § 18.5(a) (4th ed. Nov. 2022 Update) (calling preventing wrongful convictions the "foremost" purpose of statutes of limitations); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348–49 (1944) (statutes of limitations prevent cases where "evidence has been lost, memories have faded, and witnesses have disappeared").

[28] *E.g.*, *Taylor v. United States*, 579 U.S. 301, 309 (2016) (stating that the government must prove Hobbs Act element of affecting ""commerce over which the United States has jurisdiction" beyond a reasonable doubt); *United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) ("The existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), which must be proved to the jury beyond a reasonable doubt.").

punishment to ensue."[29] Indeed, since 2005, NACDL and its partners, like the Federal Defenders, have devoted thousands of hours training its members on creative and client-centered plea bargaining and sentencing advocacy. As a result, the quality of sentencing advocacy across the country has improved considerably and the federal sentencing process has become closer to the ideal that the Supreme Court initiated with *Booker* and its progeny.

In recognition of the trend in favor of variances, the Commission has proposed (a) the elimination of departures other than those for substantial assistance and early disposition, (b) the transformation of what is currently a three-step sentencing process (calculate the guidelines, determine any applicable departures, and then apply the sentencing factors under 18 U.S.C. § 3553) into a two-step one (calculate the guidelines and then apply the § 3553 factors); and (c) the creation of a new Chapter Six to facilitate the court's consideration of 18 U.S.C. § 3553(a).

NACDL has concerns about and suggestions for this proposal.

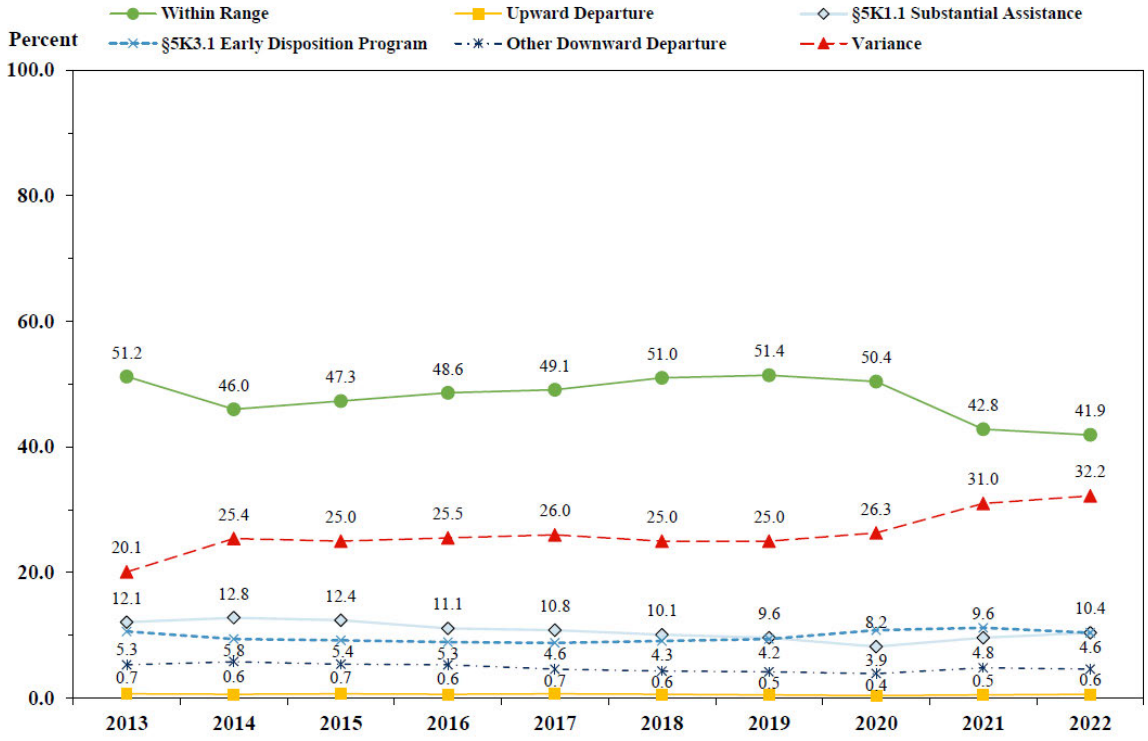
First, and foremost, NACDL is concerned how this proposal will impact the sentencing practices of those judges who persistently decline to grant variances but remain comfortable with downward departures. The Commission's own data indicates that such judges exist. Its most recent graph demonstrating sentences imposed relative to the guideline range over a ten-year period (reproduced below) reveals that the percentage of downward departures remains fairly constant at around 5%, a statistic that represents thousands of individuals every year. The apparent resilience of this departure rate, which judges could have folded into a variance decision, suggests that there is a group of judges deeply anchored in a guideline-centric sentencing methodology. Psychological literature on decision-making teaches us that such anchors can be difficult to displace, and the elimination of departures could well result in more within-guidelines sentences by judges who view variances as less legitimate.[30] The potential for thousands of criminal defendants to receive higher sentences from judges who will refuse to embrace their variance authority as a substitute for their departure authority should be evaluated before overhauling the federal sentencing process in the manner the Commission proposes.

[29] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (quotation omitted).

[30] *See*, *e.g.*, *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J. concurring) (noting that the "so-called 'anchoring effects' long described by cognitive scientists and behavioral economists, show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point"), citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

Figure 9

SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE OVER TIME[1]
Fiscal Years 2013 - 2022



[1] Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2013 - 2022 Datafiles, USSCFY13 - USSCFY22.

See 2022 Annual report and Sourcebook of Federal Sentencing Statistics, Figure 9.[31]

Second, the Commission's proposal to convert departure provisions in each individual guideline into "additional considerations" under 18 U.S.C. § 3553(a) threatens to collapse the federal sentencing into a one-step process rather than the two-step one the Commission envisages. This is directly contrary to the Supreme Court's *Booker* framework which mandates that the guideline range be calculated as an initial benchmark, but then the sentencing judge must fully consider the factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient but not greater than necessary.

Third, the Commission's proposal to create a separate chapter listing and essentially codify § 3553 factors is directly contrary to the congressional directive, oft repeated in the Supreme Court's *Booker* jurisprudence, that there is "*no limitation*" on "information concerning

[31] Available at https://www..gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

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."[32]

Finally, the Commission has not explained how it plans to roll out and implement this proposal – such as through its traditional educational programs, surveys designed to identify and later address judges' specific concerns, and/or the use of respected judicial ambassadors – to ensure that it achieves its objective.

In light of these reservations, NACDL proposes that this overhaul of the federal sentencing process be implemented in stages, pending the Commission's engagement in the kind of empirical research it does so well and the development of an effective intervention strategy to ensure that the proposal does not result in unintended consequences, which include the potential for thousands of individuals receiving within-Guidelines sentences where they would have received downward departures under the current three-step process.

First, NACDL agrees that the "Original Introduction to the Guideline Manual" should be deleted and replaced with one that reflects the sentencing framework outlined by the Supreme Court in *Booker* and its progeny.

Second, NACDL believes that the Commission could very easily begin its goal of eliminating departures by first eliminating upward departures, which, as the Commission's data indicates, are used in little over .5% of the time. *See* Figure 9 *supra*. Judges would, of course, be free to use their variance authority to impose a sentence above the Guidelines and the elimination of upward departures would be a modest and less troubling mechanism of introducing the concept of replacing departure authority with variance authority.

Third, the Commission should eliminate the concept of prohibited and disfavored downward departures other than invidious ones, as these limitations are not consistent with § 3661 and the post-*Booker* sentencing landscape in which sentencing courts are authorized to consider any relevant information.[33]

Fourth, the Commission should conduct surveys, structured interviews and focus groups – perhaps engaging in particular with chief judges and former chief judges – to better determine how the elimination of the departure step in federal sentencing will be received and applied by judges across the country. Such research will inform a successful roll-out of the Commission's

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[32] 18 U.S.C. § 3661.

[33] *See Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) *citing* *United States v. Tucker*, 404 U.S. 443, 446 (1972 ("Accordingly, a federal judge in deciding to impose a sentence 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'")

simplification proposal, and potentially identify alternative interventions to ensure the proposal does not produce unintended consequences.

Fifth, the Commission should ensure (if it does not already do so) that its educational programs for judges include a robust presentation on the judges' post-*Booker* duty to view each criminal defendant holistically as an individual, and their power to vary from the Guidelines.

Once the above have been implemented and analyzed, the Commission is in a much better place to propose the entire elimination of downward departures from the Guidelines.

Finally, the NACDL joins with the Federal Defenders in opposing any effort by the Commission to define and essentially codify the universe of potential variances. To do so risks introducing limitations despite the Supreme Court's repeated instruction that there should be no limitation on the information a sentencing court may consider.

Respectfully Submitted,

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National Center for Youth Law

February 22, 2024

Re: Support for the Elimination of the Consideration of all Adjudications and Convictions Before the Age of 18 as Part of the Criminal History Score (Proposed Amendment 2, Part A, Option 3)

The National Center for Youth Law (NCYL) is a private, non-profit organization that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves.

For over 50 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to reduce the number of youths subjected to harmful practices in the juvenile legal system, including the imposition of fines and fees on indigent youth and families and the collateral consequences from juvenile court debt, through the Debt Free Justice Campaign. NCYL has litigated to end unnecessary referral to the juvenile legal system in numerous states, and advocated at the federal, state, and local levels to reduce reliance on the court system to address the needs of youth, including eliminating fines and fees, decriminalizing normal adolescent behavior and improving young people's access to adequate developmentally appropriate treatment.

NCYL urges the Sentencing Commission to adopt Proposed Amendment 2, Part A, Option 3.

NCYL strongly supports this Amendment's elimination of all adjudications and convictions before the age of eighteen from consideration as a part of the criminal history score. Because adjudications and convictions for youth under eighteen are often the result of distinctive attributes of youth, such as transient impulsivity, proclivity for risk, and difficulty assessing consequences during moments of heightened emotions and peer pressure, and the arbitrary decision-making of adults and system actors, which racial bias and discrimination are known to impact, it is unjust to include them in calculations under the Sentencing Guidelines.

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First, Black, Brown and Indigenous youth are much more likely to enter the juvenile legal system, and to enter it earlier, than their White peers, even though rates of delinquent behavior are similar among all youth. Among other reasons, this is because Black, Brown, and Indigenous youth are subjected to targeted policing and prosecution and White youth have far more opportunities for and access to diversion programs. Second, once a youth is involved in the juvenile legal system, the youth is more likely to have further involvement. For example, youth often stay on probation longer or risk violation and new charges due to unpaid court fees and fines. Third, arbitrary distinctions between state laws and the arbitrary application of judicial discretion across the nation impact whether a youth will be adjudicated in juvenile court or convicted in adult court. Judicial discretion, which may be arbitrary and rife with implicit racial bias, often determines which youth are tried in adult court. Across the country, youth are inappropriately subjected to adult court proceedings despite the science of adolescence explaining both youth decision-making and the opportunity to eliminate recidivism with proper rehabilitative interventions available in the juvenile legal system. Black, Brown, and Indigenous youth enter and remain in the legal system far longer and more often than their White peers; eliminating the consideration of adjudications and convictions occurring before the age of eighteen can begin to remedy this racial and socioeconomic disparity.

I. Black, Brown, and Indigenous Youth are More Likely to Enter the Juvenile Legal System for Minor, Developmentally-Appropriate Behaviors

a. Black, Brown and Indigenous Youth are Disproportionately Targeted for Policing and Prosecution

Many youth enter the juvenile legal system for minor, developmentally appropriate behaviors. Once involved, these same children, who should not have been court-involved in the first place, are much more likely to end up remaining in the legal system due to probation involvement caused by unpaid fees and fines. Black, Brown, and Indigenous youth receive charges for behaviors that do not result in involvement in the juvenile legal system for their White counterparts.[1, 2] These youth are often not afforded the opportunity to be seen as children who make mistakes; their behavior can be viewed as criminal despite no real distinction between their actions and the actions of their White peers. Police officers are more likely to arrest, not just warn and release, Black, Brown and Indigenous youth.[3] Once arrested and detained, Black, Brown, and Indigenous youth experience carceral environments that inflict harm, resulting in trauma rather than "rehabilitation," which makes further juvenile legal system involvement more

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[1] Padgaonkar, Namita Tanya, et al., *Exploring Disproportionate Minority Contact in the Juvenile Justice System Over the Year Following First Arrest*. Journal of Adolescent Research 31(2): 317-334, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC8127356/pdf/nihms-1672280.pdf.
[2] McGlynn-Wright, Anne, et al., *The Usual, Racialized Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest*, Social Problems, 69(2): 299–315.
[3] Gatti, Uberto, et al., *Iatrogenic Effect of Juvenile Justice*, Journal of Child Psychology and Psychiatry 50 (8): 991.

likely.[4]

These harms are particularly seen in the context of "school safety." Though policing in schools dates back to as early as 1939, these once local safety programs garnered federal support in 1967 when President Lyndon B. Johnson established the Commission on Law Enforcement and Administration of Justice. The Commission released a racially charged report claiming that Black youth "account for a disproportionate number of arrests."[5] This report allowed for considerable attention to be placed on Black youth and "continual youth warfare," and thus increased policing in school and increased propaganda targeting Black, Brown, and Indigenous youth followed.[6]

In 2013, a study found that nationwide, police academies spend less than one percent of total training hours on topics related to youth in the juvenile legal system.[7] Yet, forty-one percent of officers surveyed in 2018 reported that their primary role on school grounds was to "enforce laws."[8] With this mindset, along with the increased number of police officers in schools in areas where Black, Brown and Indigenous youth comprise the majority of the population,[9] more arrests expectedly result. In addition, educators now depend on police officers, or "School Resource Officers" to handle minor, developmentally appropriate behaviors, such as disobedience, disrupting the classroom, truancy, loitering, etc.[10] These youth are not committing more crimes; however, they are policed more, arrested more, and given fewer chances to divert from the juvenile legal system.

b. White Youth are Far More Likely to Have Access to Diversion Programs than their Black, Brown and Indigenous Peers

In addition to Black, Brown and Indigenous youth being overpoliced, these youth often are not afforded the opportunity to participate in diversion programs that would prevent juvenile legal system involvement. White youth are much more likely to be diverted than their peers.

Part of this discrepancy lies in biases against Black, Brown, and Indigenous youth that

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[4] *Id.*
[5] Henning, Kristen, Rage of Innocence: How America Criminalizes Black Youth (2023), 128.
[6] *Id*. at 130.
[7] Mental Health America, Position Statement 41: Early Identification of Mental Health Issues in Young People (Sept. 18, 2016), available at www.mhanational.org/issues/early-identification-mental-health-issues-young-people.
[8] Whitaker, Amir, et al., *Cops and no Counselors: How the Lack of School Mental Health Staff is Harming Students*, American Civil Liberties Union (2019), 23-24, available at www.aclu.org/wp-content/uploads/publications/030419-acluschooldisciplinereport.pdf.
[9] Kupchik, Aaron, and Geoff Ward, *Race, Poverty, and Exclusionary School Security: An Empirical Analysis of U.S. Elementary, Middle, and High Schools*, Youth Violence and Juvenile Justice, 12(4): 332-354, available at https://ed.buffalo.edu/content/dam/ed/safety-conference/Kupchik%20and%20Ward%20YVJJ%202014.pdf.
[10] Henning, *supra* note 5, at 134.

impact decision making around diversion – subjective, oftentimes subconscious attitudes towards generally oppressed communities lead decisionmakers to respond less favorably to these youth. A 2011 study examining diversion in Arizona found that White youth were substantially more likely to be diverted than their Black, Brown, and Indigenous peers.[11] Additionally, the case files of Black youth had six times as many subjective critical comments about the young people's characters (such as "feels no remorse," "does not take offense seriously" or "uncooperative with justice officials") as those of White youth.[12] Brown and Indigenous youth had three times and four times, respectively, the number of negative character attributions as White youth, and these subjective attributions "had a significant negative effect on the likelihood of receiving diversion."[13]

Certain policies also make it difficult for Black, Brown, and Indigenous youth to benefit from diversion. For example, most jurisdictions nationwide limit eligibility for diversion to youth who have been referred to court for the first time.[14] This excludes a good portion of Black, Brown, and Indigenous youth, who are far more likely to be arrested for the same behavior than their White counterparts. Residing in an overpoliced area, going to overpoliced schools, and living under implicit racial bias increases the likelihood of contact with the legal system exponentially. There are also limits on access to diversion based on the nature of the charged offense, or for youth assessed as having a higher risk to offend, though no data supports that diversion will not succeed with youth assessed as being "high risk."[15] In fact, a 2014 study analyzing recidivism outcomes in Ohio found that *at every risk level* youth who were diverted from court had lower recidivism rates that those who were formally petitioned.[16]

Another issue is the implicit biases against these youth's families at the outset: research shows that court officials examine families of color more critically, which can impact the belief that diversion opportunities should not be afforded to them. A recent study explained how in considering access to diversion, the family situation of the juvenile is especially important because decision makers see the family as critical to

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[11] Beckman, Laura and Nancy Rodriguez, *Race, Ethnicity, and Official Perceptions in the Juvenile Justice System: Extending the Role of Negative Attributional Stereotypes*, Criminal Justice and Behavior 48(11):1536-1556.
[12] *Id*.
[13] *Id*.
[14] Mendel, Richard, The Sentencing Project, *Diversion: A Hidden Key to Combatting Racial and Ethnic Disparities in Juvenile Justice*, 14, available at www.sentencingproject.org/app/uploads/2022/10/Diversion-A-Hidden-Key-to-Combating-Racial-and-Ethnic-Disparities-in-Juvenile-Justice.pdf.
[15] Freeman, Kelly Roberts, Cathy Hu, and Jesse Jannetta, Urban Institute, *Racial Equity and Criminal Justice Risk Assessment,* March 2021, available at www.urban.org/sites/default/files/publication/103864/racial-equity-and-criminal-justice-risk-assessment.pdf.
[16] Mendel, Richard, *Diversion: A Hidden Key to Combatting Racial and Ethnic Disparities in Juvenile Justice*, The Sentencing Project, 14.

supporting successful diversion programs.[17] Another study found that the case records of youth of color often reported that parents were "unwilling to supervise their children and incapable of exercising proper control" despite parents expressing their willingness to do so.[18]

Finally, fees to participate in diversion programs mean that access to diversion is often limited to families who can afford to pay for it. A 2016 report found that, in 26 states, youth or their families were required to pay fees to participate in diversion.[19] In most of these states, inability to pay the fees resulted in a formal petition in court.[20] In addition to this barrier, restitution fees can also cause youth to either be terminated from the diversion program, or worse—be formally petitioned due to noncompliance. For example, in Nebraska, many diversion programs throughout the state require families to pay initial fees ranging anywhere from $50 to $300, monthly fees up to $25, and, in some cases, additional fees for services ordered by the diversion program such as counseling.[21] According to a 2020 survey, 86.4% of responding Nebraska counties indicated that they charged a fee for diversion. While some counties in Nebraska waive these fees for youth unable to pay, others do not.[22] If families cannot afford these charges, this often leads to a formal petition being filed against the youth, thus the legal system that they could have avoided is now their reality due to an inability to pay. As a result, impoverished youth develop a juvenile record while those with more resources can have their case dismissed, or charges dropped more swiftly. The impact on low-income youth is compounded by the negative effects that come with formal system processing, e.g., higher recidivism rates and longer system involvement.[23]

II. Once Involved in the Juvenile Legal System, Black, Brown, and Indigenous Youth are Much More Likely to Remain in the System.

Not only is it more likely that Black, Brown, and Indigenous youth will become court involved, they also stay in the system longer. Among the many reasons why youth stay in the juvenile legal system longer include court fees and fines. Because many states allow juvenile probation to be extended until a youth pays court fees, youth risking probation violation or new charges simply due to an inability to pay fees.[24] As probation violations are a major driver of youth incarceration, extending probation can

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[17] Love, T.P., and E.W. Morris, *Opportunities Diverted: Intake Diversion and Institutionalized Racial Disadvantage in the Juvenile Justice System*, Race and Social Problems, 11(1): 33-44.
[18] Leiber, Michael J. and Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, Minnesota Journal of Law and Inequality, 31(2): 351.
[19] Feierman, Jessica, Juvenile Law Center, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System,* 12, available at debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf.
[20] *Id*.
[21] Nungesser, Katie, Josh Shirk, and Raymond Durham, *Beware the Fine Print: The Costs of Fines and Fees in Nebraska Juvenile Court*, 2, available at voicesforchildren.com/wp-content/uploads/2024/02/FinesAndFees_IssueBrief_12624.pdf.
[22] *Id.*
[23] *Id*.
[24] Feierman, *supra* note 19, at 10.

lead to deeper juvenile legal system involvement.[25]

Disparities compound for youth in the legal system, and can result in further adjudications: once in the legal system, these youth, by virtue of being from these oppressed communities, are viewed as more culpable, less remorseful, and therefore more in need of punishment rather than rehabilitation. This can often be despite many mitigating factors. Take, for example, James:[26] James, a victim of child abuse, neglect, and abandonment, entered the juvenile legal system at twelve years old. He was adjudicated in the Commonwealth of Virginia, where he was committed to a staff-secured, out-of-state placement in a juvenile detention facility. When James returned into the community, he had minimal further contact with law enforcement. However, once James moved to Maryland, he unfortunately received another criminal infraction. Because of his prior conviction and commitment to a facility, diversion opportunities or even probation were not available to him. Placement outside of the community, which should be a last resort, had become James' only option due to the Maryland court's perception that, since he has already been committed to a facility, he presented a high risk to the safety of the public.

This is one example of how decisions within the juvenile legal system compound to make further adjudications more likely after a youth has been adjudicated once. Adolescents like James, who have experienced adversity, racism, and poverty are significantly overrepresented in juvenile and criminal legal systems. However, while these experiences may pose developmental challenges, they do not dictate fate, as the same adolescents who may make impulsive decisions during moments of "hot cognition"—times when there is external pressure and heightened emotion, combined with a need to decide quickly—are also poised for positive learning through interventions and rehabilitation.[27] Youth, particularly late adolescents, who are involved in the juvenile and criminal legal systems—even those who commit violent acts—are likely to self-desist from or "age out" of crime as they enter into adulthood, even absent punitive intervention.[28] Youth also exhibit enhanced neural sensitivity to rewards, as compared to children and adults.[29] This enhances the vulnerabilities for risk-taking commonly described in the science of youth, *but also creates a window of opportunity for prosocial learning and adaptation.*[30] For example, development of the prefrontal cortex is accompanied by improvements in self-control and decision-making that are

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[25] National Conference of State Legislatures, *Juvenile Probation Scan Work Group Executive Report*, March 2021, available at www.ncsl.org/civil-and-criminal-justice/juvenile-probation-scan-work-group-executive-report.
[26] Pseudonym created to protect anonymity.
[27] Casey, B.J., et al., Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders, 5 Annual Review of Criminology, 321-343, available at modlab.yale.edu/sites/default/files/files/annurev-criminol_Casey.pdf.
[28] Moffit, Terrie, *Male Antisocial Behaviour in Adolescence and Beyond*, 2 Nature Human Behavior 177 (2018), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC6157602/.
[29]Center for Law, Brain and Behavior, *White Paper on the Science of Late Adolescence* (2022), 36, available at clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf.
[30] *Id*. (emphasis added).

reflected in desistance of misconduct, diminished impulsivity and risk-taking, and increased ability to engage in long-term planning towards goals.[31] It makes rehabilitation, and in turn lowered recidivism, likely, yet our juvenile legal system is not structured to support youth in this growth.

III. Arbitrary Differences Between State Law and the Application of Judicial Discretion Impact Which Youth Convicted in Adult Court

Eliminating consideration of adjudications and convictions for youth under age eighteen will support the Sentencing Guidelines in increasing uniformity in federal sentencing recommendations. As discussed above, Black, Brown and Indigenous youth are more likely to be policed, arrested, and once arrested, more likely to be adjudicated.

Unfortunately, implicit biases and the dehumanization of Black, Brown, and Indigenous youth mean that the legal system *adultifies* these youth**.** Adultification is a sociocultural stereotype "based on how adults perceive children in absence of knowledge of the children's behavior and verbalization."[32] A 2014 study found that people are more likely to assume that Black children are older, and less trustworthy than other children.[33] Another 2014 study concluded that although children in most societies are in a distinct group and characterized by their innocence and need for protection, their research found that "Black boys can be seen as responsible for their actions at an age when White boys still benefit from the assumption that children are essentially innocent."[34]

Adultification can influence how system actors apply their discretion, whether consciously or unconsciously, when judges determine which youth to transfer to the adult system and which youth to adjudicate in the juvenile legal system. In 2018, though Black youth were charged in only thirty eight percent of crimes against a person, they accounted for fifty seven percent of youth who were transferred from juvenile to adult court for those same offenses.[35] In Missouri, seventy two percent of youth transferred to adult court were Black, though they only accounted for fourteen percent of the state's youth population.[36] In New Jersey, sixty eight percent of youth charged as adults between 2011 and 2016 were Black; nineteen percent were Hispanic.[37] In Oregon,

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[31] Insel, Catherine, et al., *Development of Corticostriatal Connectivity Constrains Goal-Directed Behavior During Adolescence*, 8 Nature Comm. 1, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC5705718/.
[32] Gilmore, Amir A. and Pamela J. Bettis, *Antiblackness and the Aultification of Black Children in a U.S. Prison Nation*, Washington State University. March 25, 2021, available at www.researchgate.net/publication/352106857_Antiblackness_and_the_Adultification_of_Black_Children_in_a_US_Prison_Nation.
[33] *Id.*
[34] Goff, Phillip Atiba, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children,* Journal of Personality and Social Psychology, 106(4): 526-545, available at www.apa.org/pubs/journals/releases/psp-a0035663.pdf.
[35] Henning, *supra* note 5 at 184.
[36] *Id.*
[37] *Id.* at 185.

though there were only two percent of Black youth in its population, of 139 youth who were tried as adults, fifteen percent were Black.[38]

These differences can, in part, be explained by arbitrary distinctions in how standards for transfer to adult court are applied. In Maryland, for example, the seminal juvenile court transfer case is *Davis v State.*[39] In this case, Howard Davis, a youth charged as an adult at the age of sixteen, was initially denied transfer to juvenile court, due to the court focusing on Howard's eligibility to receive treatment as representing his amenability to treatment. In the Court of Appeals decision, the court urged judges to analyze whether a child should be transferred to juvenile court using five factors: (1) the age of the child; (2) the child's physical and mental condition; (3) the child's amenability to treatment in any institution, facility, or programs available to delinquents; (4) the nature of the offense(s); and (5) public safety.[40] No factor, the court represents, should be considered independent of the other four. All factors, in addition, must converge on the youth's amenability to treatment, and public safety and amenability do not and should not exist on opposite ends of the spectrum: "that the program which is most effective in treating, educating, and rehabilitating youthful offenders will be the most economical and will best protect the public over the years."[41] In practice, however too often Maryland courts use criminal contacts and what they deem "opportunities to treatment" as a signal to deny transfer because the youth is determined not to be amenable to treatment provided through the juvenile courts.[42]

Maryland is far from the only state in which analytic frameworks are subject to a judge's arbitrary and often biased discretion. Decades of research have shown that, at decision points in the juvenile and criminal legal systems where there is significant discretion such as the decision to transfer to adult court, Black, Brown and Indigenous youth are overrepresented in worse outcomes.[43] This exacerbates the same problem: youth receive criminal convictions for the "nature of the offense," and for "having a record," yet no attention is paid to how, foundationally, the system is structured to increase the number of convictions for Black, Brown and Indigenous youth compared to their White

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[38] *Id.*
[39] 255 A.3d 56 (Md. 2021).
[40] *Id*. at 29.
[41] *Id*. at 36.
[42] *See*, *e.g.*, Baye, Rachel, *Maryland Tried Hundreds of Juvenile Defendants as Adults. One Annapolis Bill Tries to Change That*. WYPR 88.1 FM Baltimore (Feb. 2023), available at www.wypr.org/wypr-news/2023-02-17/maryland-tries-hundreds-of-juvenile-defendants-as-adults-one-annapolis-bill-tries-to-change-that.
[43] *See*, *e.g.*, Hodson, Tracey M., *Effect of Race on the Decision to Try a Juvenile as an Adult*, Journal of Juvenile Law (20) 1999, 82-107; Jeree Michael Thomas, et al., National Association of Social Workers, *The Color of Juvenile Transfer: Policy & Practice Recommendations*, available at www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0; U.S. Department of Justice, Office of Juvenile Justice & Delinquency Prevention, *Racial and Ethnic Disparity in Juvenile Justice Processing*, available at ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity; Bryson, Sara, and Jennifer Peck, *Understanding the Subgroup Complexities of Transfer: The Impact of Juvenile Race and Gender on Waiver Decisions*, Youth Violence and Juvenile Justice 18(2): 135-155.

peers. When courts can decide that because youth have had multiple contacts with the juvenile legal system, they are no longer amenable to the treatment provided by the juvenile courts, they are simply adopting the arbitrary decisions that have been made previously.

IV. Conclusion

We stand in support of the elimination of the consideration of all adjudications and convictions before the age of 18 as part of the criminal history score because this will mitigate against the harsh treatment of children and adolescents and the impact of racial bias on federal sentencing. The impact of racial bias on life outcomes of still-developing people who are enmeshed in the juvenile or criminal legal systems is one of the foundational flaws of our legal system. Removing these youths' adjudications and convictions from consideration in the federal sentencing scheme is one step towards addressing this harm. **We urge you to adopt Proposed Amendment 2, Part A, Option 3.**

Thank you for your consideration. Sincerely,

Jasmine Richardson-Rushin

Jasmine Richardson-Rushin
Staff Attorney, Justice & Equity

The National Council for Incarcerated and Formerly Incarcerated Women and Girls

Comment From The National Council For Incarcerated and Formerly Incarcerated Women and Girls On Proposed Amendments to U.S.S.G. § 1B1.3 February 22, 2024

Introduction

The National Council for Incarcerated and Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women. The founders came together in the prison yard at FCI Danbury because they were frustrated that policy makers were focusing their attention exclusively on men. They also wanted the voices of incarcerated people to be heard – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person's humanity. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although The National Council's long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. We support women seeking compassionate release and work to raise awareness of the horrific conditions in our prisons and jails. Through our "Reimagining Communities" project, a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we are supporting community organizing, economic development, and participatory budgeting. Our work will expand opportunities for those in low-income communities to keep residents out of the criminal legal system.

The use of acquitted conduct in sentencing is based on technical legal arguments,[1] but it is incomprehensible as a matter of common sense.[2] If a jury has to determine guilt

[1] The U.S. Sentencing Commission has explained that while acquitted conduct is not discussed in the *Guidelines*, "consistent with the Supreme Court's holding in *Watts*, consideration of acquitted conduct is permitted under the guidelines through the operation of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with §1B1.4 (Information to be Used in Imposing Sentence) and §6A1.3 (Resolution of Disputed Factors (Policy Statement))." https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20231222_fr-proposed-amdts.pdf, at 45.

[2] Although "all federal courts of appeals have also said that enhancements [from acquitted conduct] do not violate the right to a jury trial," one cannot help but see this blatant attack on the defendant's

beyond a reasonable doubt, it is illogical to allow a judge to punish someone if he or she thinks the weight of evidence towards guilt amounts to 50 percent and a feather. *Langland ex rel. M.L. v. Sec'y of Health & Hum. Servs.*, No. 07-36V, 2011 WL 386985, at *1 (Fed. Cl. Feb. 4, 2011), *review denied, decision aff'd sub nom. Langland v. Sec'y of Health & Hum. Servs.*, 109 Fed. Cl. 421 (2013) (stating that "this Court has likened [the preponderance standard] to fifty percent and a feather"). We urge the Commission to make a strong policy statement against the use of acquitted conduct, a position one Supreme Court Justice appears to support, while others agree that "the use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions." *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023).

Acquittals Should Protect Defendants' Presumption of Innocence

Defendants in criminal proceedings are "considered innocent unless and until the prosecution proves their guilt beyond a reasonable doubt." *ACLU v. United States DOJ*, 750 F.3d 927, 929 (D.C. Cir. 2014). Under this doctrine, the burden of proof at trial remains with the government and never transfers to the defendant. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). This evidentiary burden protects against human fallibility. *Id.* at 1076. The "beyond a reasonable doubt" standard protects from human error the "transcending value" that people have in their freedom. *Speiser v. Randall* 357 U.S. 513, 525-526 (1958). A law degree does not immunize a person against misinterpretation of evidence or lapses in judgment. A system that seeks justice should not substitute the decision of twelve people for the opinion of one in a black robe.

Acquitted Conduct Undermines Juries' Power and Principles of Justice

Acquitted conduct strips juries of their power. The jury remains today, as it has been for centuries, "a central foundation of our justice system and our democracy . . . [that] "is a tangible implementation of the principle that the law comes from the people." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017). When judges use acquitted conduct, they destroy the bond between the law and the community. Using acquitted conduct to enhance sentencing silences the voice of the people the law supposedly protects. According to Justice Kavanaugh, "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015).

Jury trials "[are] no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 404 (2004). Defendants are entitled to be judged by their peers, namely people from their communities who represent the local values and are vested in the social health and safety of their neighbors. Traditionally, juries have judged not only the culpability of the defendant but the fairness of the law itself. Since the late 19th century, however, the courts have tried to eviscerate the second purpose by refusing to tell juries that nullification

constitutional rights. Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1,2 (2016).

exists and actively removing jurors who indicate that they in good conscience cannot follow the law. *Sparf v. United States*, 156 U.S. 51, 102 (1895). Although it has been driven underground, juries still have the "the power . . . to 'nullify' or exercise a power of lenity" although it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States v. Thomas*, 116F.3d 606, 615 (2d Cir.1997). Juries split verdicts all the time in an effort to push back on overcharging or craft a resolution that they think is fair. Allowing the judge to use acquitted conduct to increase a punishment guts the jury's "power of lenity" and further erodes the connection between a trial and justice.

Juries are particularly valuable in marginalized communities that are routinely overpoliced and overcharged. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017) ("The jury was considered a fundamental safeguard of individual liberty.") (citing the Federalist Papers). As early as 1880, the Supreme Court forbade excluding jurors on the basis of race. *Id.* at 222-23 (reviewing the history of cases prohibiting racial bias in juror selection). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio,* 499 U.S. 400, 411 (1991). Preventing racial bias is so important that the Supreme Court created an exception to the juror non-impeachment rule to allow investigation of juror bias after the verdict. *Pena-Rodriguez*, 580 U.S. at 225 ("But there is a sound basis to treat racial bias with added precaution."). Creating special rules to protect defendants against juror bias is of little help if a judge can impose his or her views in place of the jury's verdict based on a more likely than not standard, in essence an evidentiary coin toss. We must not just treat judges like "a 'super juror' who can 'disregard whatever the government has failed to prove, or whatever the jury has rejected."[3]

The Commission Should Adopt, and Broaden, Option 1

For the reasons outlined above, the Commission should prohibit consideration of acquitted conduct for *all* purposes when imposing a sentence. There is no rational basis for distinguishing between determining the guideline range itself, a calculation that could not include acquitted conduct, while allowing the same conduct to justify a potentially more harmful upward departure. *See, e.g.*, *United States v. McClinton*, 23 F.4th 732, 734 (7th Cir. 2022), *cert. denied* 143 S.Ct. 2400 (2023) (allowing an upward departure from 5 years to 30 based on a murder charge for which the defendant was acquitted). In addition, Option 1 of the proposed amendment only restricts the use of acquitted conduct as relevant conduct for federal charges. This is not expansive enough to protect all defendants, including those with acquitted state, local, and tribal charges from having their sentences enhanced. If the Guidelines are to preclude the use of acquitted conduct then they must reject its use from all jurisdictional sources.

[3] Nate Raymond, *U.S. Justice Department urges panel not to limit 'acquitted conduct' sentencings*, Reuters, February 24, 2023, 7:23 PM, https://www.reuters.com/legal/government/us-justice-department-urges-panel-not-limit-acquitted-conduct-sentencings-2023-02-25/ (quoting Judge Carlton Reeves).

We appreciate the opportunity to comment and the Commission's openness to a wide range of perspectives.

Respectfully submitted,

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February 22, 2024

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Attention: Public Affairs – Proposed Amendments

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

Dear Commissioners:

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

[1] The City Bar, founded in 1870, has 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Criminal Courts Committee studies the workings of the Criminal Term of the New York State Supreme Court and the New York City Criminal Court. The White Collar Crime Committee focuses on the white collar criminal space and includes prosecutors and former prosecutors, as well as defense attorneys. The White Color Crime Committee joins in the letter, except for those members who are government lawyers and are not able to take a position.

on the United States Sentencing Commission's ("Commission") Proposed 2023–2024 Amendments to the Federal Sentencing Guidelines Manual. More specifically, the City Bar submits its comments concerning Proposed Amendment 3 regarding Acquitted Conduct. The City Bar appreciates this opportunity to comment on the Proposed Amendment.

I. INTRODUCTION

The City Bar has consistently encouraged limitations on the use of acquitted conduct in applying the Federal Sentencing Guidelines ("Guidelines") by supporting and endorsing legislation, issuing reports, and commenting on the Commission's 2022 proposed amendment regarding acquitted conduct. The City Bar welcomes the Commission's continued efforts to amend the Guidelines to limit the use of acquitted conduct.

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

In recent years, however, an increasing number of jurists have expressed concerns about the constitutionality of permitting the use of acquitted conduct to factor into and increase a

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

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

defendant's sentence, including the late Justices Scalia and Ginsburg, and current Justices Thomas, Gorsuch, and Kavanaugh.[4] Last year Justice Sotomayor joined this chorus in her statement respecting the denial of certiorari in *McClinton v. United States*; however, she acknowledged that the Commission had "announced that it will resolve questions around acquitted-conduct sentencing in the coming year."[5] Justice Kavanaugh, joined by Justices Gorsuch and Barrett, likewise commented that it was "appropriate for the Court to wait" for the Commission to act.[6] Meanwhile, the Commission decided to consider the 2022 proposed amendment further and postpone any implementation by another year.[7] Given the Supreme Court's deferral to the Commission, the time is ripe for the Commission to take action on acquitted-conduct sentencing.

For the reasons expressed by these jurists and commenters, the City Bar supports, with the modifications stated below, the proposed amendment's limitation on the use of acquitted conduct for purposes of determining the applicable Guidelines range in individual cases as set forth in Option 1.

II. PROPOSED AMENDMENT 3

On December 26, 2023, the Commission proposed an amendment to Guidelines Sections 1B1.3 and 6A1.3 that would limit the ability of federal judges to consider acquitted conduct for purposes of calculating a defendant's advisory Guidelines range. Rather than propose a single amendment, the Commission presented three different options for consideration.

Option 1 would amend Guidelines Section 1B1.3 to explicitly exclude acquitted conduct from consideration as relevant conduct for purposes of determining the applicable Guidelines range. However, the proposed amendment would continue to permit judges to consider acquitted conduct in determining the sentence to impose within the Guidelines range or whether a departure from the Guidelines is warranted. The Commission also proposed an amendment to the Commentary for Section 6A1.3 to conform with the amendment to Section 1B1.3.

The other two options would continue to allow federal judges to consider acquitted conduct in determining the applicable Guidelines range with some modifications. Option 2 would amend the Commentary to Guidelines Section 1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate

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

[5] *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., statement).

[6] *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2403 (2023) (Kavanaugh, J., statement).

[7] Remarks as Prepared for Delivery by Chair Carlton W. Reeves Public Meeting of the United States Sentencing Commission Thurgood Marshall Federal Judiciary Center, 22 (April 5, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf (last visited Feb. 21, 2024).

impact in determining the guideline range. While Option 3 would amend Section 6A1.3 to provide that acquitted conduct should only be considered if it has been established by clear and convincing evidence.

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

1. (a) With respect to Option 1, whether the amendment should also prohibit the consideration of acquitted conduct for purposes beyond the determination of the Guidelines range, such as in determining the sentence to impose within the range or whether a departure is warranted. If so, the Commission seeks comment on whether a more substantial prohibition on such conduct would conflict with 18 U.S.C. § 3661 or exceed the Commission's authority under 28 U.S.C. § 994 or other Congressional directives.

   (b) Whether as an alternative to amending Section 1B1.3, the Commission should instead adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct in certain respects.

2. Whether the proposed definition of "acquitted conduct" should be expanded to include acquittals from state, local or tribal jurisdictions.

3. Whether the proposed definition of "acquitted conduct" in Option 1 should exclude conduct establishing the offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt in order to address "overlapping" conduct.

4. Whether any of the options presented should specifically address acquittals for reasons unrelated to the substantive evidence, such as for lack of jurisdiction or venue or the statute of limitations.

III. THE CITY BAR SUPPORTS, WITH MODIFICATIONS, OPTION 1 OF THE PROPOSED AMENDMENT LIMITING THE USE OF ACQUITTED CONDUCT AT SENTENCING

The City Bar supports Option 1 set forth in the proposed amendment to the Guidelines, which limits the use of acquitted conduct at sentencing. The City Bar, however, recommends modifications to the proposed amendment's definition of acquitted conduct to make clear that (i) "acquitted conduct" includes acquittals from state, local, or tribal jurisdictions; (ii) conduct forming the basis of an acquitted charge that overlaps with conduct underlying an offense of conviction may be considered only to determine the applicable advisory Guidelines to the extent such overlapping conduct is legally necessary to establish the offense of conviction; and (iii) other

conduct underlying an acquitted charge that was not legally necessary to establish guilt may only be considered as relevant conduct if otherwise appropriate. In addition, the City Bar encourages the Commission to prohibit more broadly the use of acquitted conduct in determining whether a departure from the Guidelines is warranted.

a. Comment on Issue 1: Scope of Limitation on Use of Acquitted Conduct

The Commission should adopt Option 1 of the proposed amendment with an additional modification to the proposed language in the Commentary Section 6A1.3. The proposed amendment is too narrow in that it permits the continued consideration of acquitted conduct, on a preponderance of the evidence standard,[8] for determination of upward departures. Multiple Guidelines provisions allow for upward departures based on factual circumstances that may be presented to, but rejected by, the jury.[9] To the extent that the proposed amendment allows for upward departures on the basis of acquitted conduct, the amendment does not go far enough to address the concerns that have motivated the amendment itself, and leaves an exception that might, in practice, render the amendment ineffectual. The City Bar recommends that the consideration of acquitted conduct for purposes of upward departures be prohibited under the proposed amendment.

The City Bar's support for such an expanded prohibition, as a policy matter, should not be construed as providing any legal opinion on the interaction between the proposed amendment, as expanded above, and either 18 U.S.C. § 3661 or the Commission's statutory authority. Nevertheless, the City Bar notes that under the proposed expanded amendment, federal judges will continue to be permitted to consider acquitted conduct in determining the sentence to impose within the Guidelines range, as well as ultimately whether to vary from the Guidelines range to impose a sentence pursuant to the factors mandated by 18 U.S.C. § 3553(a).

The Guidelines already limit sentencing judges in a number of notable aspects in determining when a departure from the Guidelines is warranted. Among those characteristics which cannot be considered, or given only limited consideration, are the following: (1) age (U.S.S.G. § 5H1.1, p.s.); (2) education (Id. at § 5H1.2, p.s.); (3) vocational skills (Id.); (4) drug dependency (Id. at § 5H1.4, p.s.); (5) employment history (Id. at § 5H1.5, p.s.); (6) family and community ties (Id. at § 5H1.6, p.s.); (7) prior civic, charitable, public service or good works (Id. at at § 5H1.11, p.s.); and (8) lack of guidance as a youth or disadvantaged upbringing (Id. at § 5H1.12, p.s.). Nevertheless, Courts can and do consider at least some of these factors in imposing a sentence that is "sufficient, but not greater than necessary to comply with the purposes set forth in" 18 USC § 3553(a). Furthermore, the Commission adopted these existing limitations pursuant to 28 USC § 994(c) & (d), which provide a-non-exhaustive list of matters for which the Commission "shall consider" whether certain offender characteristics "have any relevance to the nature, extent, place of service or other incidents of an appropriate sentence."

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

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

Indeed, the proposed expanded prohibition on the consideration of acquitted conduct would be consistent with existing Guidelines Commentary. In the Introductory Commentary to Chapter 5, Part H, the Guidelines Manual observes:

> Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guidelines range but for other reasons such as in determining the sentence within the applicable guidelines range, the type of sentence . . ., and various other aspects of an appropriate sentence.

Guidelines Manual (Nov. 1, 2023) at 466.

b. Comment on Issue 2: Non-Federal Acquitted Conduct

The Commission should adopt an inclusive definition of "acquitted conduct" that would incorporate acquittals from state, local, or tribal jurisdictions. This broader definition would vindicate the policy concerns animating the proposed Guidelines amendment, conform with the constitutional principles of federalism and comity, accord with long-standing concerns expressed by the Supreme Court regarding duplicative prosecutions, and be consistent with well-established Department of Justice policy regarding successive prosecutions (and the risk of punishment) for the same underlying conduct.

There is no substantive reason for excluding from the definition of "acquitted conduct" acquittals from non-federal jurisdictions. The Guidelines already incorporate convictions from state and local jurisdictions, and reflect policy decisions to consider in a uniform manner prior dispositions from the federal system, fifty state systems, District of Columbia, territories, and foreign, tribal, and military courts.[10] There is no meaningful justification for treating acquittals from non-federal jurisdictions differently than convictions from non-federal jurisdictions. Indeed, sentences resulting from tribal court convictions are already not counted for purposes of calculating a defendant's Criminal History Category.[11]

Permitting the consideration of acquitted conduct from non-federal proceedings for purposes of federal sentencing would also be in derogation of the principles of comity and respect federal and state sovereigns should afford each other's proceedings.[12] Several states preclude the consideration of acquitted conduct as part of their state sentencing regimes.[13] A definition of "acquitted conduct" that treats state acquitted conduct equally to federal acquitted conduct for purposes of the Guidelines would be more faithful to the principles of federalism and reflect these state constitutional and policy decisions.

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[10] *See* U.S.S.G. §§ 4A1.1, 4A1.2.

[11] *See* U.S.S.G. § 4A1.2(i).

[12] *See generally Younger v. Harris*, 401 U.S. 37 (1971).

[13] *See, e.g.*, *State v. Melvin*, 248 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019); *State v. Koch*, 112 P.3d 69 (Haw. 2005); *State v. Cote*, 530 A.2d 775 (N.H. 1987).

Treating acquittals under state or tribal law the same as acquittals under federal law for purposes of the Guidelines would also be consistent with long-standing concerns expressed by the Supreme Court, and well-established Department of Justice policy, regarding prosecutions in state and federal courts for the same underlying conduct. The Supreme Court has repeatedly called for "protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct," which "but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause."[14] In response to these concerns, "the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement," the so-called *Petite* policy.[15] As the Department of Justice has explained, "[t]his policy applies whenever there has been," among other outcomes, "a prior state or federal prosecution resulting in an acquittal . . . or a dismissal or other termination of the case on the merits after jeopardy has attached."[16]

Permitting the consideration of acquitted conduct from state, local, or tribal jurisdictions for purposes of the Guidelines would be contrary to these concerns and policies.

c. Comment on Issue 3: "Overlapping" Conduct

The Commission should revise the proposed definition of acquitted conduct in Option 1 to provide additional guidance regarding overlapping conduct. The current definition proposed under Option 1 provides as follows:

> (2) DEFINITION OF ACQUITTED CONDUCT.—"Acquitted conduct" means conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.
>
> ["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].]

The bracketed terms setting forth possible language in this definition—specifically, "[underlying] [constituting an element of]"—potentially have very different meanings and could significantly

[14] *Rinaldi v. United States*, 434 U.S. 22, 27, 29 (1977).

[15] *See Petite v. United States*, 361 U.S. 529, 530–31 (1960); *Rinaldi*, 434 U.S. at 28–29.

[16] U.S. Dep't of Justice, Justice Manual § 9-2.031, "Dual and Successive Prosecution Policy ('Petite Policy')" (Jan. 2020).

influence the application of the Guidelines in particular cases. The City Bar recommends modifications to the proposed amendment's definition of acquitted conduct to account for these differences.

First, the Commission should clarify that conduct constituting an element of an acquitted charge that overlaps with conduct later found beyond a reasonable doubt to establish an offense of conviction should be considered only for purposes of determining the applicable Guidelines range where such conduct is legally necessary to establish a count of conviction. As presently drafted, proposed Guidelines Section 1B1.3(c) is ambiguous. Absent clarification, it is unclear whether courts should consider qualifying acquitted conduct for all purposes or only where such conduct forms a necessary element of the offense of conviction. The City Bar urges the Commission to provide additional guidance adopting the latter position, as the former may result in significant and unprincipled disparities in certain cases.

For example, this ambiguity could be particularly salient in cases involving conspiracy or money laundering charges. A defendant might be convicted of a money laundering offense, but acquitted of charges that he committed an alleged specified unlawful activity underlying that charge.[17] Similarly, a defendant might be convicted of a conspiracy involving multiple alleged objects or overt acts—without the jury specifying which object or overt act had been proven beyond a reasonable doubt—and simultaneously acquitted of one or more substantive offenses linked to particular overt acts that had been alleged.[18] The issue also could arise in the reverse scenario, where a defendant is acquitted of a conspiracy charge but, along with his alleged co-conspirator, convicted of substantive charges that had been alleged as overt acts.[19]

In each of these cases, additional guidance is required to give meaningful effect to the Commission's prohibition on the consideration of acquitted conduct. Thus, the City Bar recommends that the Commission modify the language of the proposed amendment to Section 1B1.3 to make clear that conduct constituting an element of an acquitted charge that overlaps with conduct underlying a later offense of conviction may be considered only for purposes of determining the applicable advisory Guidelines range to the extent that such conduct is legally necessary to the factfinder's determination of guilt.[20] In the alternative, the Commission should provide additional guidance for the application of the new provision to the same effect.

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

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

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

[20] To avoid confusion regarding the deference to be accorded the Commission's understanding of the proposed Guidelines amendment, the Commission should incorporate such changes into the text of the proposed Guidelines provision itself, and not limit such guidance to the commentary. *Cf. United States v. Banks*, 55 F.4th 246, 255 (3d

Second, the Commission should clarify that other overlapping conduct that did not constitute an element of an acquitted charge may, if otherwise consistent with Guidelines Section 1B1.3, be considered as relevant conduct for purposes of determining the applicable advisory Guidelines range for an offense of conviction. Again, proposed Guidelines Section 1B1.3(c) as presently drafted is ambiguous on this point. The City Bar urges the Commission to provide additional guidance in recognition of the fact that a determination of guilt or innocence necessarily focuses on the elements of charged offenses.[21] Without additional guidance, a prohibition on considering any "conduct (*i.e.*, any acts or omission) underlying a charge" may sweep too broadly, impeding courts' ability to consider circumstantial or other facts that were related to, but not legally essential to prove, the acquitted conduct.

For example, this ambiguity could arise in cases involving multiple charges in which a factfinder acquits on some but not all of the charged offenses. In a case involving multiple charges where a weapon was alleged to have been possessed during the commission of both offenses, for instance, it may be unclear what shared facts—such as the possession of a weapon—a court may consider if the factfinder acquits only as to one offense. Conversely, the issue also could arise in cases where a factfinder was previously presented with evidence tending to mitigate culpability that also informs a later offense of conviction. Where prior conduct reveals duress or other circumstances that also bear on why a later offense of conviction may have been committed, courts should not be prohibited from considering such conduct in determining the applicable advisory Guidelines range.

d. Comment on Issue 4: Non-Substantive Acquitted Conduct

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

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

Cir. 2022) (holding that, following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), courts must exhaust all the traditional tools of construction and conclude that a Guidelines provision is genuinely ambiguous before according deference to the Commission's commentary interpreting the Guidelines).

[21] *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (stating that the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt").

IV. CONCLUSION

The City Bar fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing and recommends that the Commission adopt Option 1 with certain modifications. Specifically, the amendment should also preclude the use of "acquitted conduct" in determining whether to depart from the applicable Guidelines range, and make clear that: (i) "acquitted conduct" includes acquittals from state, local, or tribal jurisdictions; (ii) conduct forming the basis of an acquitted charge that overlaps with conduct underlying an offense of conviction may be considered only to determine the applicable advisory Guidelines to the extent such overlapping conduct is legally necessary to establish the offense of conviction; and (iii) other conduct underlying an acquitted charge that was not legally necessary to establish guilt may only be considered as relevant conduct if otherwise appropriate. The City Bar also respectfully recommends that the proposed limitations should include acquittals from non-federal jurisdictions and apply without any distinction between acquittals based on the substantive evidence and acquittals for other reasons.

Respectfully,

Richard Hong

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February 22, 2024

Honorable Judge Carlton W. Reeves
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Re: Public Comments on Proposed Amendments to the Sentencing Guidelines

Dear Judge Reeves and Members of the Commission:

The Roderick & Solange MacArthur Justice Center is grateful for the opportunity to provide comments on the proposed amendments to the U.S. Sentencing Guidelines. We are eager to serve as a resource as you consider reforming the Guidelines, as we have decades of wide-ranging experience with issues surrounding criminal punishments and confinement.

We write to comment on two of the Commission's proposed amendments, which concern areas in which our organization has specific expertise: youthful individuals and the use of acquitted conduct in sentencing. We wish to share our views on why these amendments would be an important step towards ensuring that, for all convicted individuals, criminal punishments are proportionate, equitable, and geared towards rehabilitation.

The Roderick & Solange MacArthur Justice Center

The Roderick & Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC represents people who have been harmed by the criminal legal system and fights to vindicate their rights, hold people with power accountable, and transform the system. RSMJC has offices in Illinois, in Mississippi, in Louisiana, in Missouri, and in Washington, D.C. RSMJC attorneys routinely litigate or file amicus briefs in cases involving criminal penalties—including those that focus on young people, the rights of the indigent in the criminal legal system, and the treatment of incarcerated people.

Comments on Proposed Amendment 2: Youthful Individuals Part A

The Commission should adopt Option 3 (deleting all criminal history rules requiring counting of offenses committed prior to age 18). As the Commission noted in considering its proposals, individuals who were convicted of offenses they committed while under age 18 were still developmentally immature when those offenses occurred and for those who were adjudicated delinquent, the availability of court records is spotty. Option 3 accounts for both issues, while still considering public safety. In the event this Commission declines to adopt this option, then it should at the very least adopt Option 2, which acknowledges the difficulties posed by a system that allows

for sentencing determinations based on possibly incomplete information about a defendant's past conduct.

1. Federal statutory law requires courts to impose criminal sentences that are no more than necessary to:

> **(A)** reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> **(B)** afford adequate deterrence to criminal conduct;
> **(C)** protect the public from further crimes of the defendant; and
> **(D)** provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[1]

The application of these factors to younger adolescents and emerging adults can be particularly difficult. To comply with the Eighth Amendment, "punishment for crime should be graduated and proportioned to both the offender and the offense."[2] To ensure proportionality, sentencing judges must consider the statutory sentencing factors in a way that accounts for the characteristics of youth.[3]

For more than 15 years, it has been well-accepted in the scientific community—and in the criminal legal system—that from a brain development standpoint, adolescents are fundamentally different from adults. Those differences require a distinct calculation as to how any given criminal penalty meets the goals set forth by Congress. The key developmental characteristics that render young people different for the purposes of punishment are (1) their susceptibility to outside influences; (2) their lack of maturity, resulting in impulsivity and impetuosity; and (3) their capacity for change.[4] These characteristics—tied to physiological and psychological development—are widely understood to persist well past age 18, and up to at least age 25.[5]

Because of these salient differences between youth and adults, the conduct of young people "is not as morally reprehensible as that of an adult."[6] Thus, young people are categorically less culpable

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[1] 18 U.S.C. § 3553(a)(2).

[2] *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (cleaned up).

[3] *See id.* at 480.

[4] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (banning the death penalty for individuals, under 18 at the time of the offense, convicted of murder); *Graham v. Florida.*, 560 U.S. 48, 82 (2010) (banning life without parole sentences for juveniles convicted of non-homicide offenses); *Miller*, 567 U.S. at 465 (banning mandatory life without parole sentences for juveniles convicted of homicide); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (holding that *Miller* protections are retroactive); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1013 (2003) (regions of the adolescent brain "that are implicated in processes of long-term planning, the regulation of emotion, impulse control, and the evaluation of risk and reward" are underdeveloped).

[5] Catherine Insel et al., *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers*, Ctr. for L., Brain & Behav. at 2, 10-16 (Jan. 27, 2022), available at https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf.

[6] *Roper*, 543 U.S. at 569-70; *see also Miller*, 567 U.S. at 471.

for their actions than adults.[7] They also are more capable of change.[8] This diminishes the penological justifications for punishment—which Congress has mandated that courts consider—for youth.[9]

Consider these differences in conjunction with the purposes of punishment. First, youth under 18 are less culpable, and thus less deserving of harsh punishments. Second, the possibility of longer punishments does not deter. Research shows that deterrence depends not on the harshness of sentences, but on the perceived probability of being caught.[10] Yet some of the hallmarks of youth include impetuousness and the inability to adequately consider future consequences of their actions.[11] Third, incapacitation is necessary only for as long as an individual poses a high risk of harm, yet young people tend to "age out" of crime.[12] Therefore, offenses that a young person commits before age 18 say little about that person's level of dangerousness after they have matured. The need for additional incapacitation in the future based on offenses committed during a time of immaturity is dubious.

And age remains a consideration for sentencing departure, offering judges the discretion to depart from the guidelines based on "the criminal conduct underlying any conviction resulting from offenses committed prior to age eighteen."[13] Thus, if the sentencing judge determines that the young person's underlying criminal conduct warrants a departure, they have the discretion to do so. But they are not bound by data that often is incomplete and that only speaks to behavior that occurred before the defendant reached full brain maturity.

2. If the Commission decides not to adopt Option 3, then Option 2 (deleting all references to juvenile adjudications as part of the criminal history calculation rules) provides the next best balance between safety and recidivism concerns and the rehabilitative goal of punishment. As the Commission recognized, the availability of juvenile court records varies wildly between the states. Adding points based on juvenile adjudications creates a foreseeable disparity, whereby an individual's sentence turns not on the offense or on their personal culpability, but on what records were readily available to the government. Indeed, the Commission has already acknowledged that juvenile adjudications are not considered a part of sentencing in every state. To avoid unwanted

[7] *Montgomery*, 577 U.S. at 207-08.

[8] *Id.* at 208.

[9] *Miller*, 567 U.S. at 472.

[10] Marta Nelson et al., *A New Paradigm for Sentencing in the United States*, Vera Inst. of Just. at 23 (February 2023), available at https://static1.squarespace.com/static/5b7ea2794cde7a79e7c00582/t/649cb43cd77d834c7304bd12/1687991356868/A+New+Paradigm.pdf; Nat'l Inst. of Justice, *Five Things About Deterrence*, U.S. Dep't of Just., Office of Just. Programs (May 2016) (discussing the ineffectiveness of long sentences on deterring crime), available at https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[11] *Miller*, 567 U.S. at 472; B.J. Casey et al., *Braking and Accelerating of the Adolescent Brain*, 1 J. Res. Adolesc. 21, 21-33 (2011). Moreover, the proposed amendment to U.S.S.G. § 4A1.2(d)(1), as written requires no similar conduct between the prior offense and the current offense, making it even more difficult for young people to adequately weigh consequences.

[12] See generally Duzbayeva Saltanat Bekbolatkyzy et al., *Aging Out of Adolescent Delinquency: Results From a Longitudinal Sample of Youth and Young Adults*, 60 J. Crim. Just. 108 (2019).

[13] *E.g.*, Proposed Amendment Option 3 to U.S.S.G. §4A1.2 cmt. n.7.

sentencing disparities that result in arbitrarily disproportionate sentences, courts should be precluded from considering juvenile court adjudications.

For these reasons, requiring courts to add criminal history points for conduct that occurred before the defendant turned 18 runs a high risk of imposing a disproportionate sentence on that individual. Offenses committed in youth are materially different from those committed as a mature adult.

Comments on Proposed Amendment 2: Youthful Individuals Part B

RSMJC favors the Commission's much-needed proposal to amend §5H1.1 to (a) explicitly permit a downward departure due to the defendant's youthfulness at the time of the offense, and (b) encourage courts to consider whether forms of punishment short of imprisonment would meet the purposes of punishment for a given individual. Consistent with our comments above, the purposes of punishment listed in the guidelines must consider the individual's need to be punished, and for young people the calculus is different. However, the Commission should edit three components of its proposal to further guide courts towards proportionate punishments that account for individual characteristics of the young people being sentenced.

1. The Commission reasonably decided to limit consideration of youthful offenses to those occurring before age 18, based on the variance among jurisdictions on who is considered a "juvenile" for juvenile court jurisdiction.[14] But the science concerning brain development remains static: parts of the brain that are relevant to decision making, risk assessment, and weighing future consequences continue to develop until at least one's mid-20s.[15] Courts should be able to consider this reality when sentencing youthful defendants who committed their offenses beyond age 18. Therefore, this Commission should extend its proposed language to allow downward departures for individuals up to at least age 25.

2. To ensure uniformity among sentencing judges, when providing for age-based downward departures the Commission should add to this section of the Guidelines the age-related factors that researchers and the Supreme Court have recognized as relevant to appropriate punishment. These factors include (1) immaturity and impetuosity; (2) family and home environment; (3) circumstances of the offense, which includes the role the defendant had in the offense and any familial or peer pressure; (4) the individual's competence to deal with law enforcement and participate in their offense; and (5) the possibility of rehabilitation.[16] Grounding sentencing of youthful individuals in these factors provides a much more holistic focus on both the crime and the defendant's personal culpability than a sentencing structure that primarily focuses on the crime and criminal history.

3. The Commission should *remove* from its proposal subsection §5H1.1(2), which would instruct courts to use sweeping generalizations about recidivism to decide on appropriate punishment for an individual. The amendment mentions "research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older

[14] U.S.S.G. § 4A1.2 cmt. n.7.

[15] See Insel et al., *supra* n. 5.

[16] *Miller*, 567 U.S. at 477-78.

individuals."[17] However, this research is continuing to evolve. For instance, researchers have noted that most of the literature discusses the "broad correspondence between age and crime," but not any variants on that relationship.[18] Numerous factors apart from age have been shown to impact criminal activity.[19] Moreover, studies are beginning to show that the traditionally discussed "age-crime curve" has evolved over time. Some researchers showed a *decrease* in offending patterns during the teenage years over the last several decades.[20] Another found that the rearrest rate declines much more quickly for individuals born in the mid-1990s than those born in the early to mid-1980s.[21] This is not to say that age and rearrest rates have not been correlated; it is merely to say that because of the changes that researchers have observed in various age cohorts, chronological age is an unreliable factor for deciding whether an individual will reoffend in the future. This instruction to judges also overlooks other possible contributors to recidivism for any given person, as well as factors that would lead an individual to desist from engaging in crime at a younger age than reflected on the age-crime curve.

The Eighth Amendment requires "individualized sentencing" for youth.[22] Directing courts to use one statistical measure of future recidivism frustrates compliance with this constitutional mandate. For these reasons, we urge the Commission to amend its policy statement on age to:

- Provide for a downward departure due to a defendant's youthfulness at the time of the offense, meaning the defendant was under *at least age 25* at the time of the crime;
- Provide that in determining whether a youth-based departure is warranted, courts consider, as presently proposed, "Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision making, and resistance to peer pressure, is generally not developed until the mid-20s"; and
- Urge courts to evaluate the effects of youth with an eye towards the factors outlined in *Miller*.

[17] Proposed Amendment to U.S.S.G. §5H1.1(2).

[18] Roberto Flores de Apodaca et al., *Differentiation of the Age-Crime Curve Trajectory by Types of Crime*, 1 Am. Research J. of Human. & Soc. Sci. 1 (2015).

[19] *Id.* at 3 (listing sources).

[20] *See, e.g.*, James Tuttle, *The End of the Age-Crime Curve? A Historical Comparison of Male Arrest Rates in the United States, 1985-2019*, British J. of Criminology 1 (2023), available at https://doi.org/10.1093/bjc/azad049; Eric P. Baumer et al., *The Contemporary Transformation of American Youth: An Analysis of Change in the Prevalence of Delinquency, 1991-2015*, 59 Criminology 109, 127 (2021).

[21] Roland Neil & Robert J. Sampson, *The Birth Lottery of History: Arrest over the Life Course of Multiple Cohorts Coming of Age, 1995-2018*, 126 Am. J. of Soc. 1127, 1169. The authors attributed the differences in age of arrest to "the distinct sociohistorical environments through which each cohort aged." *Id.*

[22] *Miller*, 567 U.S. at 477.

Comments on Proposed Amendment 3: Acquitted Conduct

The Commission should, at a minimum, adopt Option 1 of the proposed amendment, which would preclude the use of acquitted conduct for purposes of determining the guidelines range. RSMJC urges the Commission to go further and prohibit federal courts from using acquitted conduct for any purpose when imposing a sentence, including for determining a within-guidelines sentence or whether a departure from the guidelines is warranted. Such a bright-line rule would be administrable, ensure uniformity in sentencing for similarly situated individuals, and—most importantly—be most consistent with the due process and jury trial rights enshrined in the Fifth and Sixth Amendments to the United States Constitution. The Commission has authority to establish such a guideline and should do so.

1. The Sixth Amendment right to a trial by a jury of one's peers is a "a fundamental reservation of power in our constitutional structure,"[23] that reflects "a profound judgment about the way in which law should be enforced and justice administered" in this country.[24] The jury is "the great bulwark" against governmental oppression.[25] It is the people's check on the Executive Branch, to "protect against unfounded criminal charges," "arbitrary law enforcement," and "the corrupt or overzealous prosecutor."[26] And it gives the citizenry "control in the judiciary,"[27] serving as an "inestimable safeguard" against "the compliant, biased, or eccentric judge."[28] Our nation's "insistence upon community participation in the determination of guilt or innocence" reflects a deep "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[29] The Sixth Amendment's jury-trial right works in concert with the Fifth Amendment's Due Process Clause to require that any fact "essential to the punishment" of a criminal defendant be found by a jury beyond a reasonable doubt.[30]

Permitting judges to increase an individual's sentence based on conduct of which they have been acquitted cannot be squared with these foundational constitutional principles. The guarantees of a jury trial and proof beyond a reasonable doubt mean little if the government can simply retry the counts on which it lost under a lower standard before a sentencing judge and persuade that judge to punish the defendant for those counts notwithstanding the jury's verdict. Not only have such counts not been found by a jury beyond a reasonable doubt—a jury specifically considered and rejected them.[31] Such a practice—which jurists have rightly described as "Kafka-esque,"

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[23] *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004).

[24] *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

[25] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)).

[26] *Duncan*, 391 U.S. at 156.

[27] *Blakely*, 542 U.S. at 306.

[28] *Duncan*, 391 U.S. at 156.

[29] *Id.*

[30] *Blakely*, 542 U.S. at 301; *see Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Apprendi*, 530 U.S. at 469.

[31] *See, e.g., United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("It is far from certain whether the Constitution allows" sentencing increases "based on facts the judge finds without the aid of a jury or the defendant's consent." (citing *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari))); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) ("[W]e believe that a defendant's Fifth and

"repugnant," "uniquely malevolent," "pernicious," and "jurisprudence reminiscent of Alice in Wonderland"[32]—is at odds with the common-law understanding of the jury's role. As RSMJC and others have explained, at the time of the Founding, a jury's acquittal was universally understood to reflect not just a factual determination about what the prosecution proved but also a *moral* determination about what conduct a defendant should be punished for.[33] When a judge overrides a jury's decision, expressed through its verdict of acquittal, that a defendant should not be punished for certain conduct, she eviscerates the jury's role as an independent moral compass—a role the Founders envisioned when they enshrined the jury-trial right in the Constitution.

As Justice Sotomayor recognized last year, acquitted-conduct sentencing also erodes the "perceived fairness" of the criminal legal system, "a concern that is vital to [its] legitimacy."[34] Lay persons—not to mention the jurors charged with deciding a defendant's fate—would undoubtedly be shocked to learn that after the jury has considered the evidence, deliberated, and determined that a defendant is not guilty of a particular charge, a federal judge can sentence him for that charge anyway based on her own view, applying a lesser standard, that he in fact committed the crime of which the jury acquitted him.[35] Indeed, the message that an individual "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."[36]

Two RSMJC clients' cases exemplify the perverse consequences of permitting judges to sentence defendants based on acquitted conduct—and the broad support for eliminating this practice. In one, the jury convicted our client of illegal reentry into the United States and transporting migrants, but acquitted him of a sentencing enhancement for conduct "resulting in death"—not a surprising acquittal, given that the evidence showed that the death was caused by local police firing over 40 rounds into a fleeing vehicle full of migrants, well after our client had been apprehended in another vehicle over 50 miles away.[37] Notwithstanding the jury's acquittal, the district judge concluded by a preponderance of the evidence that our client *was* responsible for the migrant's death and sentenced him to nearly four additional years of incarceration based on that finding—over twice

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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.").

[32] Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent," and "Pernicious"?*, 54 Santa Clara L. Rev. 675, 679, 718 (2014) (citing cases).

[33] *See* Petition for Certiorari at 13-19, *Osby v. United States*, 142 S. Ct. 97 (2021) (No. 20-1693), 2021 WL 2337153; Petition for Certiorari at 19-24, *Gaspar-Felipe v. United States*, 142 S. Ct. 903 (2022) (No. 21-882), 2021 WL 5930606; *see also* Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner, *Osby*, 142 S. Ct. 97 (No. 20-1693); *see also* Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner, *Gaspar-Felipe*, 142 S. Ct. 903 (No. 21-882), 2022 WL 161766; Judge Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 Ohio St. L. J. 935 (2010).

[34] *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2401-02 (2023) (statement of Sotomayor, J., respecting the denial of certiorari).

[35] *See id.* (citing *United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring)).

[36] 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, 185 (1996).

[37] Petition for Certiorari at 4-5, *Gaspar-Felipe*, 142 S. Ct. 903 (No. 21-882), 2021 WL 5930606.

the recommended sentencing range based on the conduct the jury had found beyond a reasonable doubt.[38] In another case, the district judge sentenced our client to nearly *five* additional years of incarceration based on conduct underlying five acquitted counts—almost *triple* the highest recommended sentence based solely on the two counts of which he was actually convicted.[39] Despite the backing of a diverse array of *amici*—including the defense bar, scholars, former federal judges, and the Cato Institute, a libertarian think-tank—the Supreme Court declined to take our clients' cases, as it has for dozens of cases presenting this issue over the last decade. Last summer, four Justices stated expressly that the Court would decline to take up the issue until this Commission acts.[40]

2. Although the abovementioned cases both involved the use of acquitted conduct to increase the guidelines range, Sixth Amendment principles, concern for the perception of fairness, and this Commission's mandate to promote "certainty and fairness" and avoid "unwarranted sentencing disparities,"[41] all weigh in favor of prohibiting judges from relying on acquitted conduct for *any* sentencing increase, whether cast as an increase to the guidelines range, determining a within-guidelines sentence, or departing upward. As noted above, the jury's verdict of acquittal reflects not just a factual determination of the evidence but a *moral* judgment that the defendant should not be punished for the conduct alleged—the jury "has been given the opportunity to authorize punishment and specifically withheld it."[42] Punishing the defendant for the very crimes of which the jury acquitted him trivializes the jury's deliberate choice to withhold authorization. The lay juror—and lay public—would find little comfort in technical legal distinctions concerning the guidelines' operation; the effect of using acquitted conduct to increase a defendant's sentence on both the jury's role and the public's perception of fairness is the same regardless of which legal mechanism the sentencing judge employs.

Moreover, permitting judges to rely on acquitted conduct to select a within-guidelines sentence or depart upward will create unwarranted sentencing disparities. Similarly-situated defendants with identical verdicts—*e.g.*, an acquittal on a higher charge but conviction on a lesser—could receive vastly different sentences based purely on their judge's philosophical view about whether a judge can or should take acquitted conduct into account. A bright-line rule—prohibiting the consideration of acquitted conduct for all purposes when imposing a sentence—would avoid this arbitrary disparity and lead to greater fairness and uniformity across sentencing.

3. The Commission should expand the proposed definition of "acquitted conduct" to include acquittals from state, local, and tribal jurisdictions, as well as analogous dispositions in juvenile adjudications. There is no principled reason to distinguish between federal acquittals and acquittals or not-guilty adjudications obtained in other tribunals; unless the conduct underlying such acquittals has been charged federally and found by a federal jury beyond a reasonable doubt, relying on judge-made findings of the acquitted conduct to increase a defendant's sentence would

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[38] *Id.* at 6-7.

[39] Petition for Certiorari at 5-7, *Osby*, 142 S. Ct. 97 (No. 20-1693), 2021 WL 2337153.

[40] *McClinton*, 143 S. Ct. at 2403 (statement of Sotomayor, J., respecting the denial of certiorari); *id.* (statement of Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari).

[41] 28 U.S.C. § 994(f); *see also* 28 U.S.C. § 991(b)(1)(B).

[42] *United States v. Mercado*, 474 F.3d 654, 664 (9th Cir. 2007) (Fletcher, B., J., dissenting).

raise the same Fifth and Sixth Amendment concerns. Nor would the lay public perceive it as somehow fairer to punish an individual for conduct of which a factfinder had previously found him not guilty simply because the not-guilty determination occurred in a non-federal jurisdiction. Notions of comity also counsel in favor of respecting not-guilty dispositions arising from state, local, and tribal jurisdictions in federal sentencing.

4. Nothing in 28 U.S.C. § 994 precludes this Commission from establishing a more expansive prohibition on the use of acquitted conduct in federal sentencing. Section 994(c) expressly directs the Commission to "consider" whether the "circumstances under which the offense was committed" have "any relevance" to an appropriate sentence and to "take them into account only to the extent that they do have relevance." Additionally, § 994(f) requires the Commission to "promote the purposes set forth in" 28 U.S.C. § 991(b)(1), with "particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." Determining that conduct of which an individual has been acquitted does not have "any relevance" to an appropriate sentence is fully consistent with—if not dictated by—these mandates. Indeed, many jurists have expressed their view that the Commission has the authority to address this issue and some have urged it to do so.[43] The United States Department of Justice has also recognized repeatedly, in opposing petitions for certiorari raising this issue, that this Commission "could promulgate guidelines to preclude … reliance" on acquitted conduct in federal sentencing.[44]

Nor would such an amendment conflict with 18 U.S.C. § 3661. As courts have recognized, § 3661 is "a safety net" designed to "make sure that any relevant information or circumstance *not formerly taken into account by the guidelines* will still be available for the district court's consideration."[45] It is not a limitation on the Commission's authority to restrict the use of certain types of information in sentencing; indeed, such a reading would create inconsistency with provisions of 28 U.S.C. § 994 that specifically command the Commission to "place limits upon what the district court may consider."[46] Simply put, once the Commission has "already considered" a category of information "in formulating the guidelines" and determined that the information should not be

[43] *See, e.g.*, *McClinton*, 143 S. Ct. at 2403 (statement of Sotomayor, J., respecting the denial of certiorari); *id.* (statement of Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of certiorari); *United States v. Watts*, 519 U.S. 148, 159 (1997) (Breyer, J., concurring); *United State v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008); *United States v. Baird*, 109 F.3d 856, 864 n.6 (3d Cir. 1997) (*Baird I*) ("We…urge the Sentencing Commission to prohibit sentencing courts from considering acquitted conduct during sentencing.").

[44] Brief in Opposition for the United States as Respondent, *McClinton*, 143 S. Ct. 2400 (2023) (No. 21-1557), 2022 WL 16553087, at *15; Brief in Opposition for United States as Respondent at 9, *Bell v. United States*, 141 S. Ct. 1239 (2021) (No. 20-5689); Brief in Opposition for United States as Respondent, *Ludwikowski v. United States*, 141 S. Ct. 872 (2020) (No. 19-1293), 2020 WL 5821347, at *8 ; Brief in Opposition for United States as Respondent at 14, *Martinez v. United States*, 140 S. Ct. 1128 (2020) (No. 19-5346); Brief In Opposition for United States as Respondent, *Asaro v. United States*, 140 S. Ct. 1104 (2020) (No. 19-107), 2019 WL 5959533, at *15.

[45] *United States v. Fairman*, 947 F.2d 1479, 1482 (11th Cir. 1991) (emphasis added); *see also United States v. Perry*, 640 F.3d 805, 810 (8th Cir. 2011); *United States v. Baird*, 218 F.3d 221, 227 (3d Cir. 2000) (*Baird II*).

[46] *Fairman*, 947 F.2d at 1481.

used to increase a defendant's sentence, it has "covered the field," so to speak, and § 3661 does not come into play.[47]

In any event, § 3661's broad language must be read consistent with constitutional principles. The Constitution itself places a limitation on the information a sentencing court can rely on to increase an individual's criminal sentence.[48] A sentencing court could not, for example, increase a defendant's sentence based on his race, or sex, or religion, notwithstanding § 3661's broad language.[49] Likewise, § 3661 does not authorize sentencing courts to rely on information that would violate the Fifth and Sixth Amendments. Thus, even if § 3661 functioned somehow to limit the Commission's authority to restrict the use of certain categories of information in sentencing—which it does not, as explained above—a sentencing guideline excluding acquitted conduct from consideration in sentencing would be fully consistent with the limits the Fifth and Sixth Amendments already place on § 3661.

5. Finally, the Commission should not make an exception for acquittals based on "reasons unrelated to the substantive evidence, such as jurisdiction, venue, or statute of limitations."[50] As a practical matter, such an exception would give rise to thorny litigation in cases where it is unclear whether the acquittal was based on the prosecution's failure to meet its burden of proof on a substantive element or a non-substantive reason like lack of venue—*e.g.*, where the jury has returned a general acquittal on a charge on which venue was disputed, or a judge grants a motion for judgment of acquittal that raised both venue and evidentiary grounds without specifying which ground he was relying on. A bright-line rule would be more administrable and not engender such litigation. But even where a judge states clearly that she is granting a judgment of acquittal on venue grounds only, the underlying substantive conduct would still not have been found by a jury beyond a reasonable doubt; relying on that conduct to increase a defendant's sentence on other counts thus "seems a dubious infringement of the rights to due process and to a jury trial."[51] At the very least, if the Commission decides to make an exception for acquittals based on "non-substantive" grounds, it should require any judicial fact-finding regarding conduct underlying such acquittals to meet the clear and convincing evidence standard.

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[47] *Id.*; *see Baird II*, 218 F.3d at 227 (concluding that U.S.S.G. § 1B1.8, which excludes from sentencing consideration self-incriminating information a defendant provides pursuant to a cooperation agreement, is "enforceable" notwithstanding "the otherwise-comprehensive language" of § 3661).

[48] *See, e.g.*, U.S.S.G. § 1B1.4 (incorporating § 3661 and stating that, in determining within-guidelines sentence or whether to depart, sentencing court may consider any information "unless otherwise prohibited by law").

[49] U.S. Const. Amend. XIV; *see also* U.S.S.G. § 5H1.10 (stating that race, sex, national origin, creed, religion, and socio-economic status are "not relevant in the determination of a sentence").

[50] Issue for Comment #4.

[51] *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of reh'g en banc).

We appreciate the opportunity to provide the Commission our views on these two important proposals. We are thankful for the Commission's continued work to make federal sentencing a fairer, more equitable, and rehabilitative system.

Sincerely,

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February 22, 2024

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

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

Dear Judge Reeves:

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

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

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

[1] Nellis, Ashley. "Mass Incarceration Trends." *The Sentencing Project*. Jan. 25, 2023. https://www.sentencingproject.org/reports/mass-incarceration-trends/.

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

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

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

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

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

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

[7] Starr, Sonja B. & M. Marit Rehavi. "Racial Disparity in Federal Criminal Sentences." *University of Michigan Law School Scholarship Repository*. 2014. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles. According to Commission data, Black and Hispanic males receive federal sentences that are, respectively, 13.4 and 11.2 percent longer than White males. "Demographic Differences in Federal Sentencing." *U.S. Sentencing Commission*. Nov. 2023. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

[8] Starr at 1320.

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

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

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

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

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

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

[11] U.S. Const. Amends. V, VI.

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

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

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

III. Conclusion

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

Sincerely,

The Leadership Conference on Civil and Human Rights

[14] U.S. v. Faust, 456 F.3d 1342, 1352-53 (11th Cir. 2006) (Barkett, J., concurring).
[15] United States v. Lasley, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases).
[16] As Justice Sotomayor recently said, "acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system." United States v. McClinton, 23 F.4th 732, 734 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 2400 (2023) (statement of Sotomayor, J.). See also Quinones v. United States, Case No. 18-6052020 WL 1509386, *15 (S.D.W Va. Jan. 9, 2020) ("If I maximize the defendant's sentence based principally on that acquitted conduct, it would, in my view, undermine the public's confidence in our system of justice."); United States v. Lombard, 102 F.3d 1 (1st Cir. 1996) ("A lawyer can explain the distinction logically but, as a matter of public perception and acceptance, the result can often invite disrespect for the sentencing process.").
[17] The Supreme Court has declined to take up cases examining its precedents on acquitted conduct in recent years. *See, e.g.*, United States v. McClinton, 23 F.4th 732, 734 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 2400 (2023); Allums v. United States, 858 F. App'x 420 (Mem), *cert. denied*, 142 S.Ct. 1128 (2022).

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February 22, 2024

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

Re: Proposed Amendments to the Sentencing Guidelines regarding Youthful Individuals

Dear Chairman Reeves:

On behalf of The Legal Aid Society (LAS), we submit the following comments regarding the proposed amendments to the Federal Sentencing Guidelines published in the Federal Register on December 26, 2023. Our comments focus only on the proposed amendments that apply to Youthful Individuals. Specifically, LAS seeks to address the first issue for comment identified by the Commission by detailing how New York (NY) sentences youthful individuals, factors that influence which court a young person is prosecuted in, practices related to sealing and expungement, and racial disparities throughout the legal system. To this end, we strongly encourage the Commission to end the practice of counting prior convictions for those 18 or younger in their criminal history calculation, including those 18-year-olds with youthful offender status, and to amend the guidelines to require downward departures based on the defendant's youthfulness at the time of the offense without requiring further consideration of additional factors.

LAS, the nation's oldest and largest not-for-profit legal services organization, is more than a law firm for clients who cannot afford to pay for counsel. It is an indispensable component of the legal, social, and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of civil, criminal, and juvenile rights matters, while also fighting for legal reform.

LAS operates three major practices — Civil, Criminal and Juvenile Rights -- through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. With its annual caseload of more than 300,000 legal matters, LAS takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession.

LAS represents more children and youth prosecuted in New York City's Family Courts and Criminal Courts than any other law firm. We have dedicated teams of lawyers, social workers, paralegals and investigators devoted to serving the unique needs of children and youth, including those charged as juvenile delinquents, juvenile offenders and adolescent offenders. The Legal Aid Society's Juvenile Rights Practice (JRP) represents the majority of youth prosecuted in Family Court in New

York City. The Legal Aid Society's Criminal Defense Practice represents the majority of indigent defendants prosecuted in Criminal Court in New York City. JRP and the Criminal Defense Practice's Adolescent Intervention and Diversion (AID) Unit have adopted an integrated representation model to ensure seamless and comprehensive representation of 16- and 17-year-old youths who appear in the Youth Part, the majority of whose cases are removed to Family Court. In addition to representing our clients in trial and appellate courts, we also pursue impact litigation and other law reform initiatives, including sentencing reform for young people.

Our comments are informed by our practice representing children and young people and our frequent interactions with the courts, social service providers and state and city agencies. These comments highlight key aspects of New York's juvenile legal system and how that system impacts young people in practice. If adopted, our recommendations would move the federal sentencing system toward greater recognition of well-established adolescent brain research and reduce rather than reinforce unjust racial disparities.

New York's Juvenile Legal System - A Brief Overview

New York has a complicated system for addressing youth who are accused of criminal activity, however, it is a system that recognizes the importance of the accused person's age. In New York, youth who come into contact with the juvenile legal system may be treated as adolescent offenders (AO), juvenile offenders (JO), or juvenile delinquents (JD). AOs are defined as those 16 or 17 years old at the time of an alleged felony offense. AOs are prosecuted in the Youth Part -- a specialized part of the Criminal Court dedicated to handling cases of youthful individuals. Depending upon the nature of the offense, an AO case may be removed to Family Court for treatment as a juvenile delinquency matter. JOs are children 13 to 15 years old charged with certain enumerated offenses and are prosecuted in the Youth Part. A JO case may also be removed to Family Court for treatment as a juvenile delinquency matter. JDs include children ages 7 to 11 charged with certain homicide offenses, children ages 12 to 15 charged with any crime, and children ages 16 or 17 charged with a misdemeanor or charged with a felony whose case was removed to the Family Court from the Youth Part.[1]

New York's juvenile legal system was founded on the idea that children can learn from their mistakes and alter their behavior, especially as they grow and mature. As such, the Family Court and the Youth Part are meant to intervene to positively affect troubled young people, not to be a mechanism for punishment. Indeed, the New York Family Court Act (FCA), which outlines procedures for the Family Court, specifically provides for the delivery of services to young people as well as the protection of their records from public access. Family Court proceedings are civil proceedings and are intended to be rehabilitative.[2] Both the Youth Part in Criminal Court and the Family Court are staffed

[1] *See*, Administration for Children's Services, Juvenile Justice Process Frequently Asked Questions, https://www.nyc.gov/site/acs/justice/juvenile-justice-process.page#:~:text=A%20youth%20who%20is%2013,be%20removed%20to%20Family%20Court.

[2] The purpose of Article Three of the Family Court Act is to establish procedures to enable the Family Court to "issue an appropriate order of disposition for any person who is adjudged a juvenile delinquent." F.C.A. § 301.1. Thus, in "any proceeding under [Article Three], the court shall consider the needs and best interests of the respondent as well as the need for protection of the community." *Id.* New York's Court of Appeals consistently has recognized that rehabilitation rather than punishment is the overarching legislative goal that animates the statutory scheme. *See Matter of Robert J.*, 2

by Family Court judges. The decision to prosecute children in these courts reflects an understanding that young people are different from adults and deserve the opportunity for rehabilitation and to move past any alleged youthful transgressions.

Diversion from Prosecution

One of the most important procedural distinctions between Family Court and adult criminal court is that the Department of Probation assesses all potential Family Court cases for "adjustment" services before that case can be referred for prosecution. If a case is adjusted, a youth is supervised and participates in community-based services for a short period, after which, if they successfully complete adjustment services, the case will not be filed. The Family Court may also order the Department of Probation to assess a case to adjustment even after a petition has been filed, and the petition may be dismissed if the young person successfully completes adjustment services. Significantly, adjustment is also available in certain cases to youth whose cases are removed from the Youth Part to Family Court. For example, in one recently removed case, a 17-year-old who had been arrested for assault and had no previous arrests was given the opportunity to have his case adjusted after being removed from the Youth Part. He successfully completed the adjustment services offered, and his case was dismissed – it was never even filed in Family Court due to this success. Similarly, the Family Court "presentment agency" has the discretion to divert or decline to prosecute cases. The availability of services and the opportunity to avoid detention or harsher penalties provides a powerful incentive to young people to accept the requirements of adjustment and forego the judicial process.

Sentencing

All cases involving youth in New York State are handled by Family Court judges, whether in Family Court or in the Youth Part in adult court, who are mandated to receive training in adolescent brain development. All sentencing of youth therefore is required to consider the age and development of youth. AOs are subject to adult sentencing, although the judge will, and often must, consider the child's age when deciding the appropriate sentence.[3] JOs are not subject to the adult sentencing scheme. Youthful Offender treatment is a mechanism available to judges in the Youth Part to take cases out of the adult sentencing scheme and reduce its punitive nature. Youthful Offender treatment removes the stigma of a criminal conviction and allows sentencing to programs, probation and/or a prison sentence more appropriate for their age. All JDs are prosecuted in the Family Court under the Family Court Act and are not subject to adult sentencing.

N.Y.3d 339, 346 (2004) ("overriding intent of the juvenile delinquency article is to empower Family Court to intervene and positively impact the lives of troubled young people while protecting the public"); *Matter of Benjamin L.*, 92 N.Y.2d 660, 670 (1999) (noting that "rehabilitation of the juvenile through prompt intervention and treatment" is "the central goal of any juvenile proceeding"); *Matter of Jose R.*, 83 N.Y.2d 388, 394 (1994) (dispositional phase of proceeding has "central goal of rehabilitative support designed to help the troubled youth").

[3] *See*, NY Courts, Adolescent Offenders, https://nycourts.gov/courthelp/Criminal/adolescentOffender.shtml; C.P.L. § 720.

Confidentiality, Sealing and Expungement

New York State provides for confidential treatment and sealing of records in most instances in which a youth is accused of a crime. The Family Court Act provides greater privacy protections to children than adults, including the confidentiality and sealing of juvenile records. For example, all Family Court records are generally considered confidential because they are not accessible by the public.[4] Likewise, an adjudication in Family Court is not considered a conviction and therefore "shall not operate as a forfeiture of any right or privilege or disqualify any person from holding public office or receiving any license granted by public authority."[5] Nor will an adjudication disqualify a person "to pursue or engage in any lawful activity, occupation, profession, or calling."[6] These protections from collateral consequences are a key component of New York's juvenile legal system – providing a rehabilitative path for young people.

In addition, young people with Family Court adjudications also have several opportunities to seal their records, and thereby further restrict access to their records. Any case that is favorably terminated is automatically sealed, and a young person has the option to seek a court order to seal any other case.[7] Finally, certain Family Court records may be expunged--physically destroyed--in order to further shield a young person from collateral consequences post-adjudication.[8]

There are similar protections in the Youth Part where a young person may be mandated or eligible for youthful offender (YO) status. A YO adjudication is also not considered a conviction. When an eligible young person pleads or is found guilty, his conviction may be vacated and replaced with a YO finding.[9] If a young person receives YO status, their records are sealed and cannot be used to disqualify them from employment, nor is a young person required to disclose a YO adjudication on housing or job applications.[10] Importantly, New York courts may not use a YO adjudication to enhance a sentence in a subsequent case.[11]

Detention and Incarceration

Detention and incarceration are different for young people as compared to adults in New York. In contrast to the punitive purpose of adult incarceration, Family Court treatment of youth serves an articulated rehabilitative purpose.[12] In New York City, the social services department, the

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[4] FCA § 166.
[5] FCA § 380.1
[6] *Id.*
[7] FCA §§ 375.1, 375.2.
[8] FCA § 375.2.
[9] CPL § 720.20.
[10] CPL § 720.35.
[11] *United States v. Matthews*, 205 F.3d 544, 548 (2d Cir. 2000).
[12] "Criminal sentencing is in substantial part, at least, retributive in nature. By contrast, the delinquency dispositional phase is essentially rehabilitative in purpose, even though the court is mandated to consider 'the needs and best interests of the respondent as well as the need for protection of the community.'" *Matter of Steven E.H.*, 124 Misc. 2d 385, 388 (Kings Co. Fam. Ct. 1984). Adolescents whose acts "bring[] them into the juvenile justice system deserve every chance to obtain an education and change the direction of their lives." *Matter of Robert J.*, 2 N.Y.3d at 346.

Administration for Children's Services (ACS) – not a criminal justice agency as with adults - is responsible for the detention of all youth and for the placement of youth adjudicated as JDs. If detained, children and youth are remanded to ACS custody and detained in specialized secure detention, secure detention or non-secure detention. Two facilities operate as specialized secure and secure detention and are authorized to hold JDs, JOs, and AOs. ACS also contracts with nonprofits for the operation of nonsecure detention facilities (NSDs) which are authorized to hold JDs. NSDs provide services and supervision for young people awaiting Family Court process.

If any youth prosecuted in Family Court is found to have committed an alleged offense, a dispositional hearing is held. If the court determines at the dispositional hearing that the least restrictive alternative for the young person is placement, in New York City they are placed in a "Close to Home" placement facility.[13] ACS contracts with not-for-profit agencies who operate these congregate residential placement facilities, which include both non-secure placement (NSP) and limited secure placement (LSP). Again, both NSP and LSP provide treatment and services for placed JDs. If a JO is found to have committed the alleged offense and sentenced to a period of incarceration, they are placed in facilities run by the state social services agency, the Office of Children and Families (OCFS). OCFS facilities provide mental health treatment and other services to assist in rehabilitation of the young person. If an AO is found guilty and is under 18 years old when sentenced to incarceration, they will be placed in either an OCFS facility or a facility designed for AOs by the state Department of Corrections and Community Supervision.

Throughout the legal process, there are several off-ramps for a young person to exit the legal system and or to avoid detention or placement. For example, ACS has created a network of Alternatives to Detention (ATD) and Alternatives to Placement (ATP) programs. ATDs are intended to prevent a youth from being placed in one of the detention facilities and ATP are community-based dispositional alternatives to a Close to Home facility which has intensive services for an adjudicated JD.

Reforms Aimed at Implementing Practices Based on Adolescent Brain Science

Adolescent brain development science has conclusively shown that the prefrontal cortex of the brain—which governs impulse-control, judgment, and planning— does not mature until after the teenage years.[14] Teenagers are not yet wired to consider the long- term consequences of their actions or to resist environmental pressures. The adolescent brain is more malleable, or "plastic," than that of adults, and because of increased plasticity, teenagers are particularly sensitive to their environment.[15] At the same time, notably, this brain plasticity reveals that youth charged with crimes are amenable to rehabilitation. Moreover, desistance from crime is correlated with the declining susceptibility to

[13] Although rare, some JDs prosecuted for a subset of alleged offenses, known as "designated felonies," may be placed in secure placement facilities.

[14] *See, e.g.*, Whiting, Freya, *Miller v. Alabama: An Empty Promise for Juveniles Facing Life Without Parole?*, 9 Va. J. Crim. L. 91 (2021).

[15] *See, e.g.*, Linder, Lindsey and Martinez, Justin, *No Path to Redemption: Evaluating Texas's Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison*, 22 Scholar: St. Mary's L. Rev. & Soc. Just. 307, (2020) (citing Patia Spear, Linda, *Adolescent Neurodevelopment*, 52 J. Adolescent Health S7, S8 (2013) (explaining how synaptic pruning allows for late brain plasticity in adolescents)).

influence from antisocial peers.[16] As such, both criminal offending and risk-taking decrease as a youth matures into adulthood. The consensus on this issue has only strengthened over time. Adolescent brain development science has driven dramatic law reform across the country, including New York.

Over the past decade, New York has engaged in legislative reform efforts to bring its practices involving youth charged with crimes in line with the science of adolescent brain development. Specifically, New York raised the age at which young people are automatically prosecuted in adult criminal court and raised its minimum age of Family Court jurisdiction. Both reforms reflect an understanding that young people are less culpable than adults and deserve a pathway to services rather than further entanglement in the legal system and the collateral consequences that result.

New York's Experience with Raise the Age

New York's "Raise the Age" law, which took effect in 2019, raised the age of criminal responsibility from 16 to 18. As a result, most youth charged with crimes are eligible to have their cases adjudicated in Family Court. Raising the age of criminal responsibility created the opportunity for most court-involved youth to be treated with a rehabilitative, age-appropriate approach and to provide greater protections for both youth and communities at large.

Raising the age of criminal responsibility is a notable and key aspect of criminal justice reform. Diverting youth to the family court system rather than criminalizing their conduct is both consistent with adolescent brain development and has a positive impact on public safety. Treating youth in the juvenile system is humane and it strengthens our economy by ensuring that more young people enter the workforce unencumbered by criminal convictions. Additionally, by raising the age of criminal responsibility, New York has increased the involvement of parents and caregivers. For instance, the NYPD is required to notify parents/caretakers of 16- and 17-year-olds when their child is arrested. It allows the parent/caretaker to be present during police interrogation and requires parental consent to police interrogation. Finally, Raise the Age protects youth from the many of harms associated with adult incarceration, particularly on the notorious Rikers Island.

Raising the Lower Age of Family Court Jurisdiction

Similarly, in recognition that criminalizing young children runs contrary to scientific research recognizing that children are inherently less culpable than adults, New York passed legislation to raise its minimum age of prosecution from 7 to 12 years old (except for certain homicide offenses). In changing the law, the state legislature acknowledged that prosecuting young children raises significant concerns about a young child's capacity to meaningfully participate in the judicial process. The decision to treat children as children and allow 7–11-year-olds to be diverted from the legal system is based on the understanding that it's important to allow children to move beyond youthful mistakes and to avoid the dangers of juvenile legal system involvement, including higher chance of early death, leaving school and barriers to employment.

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[16] *See, e.g.,* Ionescu, Ana, "*Incorrigibility is Inconsistent with Youth": The Supreme Court's Missed Opportunity to Cure the Contradiction Implicit in Discretionary JLWOP Sentencing,* 76 U. Miami L. Rev. 612 (2022).

Through these laws, New York brought its response to children in line with current research on child development, moved toward addressing racial disparities in our youth justice system, and saved and continues to save limited state and local resources by diverting young children from delinquency probation and prosecution, and into more effective, age-appropriate community-based services.

Racial Inequity Continues to Pervade the Juvenile Legal System

Notwithstanding the significant reform in New York, appalling and longstanding racial disparities still exist in every facet of NYC's juvenile legal system. Justice-involved children and teens are almost exclusively poor and Black or brown. For example, young Black and Latinx people are disproportionately targeted for arrests. In 2022, 91% of documented police encounters with people under 18 involved Black and Hispanic youth.[17] Likewise, according to pre-trial release data, in 2022, 92% of juvenile arrests involved Black and Hispanic youth.[18] There are also a disproportionate number of petitions filed against Black and Latinx youth in Family Court. In 2022, 91% of juvenile delinquency petitions filed in New York City involved Black and Hispanic juveniles.[19]

These disparities are also evident in detention and incarceration data. According to ACS Detention Demographic Data, 66.9% of all New York City youth admitted to secure detention facilities in 2021 self-identified as Black, despite Black children representing only 22% of the population of children in NYC.[20] Similarly, 71.9% of those admitted to non-secure detention facilities identified as Black. [21]These injustices are rooted in racial inequities that permeate society.

Part A: Computing Criminal History for Offenses Committed Prior to Age Eighteen

In its proposed amendments, the Commission has detailed three options to modify the guidelines dealing with computing criminal history for offenses committed prior to age eighteen. As written, the current guidelines provide that certain sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score. Specifically, "[c]ourts assign three criminal history points if a defendant was convicted as an adult for an offense committed before age eighteen and received a sentence of imprisonment exceeding one year and one month, if the sentence was imposed, or the defendant was incarcerated, within fifteen years of the commencement of the instant offense … Courts assign two criminal history points for 'each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense' … [and o]ne criminal history point is added for 'each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).'" The proposed amendments, outlined in

[17] https://www.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page
[18] https://ww2.nycourts.gov/pretrial-release-data-33136
[19] NYC JD Probation Intake Data.
[20] https://cccnewyork.org/data-publications/keeping-track-of-nyc-children-2022/?section=Who+Are+New+York+City%27s+Children%3F
[21] https://www1.nyc.gov/assets/acs/pdf/data-analysis/2021/DetentionDemographicReportFY21.pdf

three distinct options, "seek to strike the right balance between various considerations related to the sentencing of youthful individuals, including difficulties in obtaining supporting documentation for juvenile adjudications and in assessing 'confinement,' recent brain development research, demographic disparities, higher rearrest rates for younger individuals, and protection of the public."

LAS supports these goals and urge the Commission to accept Option 3, the approach that is most in line with these laudable aims. Option 3 would amend the guidelines to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. Moreover, Option 3 goes the furthest to eliminate the consideration of these youthful offenses in increasing offense levels. This approach is in line with both the policy and practice underlying youthful prosecution in New York and protects young people from unknown collateral consequences of legal system involvement. We also urge the Commission to go further and exclude state YO adjudications received by a young person over the age of 18.

First, as outlined above, New York has made clear legislative decisions, through raising the age of criminal prosecution, raising the lower age of juvenile prosecution and through its court processes and procedures, to treat children as children and shield them from the harmful effects of criminal legal system involvement. Each of these decisions is rooted in adolescent brain science showing that youth "have lower impulse control, a greater tendency toward sensation seeking … [and] act differently when they are among peers and friends than they do when they are alone."[22] The latter is an important factor considering the number of alleged offenses that occur among groups of teenagers. As outlined above, this research led policymakers in New York to amend its laws regarding youth charged with criminal behavior. This research, as the Commission is aware, also led the U.S. Supreme Court to issue several decisions recognizing the diminished culpability of justice-involved youth and finding the death penalty, mandatory life without parole sentences for homicide offenses and life without parole for any non-homicide offenses unjust and unconstitutional. Similarly, this reasoning demands that offenses committed by young people should not be equated to those committed by adults and as such the sentencing guidelines must be amended. As one commentator notes, "what an adult did when he was 17 or younger is too attenuated from a developmental perspective to factor into the punishment he deserves for a later federal offense."[23]

Second, the guidelines should be amended in recognition that young people prosecuted in New York, as in many other states, accept pleas and sentences without knowledge of the consequences of a later conviction for a federal offense. At every point, regardless of whether a young person is prosecuted as a JD, JO or AO, they are treated differently than adults. They are afforded opportunities for services and treatment, their cases are handled by judges trained in adolescent brain development, and their adjudications and convictions are often provided extensive confidentiality, sealing and expungement protections. Importantly, at no time during their involvement in the legal system are young people informed that the outcome of their case in the Family Court or Youth Part could have significant consequences if they are later found guilty of a federal offense. Indeed, the opposite is true.

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[22] Ian Marcus Amelkin & Nicholas Pugliese, *The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Defendants' Prior Offenses Committed Before Age 18*, 19 HARV. L. & POL'Y REV. (forthcoming Spring 2024).
[23] *Id.*

Young people are repeatedly informed that Family Court proceedings are confidential and they have the opportunity to seal or expunge their records, that adjudications in Family Court are not convictions and do not implicate the same collateral consequences of adult convictions, and that many convictions in the Youth Part are also not convictions, will not show up on rap sheets and will likewise not trigger many collateral consequences that can burden a person for the rest of their lives. In other words, they are expressly protected from the ramifications of an adult conviction in New York. Given this disparate treatment and lack of notice, it is unjust to allow these same adjudications and convictions to factor in federal sentencing.

Finally, it is critical that the Commission amend the guidelines to also exclude 18-year-olds with YO status from calculation of criminal history. As written the proposed amendments only include youth 17 and younger, yet many young people aged 18 are sentenced as YO and are equally entitled to its protections, including protection from use in federal sentencing. The same policy concerns apply whether the young person is adjudicated as a YO at 18 as if they adjudicated as such at 17. As such, YO adjudications for 18-year-olds must also be excluded from computation in criminal history for federal sentencing.

Part B: Sentencing of Youthful Individuals

The Commission has also included amendments to the guidelines that would provide for consideration based on age when "relevant in determining whether a departure [from the guidelines] is warranted." In addition, the amendments would add language "providing for a downward departure for cases in which the defendant was youthful at the time of the offense and set forth considerations for the court in determining whether a departure based on youth is warranted." While we applaud these proposed changes, we urge the Commission to go further and amend the guidelines to require downward departures based on the defendant's youthfulness at the time of the offense without requiring further consideration of additional factors. Courts should be required rather than permitted to consider downward departure based on age. This is in line with adolescent brain development research and would be one step toward addressing racial disproportionality in sentencing.

As outlined above, over the last two decades, adolescent brain development science has conclusively shown that young people are not yet wired to consider the long- term consequences of their actions or to resist environmental pressures. As such, mistakes of justice-involved youth are only relevant in considering downward departures from the guidelines. The lower culpability of justice-involved youth suggests that courts should consider age as a single critical factor in allowing a downward departure from the guidelines.

Moreover, as stated above, racial inequity pervades New York', and the nation's, juvenile and criminal legal system. Poor children of color are overly policed, more likely to be prosecuted, and more often detained or imprisoned. Adults of color are therefore more likely to have juvenile or youthful offender adjudications than their white peers. This systemic racism cannot be ignored. By requiring consideration of age in downward departure analysis, courts will take a critical step toward acknowledging and addressing this disparity.

Conclusion

Thank you for this opportunity to provide feedback. The Commission's proposed amendments are an important step toward recognizing the inherent differences of justice-involved youth and bringing the guidelines in line with how young people are treated at the state level. We appreciate your consideration of our comments and are available if you would like to discuss these issues further.

Sincerely,

/s/

Dawne A. Mitchell
Attorney in Chief
Juvenile Rights Practice

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Towers For Change Organization

Topics:

Acquitted Conduct

Comments:

The BOP is operating at 110 or more capacity. We are supposed to be making changes to end mass incarceration not to increase it. Acquitted conduct is acquitted. It's insane to think that you should be punished later for some thing you were found not guilty of prior, how does that even happen please eliminate punishment for acquitted conduct and make it retroactive!

Submitted on: February 21, 2024

February 20, 2024

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

Re: Proposed 2023-2024 Amendments and Issues for Comment

Dear Judge Reeves,

Tzedek Association commends the Commission for its determination to address the distorting impact of using acquitted conduct in sentencing determinations. We share our views on the best approach to guideline reform on this issue below. In addition, we appreciate the Commission's effort to make some technical changes to the rules relating to loss in §2B1.1, but we believe that far more significant reform to that guideline are needed and that any changes to the guideline should await more robust and substantive reforms in coming years.

Acquitted Conduct

As is widely recognized, the issue of acquitted conduct has attracted the attention of many reform groups from across the ideological perspective who see various problems with treating acquitted conduct no differently than convicted conduct at sentencing. The Supreme Court has highlighted the importance of this issue and the prospects for Commission action, and Congress has been working on a bipartisan, bicameral legislative reform initiative that will be usefully informed by the Commission's work here.[1]

Driving our comments here is a commitment to the fundamental structural features of our rights-protecting adversarial system of justice. The Supreme Court has repeatedly extolled and stressed our system's commitment to an individual's right to have a jury decide facts essential to punishment: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (plurality op.); *accord Alleyne v. United States*, 570 U.S. 99, 114 (2013); *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). But whenever a judge relies on facts underlying jury-rejected charges to increase a sentence, the jury trial "promise" becomes empty and this "vital" protection against the government becomes illusory.

As Justice Neil Gorsuch explained in *Haymond*, "the right to a jury trial sought to preserve the people's authority over its judicial function." 139 S. Ct. at 2375. As Justice

[1] See *McClintock v. United States*, No. 21-1557 (June 30, 2023) and Prohibiting Punishment of Acquitted Conduct Act of 2021. H.R. 1621/S. 601 (117th Congress). The proposed legislation overwhelming passed the House but was ultimately never brought to the Senate floor for a vote.

Clarence Thomas explained in *Alleyne*, juries play an historic role "as an intermediary between the State and criminal defendants." 570 U.S. at 114. And as Justice Antonin Scalia explained in *Blakely*, "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." 542 U.S. at 313. These cases and others safeguarding Sixth Amendment rights highlight that the jury trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Our comments on acquitted conduct are informed by the enduring constitutional principles that are necessarily undermined whenever judges treat acquitted conduct no differently than convicted conduct at sentencing.

The Commission has sought comment on three potential ameliorative options, as well as several ancillary issues.

I. Option 1: Acquitted Conduct Excluded from Guideline Range

Tzedek Association strongly endorses Option 1 as the <u>only</u> viable approach among the options offered that advances a meaningful effort to remediate the multi-faceted harms that stem from the use of acquitted conduct to enhance sentences. The use of acquitted conduct in calculating guideline ranges is especially pernicious because it serves not just to allow, but in fact to require, judges to treat acquitted conduct at sentencing exactly like convicted conduct. Judges are duty bound to calculate guidelines ranges and use those ranges as starting points and benchmarks. For the starting point and sentencing benchmark to include reliance on acquitted conduct serves to essentially nullify the jury's historic and intended role "as an intermediary between the State and criminal defendants." *Alleyne*, 570 U.S. at 114.

We submit that, in order to most effectively respect and fulfil the historic and constitutionally inspired role of juries, the Commission should adopt a policy statement that precludes the use of acquitted conduct for <u>all</u> sentencing purposes. The Sentencing Commission, drawing and expanding upon statutory instructions from Congress, has long stated in §5H1.10 that certain factors are "not relevant in the determination of a sentence." Tzedek's view is that a similar language could and should be used in a policy statement addressing acquitted conduct; such language would advance the sentencing instructions in 18 U.S.C. §3553(a) concerning, inter alia, the need for sentences to "promote respect for the law" and the "need to avoid unwarranted sentence disparities among defendants with similar records ***who have been found guilty of similar conduct.***"

Based on constitutional principles, statutory language and guideline application experiences, we believe that when the Commission at long last addresses the problem of sentencing individuals based upon conduct for which a jury has returned a verdict of not guilty, it is insufficient for the Guidelines to leave the Government free in any and every case to argue for an enhanced sentence, and for courts to be free in any and every case to impose such an enhanced sentence, based upon that alleged conduct.

Guided by these overriding principle, Tzedek responds to the various other options and issues upon which the Commission seeks comment as follows:

II. Option 2: Downward Departure is Inadequate

The option that provides relief from the distorting impact of acquitted conduct only when a court finds that use of that conduct results in a disproportionate or extremely disproportionate impact is far too subjective and wholly inadequate. For example, if an individual is convicted of a drug conspiracy, but is acquitted of a count charging a related homicide or acquitted of being involved with a much larger quantity of drugs and that conduct still drives the determination of the guideline range, the guideline calculation essentially nullifies the jury's acquittal. Further, if that conduct is deemed relevant to the guideline calculation by the sentencing manual's instructions, what would lead any judge to determine that its impact on the sentence is "disproportionate"? Disproportionate to what?

If the purpose of this reform is to ensure that jury's determination is duly respected, exclusion from the guideline calculation is the only sound and tangible way to deliver the message that the jury's work is meaningful and must be respected at sentencing at the very first stage in the calculation of the guideline range. Crafting a discretionary departure recommendation to apply in only some cases, even if we might reasonably expect some judges in some circumstances might opt to depart downward based on the instruction, is not nearly sufficient to address the problem and to show proper respect for the jury's role in our constitutional system.

III. Option 3: Relevant Conduct—Clear and Convincing Evidence Standard is Inadequate

Elevating the standard of proof from a preponderance of the evidence to clear and convincing evidence substitutes the illusion of reform for the reality of such reform. It perpetuates the core problem with acquitted conduct sentencing, which is that the jury's judgment of acquittal may still be functionally ignored at sentencing so that an agent of the state, and not the "the people's authority," serves to adjudicate guilt for sentencing purposes. Additionally, this reform would not deter the Government from overcharging certain defendants in the expectation that, even if the evidence is insufficient to establish guilt beyond a reasonable doubt, it may still persuade the court to sentence for the conduct. The prospect of such prosecutorial overcharging can be especially pernicious because competent and ethical defense attorneys must advise defendants that acquittal on some counts may produce no sentencing benefits and may risk losing possible reductions for accepting responsibility on the counts of conviction. Nor would just an increase in the proof standard address the underlying issue of public skepticism about a system that essentially permits a sentencing enhancement based on conduct that a jury had found was not proved.

It is also appropriate to note that this option highlights the more pervasive unfairness and inconsistency that arises more generally from the use of uncharged conduct at sentencing. This is an issue for another day, but a "reform" that perpetuates the use of acquitted conduct merely by substituting a different standard of proof begs the question of why the revision of the §6A1.3 policy statement should be limited to acquitted conduct? Arguably such a modification is just as necessary, perhaps even more necessary, in the context of uncharged conduct. If the Commission were to adopt this revision, Tzedek urges that it apply the policy to all conduct—whether acquitted or uncharged. And regardless of whether this option is adopted, Tzedek urges the

Commission to consider in future cycles reforms that address the pernicious impact of sentencing based upon uncharged conduct.

IV. Additional Issues for Comment

The Commission has invited comments on various issues ancillary to potential reforms related to acquitted conduct. Tzedek offers the following perspectives:

- **Whether to prohibit the consideration of acquitted conduct for purposes other than determining the guideline range.**

Yes. In Tzedek's view, once a jury acquits an accused person of certain charged conduct, it should not be used for any purpose. For the reasons stated above, and the many reasons previously presented to the Commission by Tzedek[2] and many other groups, sentencing based upon acquitted conduct undermines confidence in the criminal process and contributes to undue harshness and disparity. That said the inherent discretion vested in the sentence judge, combined with the plain language of 18 U.S.C. § 3661, may make it difficult if not unwise to seek to entirely prohibit a judge from considering the conduct—even where there has been an acquittal—in determining an applicable sentence within the guideline range. Nevertheless, under no circumstances should that conduct afford the basis for a departure or a variance from the guideline.

- **The interactions between 18 U.S.C. §3661 and 28 U.S.C. §994 and the more expansive potential prohibitions on the use of acquitted conduct.**

The Commission has long provided, throughout the Guidelines Manual, all sorts of instructions not only about how guidelines ranges should be calculated, but also about factors that the Commission has ***independently*** decided should categorically be excluded from other sentencing determinations and considerations. *See, e.g.*, §5H1.10 (providing, inter alia, that religion is "not relevant in the determination of a sentence"); §5H1.4 (providing that "addiction to gambling is not a reason for a downward departure"); §5H1.12 (providing that "lack of guidance as a youth" and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted). Though these factors and many other were not addressed by Congress through its instruction to the Sentencing Commission in 28 U.S.C. §994, the Commission has exercised its informed and independent judgment that certain factors not addressed by Congress ought to be in some ways prohibited from federal sentencing consideration. Acquitted conduct can be, and in our view should be, just another such factors.

Of course, this Commission cannot override the provisions 18 U.S.C. §3661 to directly preclude sentencing judges from hearing prosecutorial allegations about the defendant's conduct at sentencing, even as related to acquitted charges. But this Commission can and should preclude this conduct from being used in guideline calculations and it also can and should highlight that any significant sentencing reliance on acquitted conduct runs contrary to various

[2] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1260

key provisions of 18 U.S.C. §3553(a) such as the need for a sentences to "promote respect for the law" and the "the need to avoid unwarranted sentence disparities among defendants with similar records ***who have been found guilty of similar conduct***". A recommendation from the Commission that acquitted conduct ought not be used as the basis for an upward departure or variances may serve this end.

More fundamentally, 18 U.S.C. §3661 provides that there shall be no limitation on information that a court "may receive and consider for the purpose of imposing an ***appropriate*** sentence." Tzedek's view, which we believe is shared by the vast majority of Americans and is consistent with constitutional principles, is that "appropriate" sentences in our nation should and must be focused on conduct for which a defendant has been convicted, not acquitted conduct. Precluding consideration of acquitted conduct in no way risks limiting the consideration of appropriate sentencing factors.

Notwithstanding all of the aforementioned reasons why a policy prohibiting the use of acquitted conduct is not inconsistent with 18 U.S.C. §3661, should the Commission conclude that this statute precludes the proposed remedial amendment, then Tzedek urges the Commission to exercise its authority under 28 U.S.C. §994(w)(3) to recommend legislation amending 18 U.S.C. §3661 to expressly preclude the consideration of acquitted conduct.

- **Whether, alternatively, the Commission should adopt a policy statement recommending against, rather than prohibiting the consideration of acquitted conduct for certain sentencing steps?**

No. For the reasons stated above the Commission should adopt a policy prohibiting the consideration of acquitted conducts for any and all purposes.

- **Relatedly, what step in the sentencing process should be included in such a policy statement? Consideration of acquitted conduct for the purposes of determining the guideline range, the sentence to impose with the guideline range, whether a departure is warranted or any other factor when imposing a sentence?**

Please see the preceding comment.

- **Whether to expand the proposed definition of "acquitted conduct" to include acquittals from state, local, or tribal jurisdictions?**

Yes. There is no rational basis to treat acquittals in other jurisdictions as any different from an acquittal in a federal prosecution.

- **Should the Commission adopt the definition of "acquitted conduct" used in the "Prohibiting Punishment of Acquitted Conduct Act of 2023," S.2788, 118th Cong. (1st Sess.2023)?**

Yes. That definition includes state and tribal courts, as well any favorable disposition whether pretrial, at trial or post-trial.

- **Whether an exclusion from the definition of "acquitted conduct" is necessary with respect to "acquitted conduct" overlaps with an offense of conviction either as admitted by a defendant in a plea colloquy or found by the trier of fact beyond a reasonable doubt?**

No such exclusion should be adopted. Courts should not be in the business of surmising which element(s) of an offense a jury found was lacking. If a person is acquitted of a particular charge, that charge and related alleged conduct should not be used at all to calculate or adjust the sentence on the charges of conviction. Obviously, however, if an element of the acquitted count is also an element of the count of conviction, the court may consider the conduct that constituted that element.

- **Whether any or all the options should be revised to address acquittals based on reasons unrelated to substantive evidence, such as jurisdiction, venue, or statute of limitations? If so, how?**

For the very same due process reasons why the government must establish jurisdiction, bring the case in the proper venue, and initiate the charges within the relevant statute of limitations, Tzedek opposes any distinction that would exempt from any reform acquittals arising from these factors. Setting aside the potential difficulties in looking behind the jury's verdict to determine the basis of an acquittal, there is no sound public reason why these due process considerations should be relegated to a lower tier.

Loss and Revision of § 2B1.1

Given circuit rulings concerning the application of loss in §2B1.1, we appreciate and understanding the Commission's inclination to make some technical changes to this guideline. But especially because the Commission has indicated it is "considering conducting a comprehensive examination of §2B1.1 during an upcoming amendment cycle," Tzedek strongly urges the Commission to defer making changes to §2B1.1 and its commentary until a future amendment cycle allows consideration of more significant and substantive reforms.

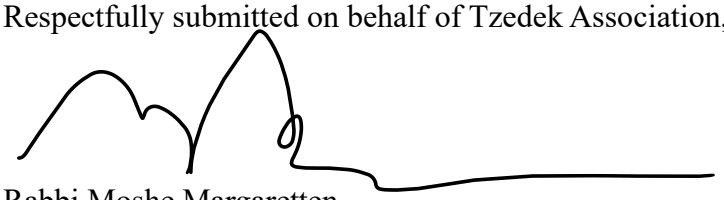
As Tzedek has discussed in prior submissions[3] and as is widely known, the Sentencing Guidelines addressing federal fraud crimes have long been the subject of criticism and confusion. In part because of a focus in §2B1.1 on measuring sentences by the greater of "intended" or "actual" loss—as well as the prevalence of numerous other severe and overlapping sentencing enhancements—the guidelines too often blur the lines between focused, intentional conduct (think Bernie Madoff) and less culpable conduct of lower-level individuals with mitigating mental states. There is widespread consensus that the fraud guidelines tend to recommend sentencing terms that are far too severe, especially for persons with mitigated culpability and first offenders. The Commission's data highlight this reality: judges impose nearly two-thirds of sentences ***below*** the terms recommended by §2B1.1. *See* U.S. Sentencing Commission, *4th Quarter 2023 Preliminary Cumulative Data*, Table 11 (Published December 1, 2023).

[3] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=195

Tzedek has noted in prior submissions that the Loss Table as written is outdated, excessive and exceedingly unfair.[4] In addition to recommending significant revisions to this table, Tzedek has also argued that, in service to simplifying and improving §2B1.1, the guideline should call for calculating "loss" in terms of actual loss, not intended loss, with judges then directed by the guidelines to give more focused attention to defendants' actual intents and motives and also to related mitigating and aggravating factors. Though this submission is not the proper venue for discussing these substantive particulars, we must note that circuit rulings restricting guideline calculations to only actual loss may well represent a substantive improvement (and one that might lead more judges to sentence within the guideline). And, more broadly, we believe quite strongly that it is time for wholesale revisions, not short-term tinkering, with §2B1.1.

Accordingly, Tzedek urges the Commission to forgo any short-term fix (which may not be a fix at all) in order to begin in earnest the robust reconstruction work needed for §2B1.1.

Respectfully submitted on behalf of Tzedek Association,[5]



Rabbi Moshe Margaretten
President

[4] Id., Tzedek submission, pages 21-25

[5] Tzedek thanks Norman L. Reimer and Professor Douglas A. Berman for their indispensable advisory role in assisting with the drafting of this letter.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

US Citizens

Topics:

Acquitted Conduct

Comments:

Acquitted conduct amendment
Started
January 26, 2024
Signatures: 48Next Goal: 50
48
50
Signatures
Next Goal
Support now
Sign this petition
Why this petition matters

Started by
Shawn Stackhouse
January 25, 2024

Dear Honorable U.S. Sentencing Commission:

Thank you for agreeing to make the "Acquitted Conduct Amendment" a necessity this year. Respectfully, we come before this Commission pleading for Retroactive Application to the Acquitted Conduct Amendment, so defendant's that have previously been unfairly affected, may have an opportunity to receive relief from the unconstitutional sentences they are having to serve. In the interest of justice and being afforded the right to due process of law as guaranteed under the U.S. Constitution, please move forward with passing the "Acquitted Conduct Amendment" and making it retroactively applicable.

Sincerely,

U.S. Citizens in support of passing the "Acquitted Conduct Amendment and Retroactive Application"

Submitted on: February 9, 2024

526 W. 14th Street, Suite 287
Traverse City, MI 49684
www.uv4sor.org

February 21, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Comment on Amendment 2 for the 2024 Amendment Cycle

Esteemed Commissioners:

Thank you for the opportunity to offer commentary on Amendment 2 of the 2023-2024 Amendment Cycle.

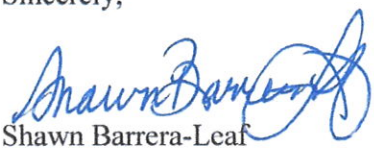
I am the Executive Director of United Voices for Sex Offense Reform (UV4SOR) a criminal justice reform non-profit organization. and an impacted family member of an adult in federal custody for a sexual offense. An important focus for our organization is following the Commission's mission of continuously establishing and amending federal sentencing guidelines for the judicial branch and assisting other branches in developing and implementing effective and efficient crime policy as it pertains to sex offenses. It is important to clarify that UV4SOR does not condone sexual abuse of any kind. We advocate for common sense policies and laws that protect public safety which are based on empirical evidence and research data.

We support the Commission's efforts to refine the provisions in §4A1.2 (Definitions and Instructions for Computing Criminal History) that cover criminal history calculations for offenses committed prior to eighteen and also amending sentences for offenses and options for consideration in calculating criminal history scores, and especially (B) the amendment to §5H1.1 to address unique sentencing considerations relating to youthful individuals.

It is not in the purview of our organization to address ***specific*** alternate sentencing considerations for juveniles. UV4SOR's position is that the new provisions adopted by the Commission should not stop at age 18, but should include emerging adults up to the age of 25. There is voluminous research and data available to support our position which includes data on decision-making strategies and the brain development of individuals in the emerging adult population. However, among this population, we would be remiss if we did not underscore the importance of brain development in addressing sentencing considerations. Normally, executive function in the brain reaches full capacity as late as 25 years of age and, therefore, impacts the ability to make sound judgments at an adult level in this age group. Brain injuries and other types of trauma, even in the childhood years, may profoundly impact decision-making capabilities in this population. We have included several research citations for the Commission's perusal.

Thank you for soliciting comments from the public. We appreciate the Commission's consideration of our proposed solutions to create alternatives to reduce mass incarceration. We realize how many letters the Commission receives and we appreciate you taking the time to read ours.

Sincerely,



Shawn Barrera-Leaf
Executive Director
United Voices for Sex Offense Reform
UV4SOR.org

RECOMMENDED ARTICLES

Icenogle, Grace, and Elizabeth Cauffman. "Adolescent decision making: A decade in Review." *Journal of Research on Adolescence*, vol. 31, no. 4, 24 Nov. 2021, pp. 1006–1022, https://doi.org/10.1111/jora.12608.

Letourneau, Elizabeth J., et al. "No check we won't write: A report on the high cost of sex offender incarceration." *Sexual Abuse*, vol. 35, no. 1, 23 Mar. 2022, pp. 54–82, https://doi.org/10.1177/10790632221078305.

Schwartz, Joseph A., et al. "Head injuries and changes in delinquency from adolescence to emerging adulthood." *Journal of Research in Crime and Delinquency*, vol. 54, no. 6, 7 June 2017, pp. 869–901, https://doi.org/10.1177/0022427817710287.

Modecki, Kathryn L., et al. "Emotion regulation, coping, and decision making: Three linked skills for preventing externalizing problems in adolescence." *Child Development*, vol. 88, no. 2, 13 Feb. 2017, pp. 417–426, https://doi.org/10.1111/cdev.12734.

526 W. 14th Street, Suite 287
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www.uv4sor.org

February 21, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Comment on Amendment for the 2024 Amendment Cycle

Dear Judge Reeves and Esteemed Commissioners:

On behalf of the members of United Voices for Sex Offense Reform (UV4SOR), a criminal justice reform non-profit, and as a justice-impacted family member of an adult in federal custody, thank you for the opportunity to provide input to the Commission and to publicly address Amendment 5 (F) of the 2023-2024 amendments and issues for comments. Our membership supports the new §4C1.1 (Adjustment for Certain Zero-Point Offenders) which provides a decrease of two levels from the offense level determined under Chapters Two and Three for offenders who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors. However, we do not support the decision to include the following instant offense to §4C1.1 (Adjustment for Certain Zero-Point Offenders) as an aggravating factor:

ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS §4C1.1.

Adjustment for Certain Zero-Point Offenders
(5) the instant offense of conviction is not a sex offense;

We vehemently disagree with 5(F), the two options for amending §4C1.1 (Adjustment for Certain Zero-Point Offenders) to address concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b) (2)."

The subsection:
(b) Definitions and Additional Considerations.—
(2) "Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.

- Specifically §4C1.1 #5 the offense of conviction is not a sex offense;

We propose that ***Subsection (b) (2) (ii) chapter 110 of title 18, not including a recordkeeping offense*** be removed in its entirety. Those convicted of Chapter 110 sexual related offenses, which are non-contact, non-violent offenses, are a population with an ***astoundingly*** low recidivism rate, much lower than the other populations who are currently allowed to participate in the new amendment. They should be included to qualify for a 2-level reduction off of the offense level and participate in the U.S. Sentencing Commission sentencing guideline reforms. The vast majority of those currently in federal custody for Title 18 Chapter 110 convictions not only have "Zero Criminal History" points, but zero arrests. (https://www.ussc.gov/research/quick-facts/child-pornography). Including non-violent, non-contact sex offense convictions in §4C1.1 would not over-burden the Courts administratively, since the entire currently incarcerated population with these convictions within the Bureau of Prison System is small at only 7,815 people (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2023.pdf).

For years, the Department of Justice has ignored not only its own data and research studies, but the studies of the United States Sentencing Commission; this data supports including people with non-contact, non-violent sex offense convictions in reforms like in §4C1.1 (Adjustment for Certain Zero-Point Offenders). The Department of Justice, the Courts, and Congress continue to rely on discredited data studies to perpetuate the "frightening and high" myth, and that they are keeping the public safe by excluding all people with sex offense convictions (including non-violent non-contact convictions) from criminal justice reform legislation, and participation in U.S. Sentencing Commission sentencing guideline reforms. Volumes of scholarly research and 25 years of metadata studies exist that demonstrate that this population has the lowest documented recidivism rate of any convicted group and is less of a threat to the public than those with other convictions. (https://www.ojp.gov/pdffiles1/nij/grants/231989.pdf)

By eliminating Subsection (b)(2)(ii) Chapter 110 of title 18 and allowing those with non-violent, non-contact convictions to participate in §4C1.1 the Commission, in conjunction with Congress and the Department of Justice, have the opportunity to stop the continuous marginalization, economic and social discrimination, and other collateral consequences and suffering that our loved ones and their families who support them experience, despite research that shows low recidivism and re-arrest rates for people convicted of sexual offenses. We have included research for the Commission's perusal which supports these findings and the merits of our proposal.

Thank you, Judge Reeves and Commissioners, for the opportunity to provide commentary on Amendment 5F and for considering our proposal. UV4SOR members know the Commission takes the time to listen, that you hear us, and we value your representation of truth and justice.

Sincerely,

Shawn Barrera-Leaf
Executive Director
United Voices for Sex Offense Reform
UV4SOR.org

OTHER SUPPORTING RESEARCH

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf

https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf (Chapter 5)

https://hub.jhu.edu/2022/04/05/incarcerating-child-sexual-abusers-5-billion/

UV4SOR will provide additional research upon request.

youthrepresent
JUSTICE FROM COURTROOM TO COMMUNITY

Feb. 22, 2024
Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Re: Proposed Amendment to U.S. Sentencing Guidelines - Youthful Individuals

Dear Judge Reeves,

Founded in 2006, Youth Represent provides legal services to New York City youth aged 26 and under who have had contact with the juvenile or criminal legal system. We help young people access the fundamental elements of a stable and successful life – education, employment, housing, and family resiliency. In addition to our legal representation, we marshal evidence from the scientific community related to adolescent and young adult development, as well as expertise derived from our representation of thousands of young clients, to advocate for changes in law and policy.

We commend the Sentencing Commission for proposing changes to the sentencing guidelines related to youthful individuals. As we will detail below, **Youth Represent urges the Commission to adopt Option 3 of Part A of the proposed amendment**, amending §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. **We also urge the Commission to adopt Part B of the proposed amendment**, clarifying in §5H1.1 (Policy Statement) that "[a]ge may be relevant in determining whether a departure is warranted," adding language specifically providing for a downward departure based on youth, and directing the court to consider scientific evidence that psychosocial maturity is generally not developed until the mid-20s.

As noted in the Proposed Amendment, §4A1.2 (Definitions and Instructions for Computing Criminal History) is unchanged since the original guideline was enacted in 1987. In the nearly four decades since, our understanding of adolescent and young adult brain development has advanced dramatically. In jurisprudence, neuroscience, psychology, and social science, there is consensus that adolescents are biologically and psychologically different from adults in ways that affect their functional ability. Research on adolescent brain development shows that young people have not yet developed the full reasoning and decision-making abilities of adults. In the past two decades, the United States Supreme Court has repeatedly affirmed the distinctions between adults and youth by relying on neuroscience research pinpointing differences between adult and adolescent brains that affect decision-making capacity.[1] In 2005, the Court ruled in

[1] *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *JDB v. North Carolina*, 564 U.S. 261 (2011); *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012).

Roper v. Simmons that youth under 18 have reduced criminal culpability due to their immature judgment, susceptibility to negative peer influences, and transitory personality development.[2]

More recent research in developmental neuroscience has underscored that the human brain continues to mature into the late twenties. The functioning and connectivity of the prefrontal cortex, which controls decision-making, self-control and emotional processing, are among the last to fully mature.[3] This means that even emerging adults in their early 20's have less capacity than older adults to weigh risk and reward, delay gratification, and resist pressure from peers. The brains of children under 18 are in the earliest stages of developing these adult skills. Moreover, environmental and socioeconomic factors including food insecurity, unstable housing, physical danger, foster care placement, failing schools, and lack of access to healthcare (including diagnosis and treatment of mental and behavioral health issues) present additional challenges to developing children and adolescents. While accountability and effective intervention are necessary for this age group, the fact of their biological immaturity substantially reduces their criminal culpability.

Simply put, decisions made during adolescence and emerging adulthood – even decisions that cause significant harm – are made without the benefit of full maturity and should not continue to burden an individual throughout adult life. This is especially true for conduct by youth under the age of 18.

In this letter we describe research on adolescent brain development, evidence of how racial disparity and environmental factors drive juvenile justice involvement, jurisdictional variation in treatment of youth, and observations from our own practice representing young people to support this argument.

Part A: Computing Criminal History for Offenses Committed Prior to Age Eighteen

1. Adolescents are Different from Adults and Should be Shielded from Adult Punishment.

As noted in the Proposed Amendment, research has shown that brain development continues until the mid-20s on average and that the immaturity of adolescent and young adult brains can contribute to impulsivity and reward-seeking behavior. Below we outline in more detail some of the findings from developmental neuroscience over the past two decades that illustrate the differences between adolescent and adult brains. These findings support the argument that adolescents should be shielded from adult culpability and punishment.

- **Heightened Response to Reward:** Research in developmental neurobiology underscores what we know empirically – that adolescents are more prone to impulsive decision-making, especially in emotionally charged situations. Somerville and Casey write in the Current

[2] Feld, Barry C. *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 Law & Inequality, at 263 (2013), available at https://scholarship.law.umn.edu/faculty_articles/296.
[3] Center for Law, Brain & Behavior at Massachusetts General Hospital. *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers*, at 7 (2022), available at https://clbb.mgh.harvard.edu/white-paper-on-the-science -of-late-adolescence/.

Opinion in Neurobiology Journal, "[a]ccording to recent studies, adolescents show a unique sensitivity to motivational cues that challenges the less mature cognitive control system, resulting in an imbalance between these systems and ultimately patterns of behavior that are unique to adolescents."[4] Their paper reviews gambling experiments using real money where adolescents made far riskier decisions than adults, but only in emotionally charged or "hot" conditions.[5]

Dr. Laurence Steinberg, a leading expert on the psychology of adolescence, has documented that risk taking declines between adolescence and adulthood as structural and functional changes in the prefrontal cortex facilitate maturation of the cognitive control system, strengthening inhibition and the ability to engage in long-term planning. Simultaneously, the maturation of connections throughout different regions of the brain allows for coordination of cognition and behavior, strengthening the ability to temper emotional responses with deliberative reasoning.[6]

- **Heightened Responses to Threat:** Studies have shown that adolescents are especially sensitive to threatening stimuli. In a 2014 experiment, people across age groups were instructed to quickly classify a series of faces by pushing a button for calm faces, and withholding a button push for fearful faces. Adolescents (age 13-17) reacted with false alarm to fearful faces more often than both adults and younger children. According to the authors, "The present study demonstrates that impulsive behavior during adolescence is as likely to occur in the presence of threat as reward cues. We show that rather than retreating or withholding a response to threat cues, adolescents are more likely than children or adults to impulsively react to them, even when instructed not to respond."[7]

- **Susceptibility to Distraction by Emotional Information**: Connected to research showing increased impulsivity among adolescents in emotionally charged situations, studies have found that adolescents are less capable of staying focused on a task when presented with emotionally negative images (as opposed to positive or neutral images), compared to adults and younger children.[8]

- **Susceptibility to Peer Influence**: Establishing friendships, romantic relationships, and other peer relationships is a critical task of adolescence and emerging adulthood. For this reason, a greater focus on peers and sensitivity to peer influence is healthy and adaptive in this period of life. Brain imaging studies have shown that interacting with peers stimulates activity in the reward center of the adolescent brain."[9] The biological instinct to seek peer approval,

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[4] Somerville, LH and Casey, BJ. *Developmental Neurobiology of Cognitive Control and Motivational Systems*, 20(2) Current Opinion in Neurobiology, at 236-241 (2010), available at: 10.1016/j.conb.2010.01.006.
[5] *Id.*
[6] Steinberg Laurence. *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28(1) Developmental Review: DR, 78–106 (2008), available at: https://doi.org/10.1016/j.dr.2007.08.002. (Citing author's manuscript, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2396566/#R119, at. 18.)
[7] Dreyfuss, Michael et al. *Teens Impulsively React rather than Retreat from Threat*, 36(3-4) Developmental Neuroscience, at 220–227 (2014), available at: https://doi.org/10.1159/000357755.
[8] Cohen-Gilbert, JE, and Thomas, KM. *Inhibitory Control During Emotional Distraction Across Adolescence and Early Adulthood*, 84(6) Child Development, at 1954–1966 (2013), available at: https://doi.org/10.1111/cdev.12085.
[9] *See* Feld, *supra* note 2 at 263.

combined with the developing capacity to weigh risk and reward, may make a young person more likely than an adult to "make a spur-of-the-moment decision to commit a crime with accomplices fearing social rejection if he refuses."[10] Additional research has shown that the mere presence of peers can encourage risky behavior.[11]

- **Exploratory Behavior and Unfixed Identity:** Like the importance of peer approval, exploratory and experimental behavior in adolescents is not only normal but positive from a developmental point of view. Steinberg writes, "The emergence of personal identity is an important developmental task of adolescence" and notes that the process begins in middle adolescence but typically does not resolve into the formation of a fully developed *self* until late adolescence or young adulthood.[12] As is well known, this period of experimentation can involve risky, illegal, or dangerous activities including alcohol and drug use, unsafe sex, and aggressive or antisocial behavior. For most adolescents these behaviors are transitory and fleeting. Among those for whom these behaviors persist, effective interventions should be available to all children to support their health and improve public safety by reducing the likelihood of future harmful behavior.

2. Racial Disparity and Environmental Factors Drive Juvenile Justice Involvement.

As our understanding of the developing brain has advanced, so has our awareness of racial and economic disparity and of the environmental factors that drive low-income youth, especially youth of color, into the juvenile justice system. From 2011 to 2021, youth incarceration fell by 59%, but exceedingly high rates of racial disparity in the system persisted. In 2021, Black youth were 4.7 times more likely than their white peers to be placed in juvenile facilities.[13] This race disparity is also evident in the public data on the proposed amendments published by the Commission, which reflect that 46.1% of people with 1-point juvenile adjudications and 66% of those with at least one 2-point juvenile adjudication are Black,[14] compared to 13.6% of the U.S. population.[15] The data from the Commission also suggest that Black individuals receive points based on offenses committed prior to age 18 at especially high rates: 59.7% of people who received at least one point for offenses prior to age 18 are Black, but Black individuals comprise only 28.1% of those who otherwise received at least one point.[16]

In *Roper v. Simmons*, the U.S. Supreme Court recognized that an adolescent's lack of control over their life circumstances, including where they live, contributes to their diminished legal

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[10] *Id.* at 291.
[11] Chein, Jason et al. *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14.2 Developmental Science, at F1–F10 (2011), available at: https://doi.org/10.1111/j.1467-7687.2010.01035.x.
[12] Steinberg, Laurence and Scott, Elizabeth S. *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58(12) The American Psychologist, at 1014 (2003), available at: https://doi.org/10.1037/0003-066X.58.12.1009.
[13] The Sentencing Project. *Black Disparities in Youth Incarceration*, at 1 (2023), available at: https://www.sentencingproject.org/app/uploads/2023/12/Black-Disparities-in-Youth-Incarceration.pdf
[14] United States Sentencing Commission. *Public Data Presentation: Proposed Amendment on Youthful Individuals*, slide 10 (2024), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf.
[15] United States Census. *Quick Facts: Population Estimates, July 1, 2023* (2023), available at: https://www.census.gov/quickfacts/fact/table/US#.
[16] United States Sentencing Commission, *supra* note 14, slide 28.

culpability.[17] Research suggests that nearly every child who enters the juvenile justice system has experienced at least one adverse childhood experience (ACE), with each additional adverse experience increasing the risk that a child will commit a serious and violent offense. In a study of over 64,000 young people who had received an official juvenile referral (the equivalent of an adult arrest) in Florida, only 3.1% of the boys and 1.8% of the girls reported no ACES,[18] compared to 34% in the Centers for Disease Control's study of the general U.S. population.[19] A subsequent study of over 22,000 youth in Florida who had demonstrated "serious, violent or chronic" lawbreaking behavior ("SVC youth") found that compared to young people with a single, minor interaction with the juvenile justice system, SVC youth showed "higher prevalence of individual ACE's as well as higher composite ACE scores." SVC youth were also three times more likely to have experienced six or more types of trauma, abuse and adversity.[20] SVC youth were generally from lower-income families compared to other youth in the system.[21]

3. Policies and Practices for Youth Prosecution and Sentencing Vary Widely.

States have incorporated research on adolescent development and environmental factors into their juvenile justice systems to different degrees, with laws and practices varying widely from jurisdiction to jurisdiction and even courtroom to courtroom. Today, nearly all states set the age of adult prosecution at 18, but in Wisconsin, Texas and Georgia it remains age 17.[22] The minimum age of juvenile prosecution varies even more widely and ranges from age 6 to age 12, with many states having no minimum age.[23] Meanwhile, differences in youth transfer laws mean that even among states that nominally set the same age of adult prosecution, the percentage of youth actually tried and sentenced as adults diverges significantly. For instance, an analysis by the Justice Policy Institute found that in Arizona and Indiana, more than 80% of cases where a youth under 18 is charged with a violent offense are transferred to adult court, whereas in Oregon and New Jersey the percentages are 55% and 56% respectively.[24]

The implementation of New York's Raise the Age law, enacted in 2017, illustrates how widely treatment of young people can vary even across counties governed by the same state law. Under New York's Raise the Age law, all 16- and 17-year-olds charged with felonies are arraigned in youth parts of adult court, with cases either transferring to family court or remaining in the adult

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[17] *Roper*, 543 U.S. 551 at 553.
[18] Baglivio, Michael T. et al. *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3(2) OJJDP Journal of Juvenile Justice, at 7 (2014), available: https://www.prisonpolicy.org/scans/Prevalence_of_ACE.pdf
[19] Centers for Disease Control and Prevention. Fast Facts: Preventing Adverse Childhood Experiences, available at: https://www.cdc.gov/violenceprevention/aces/fastfact.html.
[20] Fox, Bryanna Hahn et al. *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 Child Abuse & Neglect, at 170 (2015), available at: https://doi.org/10.1016/j.chiabu.2015.01.011.
[21] *Id.* at 168.
[22] *See* Wisconsin Statutes §9.38.02(10m); Texas Family Code §51.02(2); Official Code of Georgia Annotated §15.11.2(10).
[23] National Juvenile Justice Network. *POLICY PLATFORM: RAISE THE MINIMUM AGE FOR TRYING CHILDREN IN JUVENILE COURT*, at 3-4 (2020), available at: https://www.njjn.org/our-work/raise-the-minimum-age-for-trying-children-in-juvenile-court--.
[24] Justice Policy Institute. *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, at 13 (2020), available at: https://bit.ly/2Vf9MSq.

court based on charges and other factors. While granular data on the transfer process is limited, an early report on implementation in New York City found that 92% of youth in Kings County (Brooklyn) but only 57% of youth in Queens County had their cases removed to family court after a felony arraignment.[25] More recent data on placement of youth in custody post-adjudication shows that in 2022, New York City (population 8.4 million) was responsible for a total of 57 placements of youth into state custody, while Erie County (population 946,000) was responsible for 46 placements and Monroe County (population 747,000) was responsible for 57 placements.[26]

4. Barriers and Opportunities for Youth in the Juvenile Justice System – Observations from Practice.

At Youth Represent, we provide legal services to hundreds of young people from across the five boroughs of New York City each year, representing them in matters ranging from state criminal court cases to employment discrimination to evictions from public housing. We also train clients and youth participants in advocacy skills. Nearly all our clients are Black and Latinx. Many have overcome racism, poverty, and other adversity to successfully build their own families, careers, and communities. But in our practice, the link between adverse childhood experiences and subsequent juvenile and criminal legal system involvement are glaringly clear. In the paragraphs below we report the trends we have observed based on representing thousands of young people in New York City over the past seventeen years.

When we ask our clients and youth participants what resources are most important to them, the answers are simple: Safe, stable housing and healthy food. Clean and accessible parks, recreational facilities, and other green spaces. Easy access to high quality healthcare providers. Safe schools with teachers who are invested in their education. Adequate school support staff, including counselors and mediators. Accessible sports, music, dance, and other enrichment programing, which when available are often costly to enroll in. Opportunities to leave their neighborhoods and experience things outside of the city. Young people also emphasize the importance of high-quality youth programs, not just any programs. One client reports that he was consistently bullied in his after-school program and that staff members either encouraged the bullying or did not intervene, but because there was no other available program in his neighborhood he had to continue attending for years.

Many of our clients with the most serious legal system involvement were separated from their parents as children by the family court system, incarceration of a parent, or death of a parent. Some moved between foster care placements and group homes, lacking both stable family support and a stable place to live. Many also experienced homelessness and unstable housing even when not separated from a parent. Some were evicted because of rising rents or family loss of income, leading to stays in the shelter system or sleeping on floors and couches of relatives and friends.

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[25] New York City Mayors Office of Criminal Justice. *Report: Raise the Age in New York City,* at 22 (2019), available at: https://criminaljustice.cityofnewyork.us/reports/raise-the-age-in-new-york-city/.
[26] New York State Office of Children and Family Services. *2022 Annual Report: Youth In Care,* at 3-4 (2022), available at: https://ocfs.ny.gov/reports/jj-yic/Youth-In-Care-Report-2022.pdf.

Stable housing does not always mean safe housing. We have represented young people living with their families in apartments that have toxic mold, burst pipes and non-functioning plumbing, non-working elevators, rodent infestation, and non-functioning doors and locks. Many also report fearing gun violence in their apartment buildings or neighborhoods.

Nearly all the young people we work with grew up in low-income neighborhoods in New York City and report lacking the resources and supports they needed, whether to address childhood trauma, mental health issues, or the simple needs of any young person growing up. Some have learning disabilities and neurodevelopmental disorders that were not diagnosed until adolescence or later. We have represented high school students in school suspension hearings and identified that Individualized Education Plans (IEP's) were never properly implemented for them. Almost none of our clients, including those who have experienced multiple ACE's, have access to affordable or culturally competent individualized therapy or other mental health care.

Many of the young people we work with had early adverse experiences with people in positions of authority, including child protective workers who removed them from their parents. Many had negative experiences with teachers and school staff, including school suspensions starting as early as first grade. Most report negative interactions with police, including aggressive stops and searches with unnecessary force, leading to distrust of the police and fear of being hurt or killed by law enforcement.

All young people, regardless of race and income-level, are more prone to risky behavior, impulsive and emotional responses to negative stimuli, peer influence, and exploratory behavior. Unaddressed trauma can intensify these behaviors. Well-resourced communities create avenues for safe exploration and risk-taking, formal and informal mentoring to support the development of emotional regulation, accessible treatment for mental and behavioral health needs, and guardrails when normal risk-taking behaviors cross boundaries. When children under 18 are arrested and prosecuted, in most cases it means we as adults have failed to provide them the resources, opportunities, and support they need for healthy development.

Instead of continuing to punish individuals throughout their lives for childhood missteps—and to entrench wide disparities in law and practice into the guidelines—we urge the Commission to adopt Option 3 of the proposed amendment, entirely excluding youthful convictions from the criminal history score.

Part B: Sentencing of Youthful Individuals

1. Transience of Youth

In addition to the hallmarks of youth outlined in Section 1 under Part A above, research in neurobiology also demonstrates that adolescence is a period of "transient immaturity," a framework that has been consistently affirmed by the U.S. Supreme Court since it decided *Roper* in 2005.[27] Researchers from the Center for Law, Brain and Behavior write that there is "robust

[27] *See* White Paper on the Science of Late Adolescence (*supra* note 3), at 5. The authors note that while the Court held in *Jones v. Mississippi* (2021) that a sentencing judge need not make a specific finding that a juvenile is

scientific basis…to identify the 'transient immaturity' of youth and emerging young adults and the normal process of self-desistence from criminal misconduct that occurs with maturation."[28] This growing body of evidence, along with the diminished culpability of youth described above, supports the adoption of the proposed amendment allowing for downward departure and alternatives to incarceration for youth under 18 as well as older adolescents and emerging adults.

Because of the malleability of young people's brains, they are both especially vulnerable to trauma and especially capable of making positive change. The developing brain, while still building the functioning and connectivity necessary for adult decision-making and impulse control, is also uniquely motivated to learn about the world, create, and connect to others.[29] For this reason, it is incumbent upon adults to provide effective interventions for young people upon arrest and prosecution. Doing so benefits all of society by supporting young people's positive development and decreasing rates of re-offense.

2. <u>Effective Interventions to Reduce Recidivism and Improve Public Safety</u>

Fortunately, effective interventions can be replicated and expanded upon. Credible messenger mentoring has been independently evaluated and found to significantly reduce recidivism in adolescents. For example, in the Advocate Intervene Mentor (AIM) program in New York City, a one-on-one mentoring program known as an Alternative to Placement for youth in family court, 90.9% of participants avoided another Family Court adjudication within one year of program enrollment, and within one year of program completion only 3% had a youthful offender adjudication or felony conviction. By comparison 25% of youth released from facilities are reconvicted within a year of release.[30] Internal evaluations of highly regarded alternative to incarceration programs in New York City like *exalt* have found that 95% of graduates do not recidivate 2 years after program completion, compared to 60% of youth statewide.

Research has also found that preventative programs such as Multi-Systemic Therapy (MST), Functional Family Therapy (FFT), and Parent–Child Interaction Therapy (PCIT), especially for children and adolescents who have experienced adverse childhood experiences, can prevent harm and juvenile justice contact. In doing so, they also create savings for taxpayers by preventing crime. An analysis by the Washington State Institute for Public Policy found that for every $1 invested in FFT, MST, and PCIT programs, there was an average of $7 in future savings. Another study found that every $1 invested in trauma-specific prevention programs can produce $8.70 in future savings for municipalities.[31]

"permanently incorrigible" or even make formal findings of fact in support of a discretionary sentencing decision, SCOTUS did not explicitly strike down the *Miller* factor framework and left undisturbed the concept of the "transient immaturity" of youth reflected in decisions from *Roper* (2005) through *Montgomery v. Louisiana* (2016).

[28] *Id.* at 6-7.

[29] Galván, Adriana and Nim Tottenham. *Adolescent Brain Development*, Developmental Psychopathology, at 25 (2016), available at https://doi.org/10.1002/9781119125556.devpsy218.

[30] Lynch, Matthew et. al. *Arches Transformative Mentoring Program An Implementation and Impact Evaluation in New York City*, Urban Institute (2018), available at https://www.urban.org/research/publication/evaluation-report-nycs-advocate-intervene-mentor-program.

[31] *See* Fox, *supra* note 17 at 171.

Children are different from adults and should be treated differently under the law, including in sentencing. Doing so is a moral imperative given the developmental immaturity and diminished culpability of children and adolescents. It is also prudent public policy, as prioritizing effective interventions based on principles of positive youth development supports young people's healthy physical, emotional, and intellectual growth into caring, responsible adults. This reduces recidivism and benefits public safety. The amendment to the Policy Statement under consideration does not *require* downward departure or a form of punishment other than incarceration for young people. It represents the minimum change supported by a vast body of research in adolescent brain development and a review of best practices for youth in the juvenile justice system. We urge the Commission to adopt it.

Sincerely,

Kate Rubin
Director of Policy
Youth Represent

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February 19, 2024

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

RE: Public Comment — Proposed Amendments to Section 4A1.2

Dear United States Sentencing Commission:

We respectfully submit the attached article, which will be published in the coming months by Harvard Law and Policy Review, in response to the Commission's proposed amendments related to prior offenses committed before age 18.

The article strongly endorses amending Section 4A1.2 of the Guidelines along the lines of the Commission's proposed Option 3 (excluding all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score). Our recommendation is based on factors such as constitutional concerns, brain development research, disparities in sentencing, and racially disparate impact.

The article also endeavors to address some of the Commission's "Issues for Comment," such as whether implementing Option 3 would exceed the Commission's authority (*see* p. 51 n. 243).

The suggested citation for our article is Ian Marcus Amelkin & Nicholas Pugliese, *The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Defendants' Prior Offenses Committed Before Age 18*, 19 HARV. L. & POL'Y REV. (forthcoming Spring 2024). It can also be accessed on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4712095.

Thank you for considering this important issue. We can be reached at ian_marcus_amelkin@fd.org or (917) 676-0331.

Sincerely,

Ian Marcus Amelkin & Nicholas Pugliese

THE DELINQUENT GUIDELINES: CALLING ON THE U.S. SENTENCING COMMISSION TO STOP COUNTING DEFENDANTS' PRIOR OFFENSES COMMITTED BEFORE AGE 18

Ian Marcus Amelkin & Nicholas Pugliese[1]

Abstract: The United States Sentencing Guidelines' recidivism provisions recommend harsher punishment for defendants with a prior criminal record. The Guidelines authorize an accounting not only of a federal defendant's criminal record as an adult, but also as a child. Prior offenses committed before age 18 enhance sentences for thousands of people each year, but the practice has not been widely explored in the academic literature. A federal defendant's juvenile record can lead to a higher Guidelines range through a variety of mechanisms: it can increase a defendant's criminal history category, increase the crime's total offense level, qualify the individual for "career offender" status, and deny relief from mandatory minimum sentences.

The use of pre-18 priors to enhance later federal sentences is both constitutionally suspect and misguided public policy. First, the practice stands in tension with Supreme Court precedent recognizing "that children are constitutionally different from adults for purposes of sentencing" in a way that makes them "less deserving of the most severe punishments." Second, it is unequitable to people of color, who are more likely to be prosecuted for their pre-18 conduct than their white counterparts who commit similar acts. Third, it generates unequal treatment between similarly-situated defendants, a result at odds with the Guidelines' "primary goal" of fostering uniformity in sentencing. Finally, it raises problems of notice given that pre-18 offenders are not told that their juvenile or youthful offender cases, which are not "convictions" under most states' laws, can later be used against them to enhance a future federal sentence.

Now that the Sentencing Commission is back in action following a three-and-a-half-year hiatus, this article recommends that the Commission amend the Guidelines to stop counting pre-18 prior offenses.

Suggested Citation: Ian Marcus Amelkin & Nicholas Pugliese, *The Delinquent Guidelines: Calling on the U.S. Sentencing Commission to Stop Counting Defendants' Prior Offenses Committed Before Age 18*, 19 HARV. L. & POL'Y REV. (forthcoming Spring 2024).

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[1] Ian has worked for seven years as an assistant federal defender at the Federal Defenders of New York, Inc., in the Southern District of New York. That organization contracts with the federal judiciary to represent indigent clients charged with federal crimes. Similar offices exist in each judicial district throughout the country. *See generally* David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017). Nicholas is a judicial clerk for a federal judge. A previous version of this article won the Benjamin Scharps Prize at Yale Law School for the best paper by a third-year student.

We thank Miriam Gohara, Clinical Professor of Law and Director of the Jerome N. Frank Legal Services Organization at Yale Law School, for her supervision of early versions of this article. We are also indebted to Kaelin Bush, Mahathi Kumar, and Miriam Raffel-Smith, currently students in New York University School of Law's federal defender clinic, for their outstanding assistance with research and editing. Finally, thank you to our families for their love and support.

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INTRODUCTION

The United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines"), which federal judges rely on to impose criminal sentences, are animated by the belief that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[2] To that end, the Guidelines contain "recidivist enhancements," provisions that result in higher recommend sentences and harsher punishment for defendants with a prior criminal record.[3] Of central concern to this article, the Guidelines authorize an accounting not only of a defendant's criminal record as an adult, but also as a child.[4] Prior offenses committed before age 18 enhance sentences for thousands of people each year, including more than 3,000 in 2022 alone.[5] Under the Guidelines, the more criminal history points, the longer a defendant's recommended sentence.[6]

Criminal history points are just one of several ways that the Guidelines recommend an escalating term of incarceration based upon a defendant's pre-18 priors.[7] Those priors may also

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[2] U.S. SENT'G GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2023) [hereinafter U.S.S.G.]. Unless otherwise noted, all citations to U.S.S.G. refer to the 2023 Guidelines, effective November 1, 2023.

[3] *See id.* § 4.

[4] *Id.* § 4A1.2(d).

[5] U.S. SENT'G COMM'N, PUBLIC DATA PRESENTATION: PROPOSED AMENDMENTS ON YOUTHFUL INDIVIDUALS 26, (Jan. 2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf. According to another study examining data from 2010 to 2015, one in four defendants under 25 at the time of their federal sentencing received "criminal history points" for pre-18 priors. U.S. SENT'G COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM 35-36 (May 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

[6] U.S.S.G. ch. 5, pt. A. A defendant receives criminal history points for prior offenses as outlined in Chapter Four of the Guidelines. Those points determine a defendant's criminal history category.

[7] "Pre-18 priors" means all offenses committed before age 18, regardless of whether they are adjudicated as juvenile offenses in a state's juvenile courts, adult convictions in a state's criminal

influence a defendant's offense level score, the other major variable that judges plug into the Guidelines' Sentencing Table to calculate the recommended sentence.[8] What is more, pre-18 priors can trigger other devastating outcomes: the draconian "career offender" enhancement as well as mandatory minimum sentences.[9] In short, the Guidelines' treatment of pre-18 priors is a powerful but often overlooked engine of incarceration.

This article calls on the United States Sentencing Commission (the "Commission") to end the practice of counting pre-18 priors in the Guidelines. Federal judges routinely incarcerate people for extra years or even decades due to these Guideline enhancements. Courts' continued reliance on these provisions is constitutionally suspect and deeply misguided public policy. The Commission has the power to stop this unjust practice while not disturbing federal judges' ultimate discretion to consider a defendant's pre-18 priors in crafting an appropriate sentence.

In Part I, we explain how the Guidelines use pre-18 priors to enhance federal defendants' sentences. In Part II, we argue that counting pre-18 offenses is inappropriate in light of Supreme Court precedent holding "that children are constitutionally different from adults for purposes of sentencing" in a way that makes them "less deserving of the most severe punishments."[10] Central to the Court's reasoning is that because the adolescent brain is still developing, teenagers as a group are more inclined to commit crimes compared to older and younger cohorts. In Part III, we argue that counting pre-18 priors is unfair and constitutionally suspect for three reasons. First, it is unequitable to people of color, who are more likely to be prosecuted for their pre-18 conduct

courts, or youthful offenses adjudicated in whichever courts are designated by a state's youthful offender statute (typically criminal courts).

[8] U.S.S.G. ch. 5, pt. A. A defendant's offense level score is calculated under Chapters Two and Three of the Guidelines.

[9] *Id.* § 4B1.1(a); 18 U.S.C. § 3553(f) (denying "safety valve" relief from mandatory minimums to defendants with certain criminal history).

[10] Miller v. Alabama, 567 U.S. 460, 471 (2012).

than their white counterparts. Second, it generates unequal treatment between similarly-situated defendants, a result at odds with the Guidelines' "primary goal" of fostering uniformity in sentencing.[11] Third, pre-18 offenders are not told by their counsel or by a court that their juvenile or youthful offender cases, which are not "convictions" under most states' laws, can later be used against them to enhance a potential federal sentence.

The Commission can make straightforward changes to the Guidelines to stop counting pre-18 priors. In fact, the Commission announced on December 14, 2023, that it was studying the very recommendations we make in Part IV.[12] We recommend that *no* pre-18 prior offenses should be counted to enhance a federal defendant's sentence under the Guidelines. This approach is the optimal choice for four reasons. First, it requires action by a single agency, the Commission, whose role is to "review and revise" the Guidelines on an annual basis.[13] Second, our recommendation is simple to implement from a technical standpoint, requiring minimal edits to the Guidelines as opposed to a significant overhaul of federal law. Third, this option best accords with the insights of the Supreme Court, modern developmental research, and policy considerations, all of which support the conclusion that individuals charged with federal crimes should not receive a higher Guideline range (and thus, most likely, a higher sentence) because of their pre-18 priors. Fourth, this option will not foreclose federal judges from considering pre-18

[11] S. Rep. No. 98-225, at 52 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3235 ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.").
[12] *U.S. Sentencing Commission Seeks Comment on Proposals Addressing the Impact of Acquitted Conduct, Youthful Convictions, and Other Issues*, U.S. SENT'G COMM'N (Dec. 14. 2023), https://www.ussc.gov/about/news/press-releases/december-14-2023.
[13] 28 U.S.C. § 994(o). After a three-and-a-half-year period under the Trump Administration when it lacked the quorum needed to conduct business, the Commission returned to action in August 2022. DAVE S. SIDHU, CONG. RSCH. SERV., LSB10890, BACK IN ACTION, THE U.S. SENTENCING COMMISSION TO RESOLVE CIRCUIT SPLITS ON CONTROLLED SUBSTANCES AND SENTENCING REDUCTIONS 1 (2022).

priors in sentencing. The Guidelines are advisory, and under federal law, federal judges can still weigh a federal defendant's pre-18 priors if they so choose as part of the mandatory 18 U.S.C. § 3553(a) analysis that forms the heart of post-*Booker* sentencing decisions.[14]

A real-world example that inspired this paper comes from one of the authors' representation of an 18-year-old client in the Southern District of New York. This client was charged with robbing a taxi driver and then briefly driving the taxi before abandoning it in the Bronx. The client had a difficult upbringing and severe cognitive challenges. He also had no prior adult felony convictions. Facing his first federal and adult case, the client was shocked to learn that four prior "youthful offenses" he previously pleaded guilty to in New York State court, for conduct he committed when he was 16 and for which he served a single concurrent sentence, greatly enhanced his Guideline range. He was shocked because he had been advised—correctly—that youthful offender adjudications are not convictions and are sealed under New York law.[15] In New York City, where the client spent his entire life, he had no criminal record. Under federal law, however, each of his youthful offender adjudications counted separately as if they were adult convictions. Accordingly, he was treated under the Guidelines as the most aggravated possible repeat offender, skyrocketing his recommended sentencing range from 63 to 78 months, to 120 to 150 months.[16]

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[14] *See* 18 U.S.C. § 3553(a)(1) (requiring courts to consider the history and characteristics of the defendant, the nature and circumstances of his crime, similarly-situated defendants, the defendant's need for treatment and other factors in each case); *see also Gall v. United States*, 552 U.S. 38, 49–53 (2007).

[15] N.Y. CRIM. PROC. LAW § 720.35(1) ("A youthful offender adjudication is not a judgment of conviction for a crime or any other offense."); *id.* § 720.35(2) (sealing records of youthful offender adjudications).

[16] The client ultimately received a sentence significantly below the recommended Guidelines range because his sentencing judge "varied downward" pursuant to 18 U.S.C. § 3553(a). Such downward variances are not common in many districts throughout the country. In 2022, they were granted in only 30% of sentencings nationwide while 70% of defendants were sentenced to

The use of pre-18 priors to enhance federal defendants is unfair and unjust. It is time for this practice to end.

PART I: HOW THE GUIDELINES USE PRE-18 PRIORS TO ENHANCE FEDERAL SENTENCES

A. The Guidelines Regime from Inception to Modern Practice

The Guidelines have been at the heart of federal sentencing practice since 1987, when they were first promulgated by the Commission pursuant to the Sentencing Reform Act of 1984 (the "SRA").[17] The Guidelines were conceived amid a "sentencing revolution" spurred by a crisis of faith among leading legal thinkers in the ability of incarceration to promote rehabilitation and by the belief that excessive judicial discretion had led to unfair disparities in sentencing.[18] Particularly influential in shaping public discourse was Judge Marvin Frankel's 1973 book *Criminal Sentences: Law Without Order,* in which he described the sentencing power of federal judges as "almost wholly unchecked and sweeping" and which he found "terrifying and intolerable for a society that professes devotion to the rule of law."[19] In response, Congress created the Guidelines to impose a determinate sentencing regime that cabined judges' decision-making.[20]

To create greater uniformity in sentencing, the Guidelines introduced a point system that assigns a numerical value to the charged offense and the defendant's criminal history. The higher

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a term of imprisonment within their advisory Guideline range. U.S. SENT'G COMM'N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 87–89 tbl. 30 (2023) [hereinafter U.S. SENT'G COMM'N, 2022 SOURCEBOOK].

[17] Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[18] James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. Legal Analysis 119, 127–28 (2009).

[19] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

[20] Whitman, *supra* note 18, at 127–28.

the score in each category, the higher the sentence. The scheme is encapsulated in a two-dimensional grid known as the "Sentencing Table."[21]

Ch. 5 Pt. A

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
Zone A	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

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After the judge calculates an individual's base offense level (ranging from 1 to 43 on the y-axis) and criminal history category (ranging from I to VI on the x-axis), she finds the Guideline Range at the intersection of the two. To calculate those scores, a judge applies hundreds of pages of "sentencing factors" set forth in Chapters One through Four of the

[21] U.S.S.G. § 5A.

Guidelines. Every federal crime has a base offense level that must be adjusted up or down based on various aspects of the crime, such as whether a weapon was used,[22] or based on the defendant's prior and subsequent behavior, such as acceptance of responsibility.[23] The defendant's criminal history category, in turn, is determined by adding up points based on the number of prior convictions and the sentences received for those convictions.[24]

The Guidelines as originally conceived were mandatory and binding on judges.[25] After judges calculated the Guideline Range, they were required to sentence defendants to a period of incarceration within the range specified by the Sentencing Table.[26] The main exception was if the judge determined that an upward or downward adjustment, known as a "departure," was warranted.[27] The availability of departures, however, was tightly constrained by "policy statements" within the Guidelines, which specified that considerations such as race or socioeconomic status were "not relevant" in granting departures, while other factors such as family ties, mental health, and addiction were "not ordinarily relevant."[28] Judges could also depart if an aggravating or mitigating circumstance was present "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[29] The Guidelines were clear that departures should occur only in the "atypical" or "unusual" case.[30] The most common

[22] *See, e.g.*, U.S.S.G. § 2A2.2 ("If [during an aggravated assault] (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.")
[23] *Id.* § 3E1.1.
[24] *Id.* § 4.
[25] *Mistretta v. United States*, 488 U.S. 361, 367 (1989).
[26] *Id.*
[27] Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 778, 782 (2006).
[28] U.S.S.G. § 5H1 (U.S. SENT'G COMM'N 1987).
[29] 18 U.S.C. § 3553(b)(1).
[30] U.S.S.G. § 1A4(b) (U.S. SENT'G COMM'N 1987).

basis for departure was for "substantial assistance in the investigation or prosecution of another person."[31] Judges, therefore, had limited ability to maneuver around the dictates of the Sentencing Table.[32] The results of the mandatory Guidelines scheme were devastating for federal defendants.[33]

In 2005, the Supreme Court declared in the seminal case of *United States v. Booker* that the sentencing ranges prescribed by the Guidelines were no longer mandatory, but instead advisory in most cases.[34] In relegating the Guidelines to advisory status, the Court breathed new life into 18 U.S.C. § 3553(a), which directs sentencing judges to consider each defendant's "history and characteristics" and "impose a sentence sufficient, but not greater than necessary" to comply with the statutory purposes of sentencing, which are generally punishment, deterrence, incapacitation, and rehabilitation.[35]

In a series of decisions in the wake of *Booker*, the Supreme Court clarified the extent of judges' discretion to deviate from the Guidelines. District courts no longer need to presume that a sentence with the recommended Guidelines range is reasonable.[36] Judges are free to deviate

[31] *Id*. § 5K1.1 (still a ground for departure today).
[32] That is not to say that all discretion was removed from federal sentencing. Prof. Michael O'Hear, for example, has pointed out that the departure mechanism allowed judges discretion in both whether to depart (e.g., what are the boundaries of "not ordinarily relevant") and by how much. O'Hear, *supra* note 27, at 798. And by constraining judges, the Guidelines transferred discretionary power to prosecutors in their charging decisions, plea bargains, and control over cooperation benefits. *Id*. at 807–08.
[33] Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328–33 (2005).
[34] 543 U.S. 220 (2005).
[35] 18 U.S.C. § 3553(a); Peugh v. United States, 569 U.S. 530, 536 (2013) ("[T]he Guidelines are no longer binding, and the district court must consider all of the factors set forth in §3553(a) to guide its discretion at sentencing.") (citing *Booker*).
[36] Rita v. United States, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). For their part, courts of appeal may—but are not required to—presume that a within-Guidelines sentence is reasonable. *Id*. at 353.

from the Guidelines based solely on policy considerations, such as disagreement with the Guidelines' shameful former 100-to-one ratio for crack cocaine versus powder cocaine sentences.[37]

Even post-*Booker*, though, the Guidelines continue to serve as "the starting point and the initial benchmark" of sentencing.[38] Sentencing judges follow a three-step process set forth by *Gall v. United States*.[39] First, judges must properly calculate the advisory Guidelines range.[40] Second, they must determine whether to depart from the Guidelines range.[41] Third, once the final Guidelines range is pronounced (after ruling on any objections), they consider the factors in 18 U.S.C. § 3553(a) to determine whether a sentence outside the Guidelines range, known as a "variance," is warranted.[42]

This scheme has meant that the Guidelines, although advisory, continue to exert considerable sway over the decisions of sentencing judges.[43] In 2022, even after 35 years of

[37] Kimbrough v. United States, 552 U.S. 85, 91 (2007); Spears v. United States, 555 U.S. 261, 265 (2009). Congress subsequently increased the quantities of crack cocaine that trigger five- and ten-year mandatory minimum sentences and eliminated the mandatory minimum sentence for simple possession of crack cocaine. Fair Sentencing Act of 2010, Pub. L. No. 111–220, §§ 2–3, 124 Stat. 2372, 2372 (2010). *See also* Deborah J. Vagins, et al., *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU i–ii (Oct. 2006) (highlighting how the enactment of federal mandatory minimum sentencing for crack cocaine offenses drastically increased sentencing disparities between white and Black individuals).
[38] Gall v. United States, 552 U.S. 38, 49 (2007).
[39] *Id*. at 49–50; *see also* U.S.S.G. § 1B1.1(a)–(c) (application instructions). Judges receive key assistance in applying the Guidelines from the U.S. Probation Office, which must conduct a presentence investigation and submit a presentence report to the court prior to every sentencing, with limited exceptions. FED. R. CRIM. P. 32.
[40] *Gall*, 552 U.S. at 49; 18 U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.1(a).
[41] *Gall*, 552 U.S. at 49–50; 18 U.S.C. § 3553(a)(5); U.S.S.G. § 1B1.1(b).
[42] *Gall*, 552 U.S. at 49–50; U.S.S.G. § 1B1.1(c).
[43] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 543–44 (2013) ("[Defendant] points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.").

criticism,[44] federal judges nationwide imposed within-the-Guidelines-range sentences in 68% of cases while granting variances in only 32%.[45] Absent a prosecutor's agreement or suggestion, courts adhere to the Guidelines even more closely, granting upward or downward variances in less than one-quarter of all cases.[46]

Even when judges do grant variances, the Guidelines influence what judges think is a reasonable length of imprisonment—a phenomenon known as the "anchoring effect."[47] The anchoring effect is a cognitive bias that describes the human tendency to adjust judgments higher or lower based on previously disclosed external information.[48] Former District Court Judge Mark W. Bennett convincingly argues that the Guidelines are a "hulking anchor for most judges" that

[44] *See, e.g.*, Jed. S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT. REP. 6, 7 (2013) ("Perhaps the most fundamental flaw in the Sentencing Guidelines is that they are based on the assumption that you can, in the name of reducing disparities, isolate from the complexity that every sentence presents a few arbitrary factors to which you then assign equally arbitrary weights—and somehow call the result 'rational.'"); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, U. CHI. LEGAL F. 149, 164 (2005) ("At or near the root of virtually every serious criticism of the Guidelines is the concern that they are too harsh—that federal law requires the imposition of prison sentences too often and for terms that are too long."). Though the rate at which judges have sentenced below the Guidelines have increased since *Booker*, rates of imprisonment were unaffected because "the guidelines recommend sentences of incarceration for almost all defendants." Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 145 (2019).
[45] U.S. SENT'G COMM'N, 2022 SOURCEBOOK, *supra* note 16, 84 tbl. 29. In 2021, 69% of cases were within-the-Guidelines-range, while judges granted variances in 31% of cases. U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 tbl. 29 (2022). And in 2020, judges imposed sentences within-the-Guidelines-range in 74% of cases while granting variances in 26% of cases. U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 tbl. 29 (2021).
[46] U.S. SENT'G COMM'N, 2022 SOURCEBOOK, *supra* note 16, 84 tbl. 29. Considerable variation exists between federal judicial districts in the rate at which they grant variances, ranging from a low of 10.8% in the District of Arizona to a high of 71.6% in the District of Rhode Island. *Id*. at 87-89 tbl. 30.
[47] 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, 495 (2014).
[48] *Id*.

prevents them from meaningfully deviating from the advisory ranges even as they express widespread dissatisfaction with the Guidelines' harshness.[49]

Judge Bennett's assertion is supported by scientific experiments that have confirmed the anchoring effect in a variety of settings, including among physicians, real estate agents, lawyers, and judges.[50] In one study of German judges, for example, participants in a mock sentencing scenario received an unexpected phone call from a reporter who suggested different anchors by asking: "Do you think that the sentence for the defendant in this case will be higher or lower than [one or three] year(s)?"[51] When asked if they were going to impose a one-year sentence, the judges imposed an average sentence of 25 months, while those asked if they were going to impose a three-year sentence imposed an average sentence of 33 months.[52] The anchoring effect is observed "even when the anchors are incomplete, inaccurate, irrelevant, implausible, or random."[53]

The post-*Gall* sentencing procedure, when combined with the anchoring effect, thus preserves the Guidelines' status as the "lodestone of sentencing" even in the post-*Booker* era.[54]

B. The Guidelines' Treatment of Offenses Committed Before Age 18

A federal defendant's juvenile record can lead to a higher Guidelines range through a variety of mechanisms: it can increase a defendant's criminal history category, increase the

[49] *Id*. at 523, 525–28 ("Given the widespread dissatisfaction among federal district judges with the Guidelines, judicial acceptance cannot possibly explain the extent of judges' tethering to the Guidelines."). To counter the influence of the anchoring effect, Judge Bennett proposes requiring judges to consider the defendant's personal history and other factors under 18 U.S.C. § 3553(a) and determine a preliminary sentencing range *before* the presentence report prepared by the U.S. Probation Office discloses the advisory Guidelines range. *Id*. at 529–30.
[50] *Id*. at 495.
[51] *Id*. at 504.
[52] *Id*.
[53] *Id*. at 502.
[54] Peugh v. United States, 569 U.S. 530, 544 (2013).

crime's total offense level, qualify the individual for "career offender" status, and deny relief from mandatory minimum sentences.

The most straightforward way that pre-18 priors contribute to a higher recommended sentence is via the criminal history categories. To calculate this metric, judges review a defendant's prior convictions and assign each of them a numerical value.[55] The "points" are then added together to calculate the defendant's criminal history category, ranging from I to VI. Category I corresponds to 0 or 1 point, Category II to 2 or 3 points, and so on, up to Category VI at 13 or more points.[56] A higher criminal history category equates to a longer recommended incarceratory sentence.[57]

The Guidelines contain two similar but distinct schemes to assign criminal history points depending on whether the prior offense was committed before or after age 18. Under the scheme for past adult offenses, the Guidelines assigns three criminal history points for each prior sentence of imprisonment exceeding one year and one month, two points for each prior sentence exceeding 60 days, and one point for prior sentences not otherwise counted.[58] Three-point offenses are counted provided the defendant was incarcerated at any time on that sentence within 15 years of committing the charged federal crime, including violations of probation or parole that resulted in short jail sentences.[59] Two- and one-point offenses have a 10-year lookback window from the date of the federal crime.[60]

[55] U.S.S.G. § 4A1.1.
[56] *Id*. § 5A.
[57] *Id*. For a crime with a base level offense of 14, for example, the advisory range is 15–21 months in Criminal History Category I but 37–46 months in Criminal History Category VI.
[58] *Id*. § 4A1.1.
[59] *Id*. § 4A1.2(e).
[60] *Id*.

The counting scheme for past offenses committed prior to age 18 differs slightly. A defendant will receive three points if "convicted as an adult" and sentenced to a term of imprisonment exceeding one year and one month, two points for each adult or juvenile sentence of at least 60 days, and one point for all other adult or juvenile sentences.[61] Three-point offenses are subject to the same 15-year lookback period as in the adult scheme.[62] Unlike prior adult offenses, however, two- and one-point offenses committed prior to age 18 are counted only if they resulted in imposition of an adult or juvenile sentence or release from confinement within five years of the commission of the charged federal offense.[63]

The second way pre-18 priors enhance Guidelines ranges is by raising the offense level for certain categories of crimes. Each charged federal crime is assigned a base offense level between 1 and 43.[64] The higher the number, the higher the recommended sentence.[65]

The base offense level for each type of crime can then be adjusted upward or downward based on aggravating or mitigating factors. Consider, for example, an individual found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Pursuant to U.S.S.G. § 2K2.1(a), if that person had previously sustained a felony conviction for a "crime of violence" or a "controlled substance offense," the offense level increases by four points; if he had two such convictions, the offense level increases by eight.[66] "Felony conviction" is defined

[61] *Id*. § 4A1.2(d).
[62] *Id*. § 4A1.2(e).
[63] *Id*. § 4A1.2(d).
[64] *Id*. § 5A.
[65] *Id*.
[66] *See id*. §§ 2K2.1(a)(2), (a)(4). A "crime of violence" is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is categorically "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." *Id.* § 4B1.2(a). A "controlled substance offense" is any felony that "prohibits the manufacture, import, export,

to include judgments for offenses committed prior to age 18 if the judgment "is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[67] Similar language appears in two other Guidelines sections concerning the crimes of unlawfully entering or remaining in the United States[68] and unlawful receipt, possession, or transportation of explosive material.[69] These offenses are among the most commonly charged by federal prosecutors, with firearms and immigration cases alone accounting for roughly 44% of all federal sentences in 2021.[70]

Pre-18 priors can also make a defendant a "career offender," a designation that applies to federal defendants who commit a crime of violence or controlled substance offense after sustaining two prior felony convictions for such crimes.[71] Crucially, pre-18 offenses count as qualifying priors if they were classified as adult convictions in the jurisdiction that adjudicated the case.[72] Being deemed a career offender is one of the most consequential misfortunes that can befall an individual charged in federal court. It automatically places the defendant in the highest criminal history category and simultaneously increases the base offense level to produce an advisory Guidelines range approximating the statutory maximum for the offense of conviction.[73]

distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense" or is "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)." *Id.* § 4B1.2(b).

[67] *Id.* § 2K2.1 cmt. n.1.

[68] *Id.* § 2L1.2; *id.* § 2L1.2 cmt. n.1(B).

[69] *Id.* § 2K1.3; *id.* § 2K1.3 cmt. n.2.

[70] U.S. SENT'G COMM'N, 2022 SOURCEBOOK, *supra* note 16, at 46 tbl. 4.

[71] U.S.S.G. § 4B1.1(a).

[72] *Id.* § 4B1.2(e)(4) (using same language as in §§ 2K1.3, 2K2.1, and 2L1.2).

[73] *Id.* § 4B1.1.

Many small-time, non-violent drug dealers are now spending the rest of their lives in prison because of this provision of the Guidelines.[74]

To take a real-world example, a Federal Defenders client pleaded guilty in 2021 to federal charges of brandishing a firearm during a robbery of a New York City bodega.[75] His plea agreement stipulated an advisory Guidelines range of 121 to 130 months based on a base offense level of 17 and a criminal history category of IV. In preparing the Presentence Investigation Report ("PSR"), the U.S. Probation Office uncovered a youthful offender adjudication from a New York State case that was sealed and thus unknown to the prosecutor. Taking that adjudication into account, which stemmed from conduct when the client was 17, the probation office classified the client as a career offender, more than doubling his advisory Guidelines range to 262 to 327 months.[76]

In addition to enhancing Guidelines ranges, pre-18 priors may make a federal defendant ineligible for relief from statutory mandatory minimum sentences for controlled substance offenses.[77] Congress has dictated that hundreds of offenses require punishment by a mandatory term of imprisonment. These mandatory sentences are especially common for drug trafficking

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[74] ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 13 (2017) ("More than two-thirds of federal prisoners serving life or virtual life sentences have been convicted of nonviolent crimes, including 30 percent for a drug crime.") (internal footnote omitted); *see also* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 31 (Aug. 2016) ("[T]he career offender guideline has the greatest impact on the offenders in the drug trafficking *only* category.") (emphasis added).

[75] These facts, with identifying information removed, were taken from court submissions in the 2022 sentencing of a client represented by the Federal Defenders of New York, Eastern District, and shared with the authors.

[76] In this case, the prosecutor abided by the terms of the plea agreement and asked the judge for a sentence of 130 months. The judge ultimately imposed a sentence of 96 months.

[77] The most commonly prosecuted drug offenses carrying mandatory minimum sentences are found at 21 U.S.C. §§ 841, 960; *see also* U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11–12 (2017).

offenses.[78] Congress created a narrow exception in 1994, the so-called "safety valve," to allow certain people convicted of drug crimes to avoid the harshness of the statutory minimums.[79] To qualify for the safety valve, the drug crime of conviction must not have resulted in death or serious injury; the crime must not have been violent; the offender cannot have been armed or a leader in a drug trafficking organization; and the individual must provide the government with a full accounting of their role in the offense and related conduct.[80] Finally, the individual must not have more than a certain number of criminal history points. Until 2018, anyone with more than one criminal history point under the Guidelines was ineligible for safety valve relief.[81] The First Step Act, enacted in 2018, broadened that criterion slightly so that defendants are ineligible only if they have a prior two-point violent offense, a prior three-point offense, and more than four total criminal history points.[82] Even after the First Step Act, however, pre-18 priors can be used to deny safety valve relief, exposing scores of federal defendants to draconian mandatory minimums for non-violent drug offenses.

[78] U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES 1 (2023) ("Of all cases carrying a mandatory minimum penalty: 73.2% were drug trafficking.").
[79] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001, 108 Stat. 1796, 1985–86. The only other ways to get out from under statutory mandatory minimum sentences require a motion from the prosecutor based on the defendant's substantial assistance to the government. 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b); *see also* CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 2 (July 5, 2022).
[80] 18 U.S.C. § 3553(f).
[81] First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221 (amending 18 U.S.C. § 3553(f)(1)).
[82] *Id.*; *see also* United States v. Lopez, 998 F.3d 431, 437 (9th Cir. 2021) ("Thus, a defendant must meet the criteria in subsections (A) (more than four criminal-history points), (B) (a prior three-point offense), *and* (C) (a prior two-point violent offense) to be barred from safety-valve relief by § 3553(f)(1). This means one of (A), (B) or (C) is not enough. A defendant must have all three before § 3553(f)(1) bars him or her from safety-valve relief.") (emphasis in original).

C. How the Guidelines Transform State "Youthful Offender" Adjudications into Adult Convictions for Sentencing Purposes

This article's discussion of pre-18 priors encompasses three categories of offenses: adjudications through states' juvenile courts, convictions under state "youthful offender" statutes, and adult convictions even though the crime was committed when the offender was still a child. The treatment of the second category—state-level youthful offenses—in federal sentencing raises major policy and constitutional concerns. This troubling subject has been little explored in the academic literature but is potentially life-changing for defendants.

Youthful offender statutes in many states create interstitial adjudicatory systems with procedures that mix those found in juvenile and adult courts. The statutes often authorize special procedures by which offenders who are ineligible for juvenile court but still under a certain age—often 18 but sometimes several years older—can receive dispositions that are more rehabilitative and less punitive than the penalties to which adults in criminal courts are exposed.[83] In New York, for example, a state court can grant "youthful offender" status to people 18 or younger who commit a crime but for whom burdening with a criminal record would be against "the interest of justice."[84] Accordingly, under New York law, a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense," and the records are sealed.[85]

The Guidelines, however, recognize only two categories of prior criminal adjudications—juvenile and adult.[86] At first glance, youthful offenses, which are often committed by teenagers, appear to fit more naturally into the category of juvenile than adult priors. Most federal appellate

[83] 43 C.J.S. *Infants* § 380 (2023).
[84] N.Y. CRIM. PROC. LAW § 720.20(1)(a) (McKinney 2023).
[85] *Id.* §§ 720.35(1)–(2).
[86] *See, e.g.*, U.S.S.G. § 4A1.2(d).

courts to consider the issue, however, have interpreted language in the Guidelines to hold the opposite.[87] As a result, judgments that are classified as "youthful offender" adjudications under state law are counted as adult convictions under the Guidelines in several circuits.[88] New York is an exemplar of this dynamic but by no means singular; youthful offenses in several other states have similarly been held by federal circuit courts to qualify as adult convictions, as described in the case studies below. This dynamic is problematic because the Guidelines' treatment of youthful offender adjudications is often in direct conflict with language in state statutes labeling them as non-convictions and limiting their use in future proceedings.

In sorting a defendant's priors into either the juvenile or adult bucket, the Guidelines look to more than just the age at which the prior offense was committed. That is, the Guidelines do not classify all offenses committed prior to 18 as juvenile offenses. Instead, the Guidelines ask how defendants were prosecuted for that offense in the relevant jurisdiction—whether as a juvenile or as an adult. In its instructions for assigning criminal history points to pre-18 priors, the Guidelines specify that an offense should receive three points "*[i]f the defendant was convicted as an adult* and received a sentence of imprisonment exceeding one year and one month."[89] Separately, in its instructions about whether a pre-18 offense can count as a predicate "prior felony conviction" toward designation as a career offender, the Guidelines advise:

> "Prior felony conviction" means a prior *adult* federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year. . . . A conviction for an offense committed prior to age eighteen is an adult conviction *if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted* (e.g., a federal conviction for an offense committed prior

[87] *See infra*, Sections I.C.i–v.
[88] *Id*.
[89] U.S.S.G. § 4A1.2(d)(1) (emphasis added).

> to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).[90]

This language in the Guidelines recognizes that all states have statutes specifying when crimes committed by an individual under 18 years old may or must be considered the crime of an adult.[91] Three different practices predominate: (1) statutory exclusion laws, which require charges against juveniles to be filed in adult court for certain offenses; (2) prosecutorial discretion laws, which give prosecutors discretion to file charges directly in adult court; and (3) judicial waiver laws, which require a juvenile court judge to decide whether a minor can be charged as an adult.[92] Some states specify a minimum age at which minors can be transferred to adult court, while others set no minimum age.[93]

Read literally, the Guidelines give substantial deference to prosecuting state jurisdictions in determining whether a pre-18 prior should subsequently be treated by federal courts as a juvenile adjudication or adult conviction. In practice, the Guidelines have been interpreted by federal courts to permit most youthful offender adjudications to count as adult priors, regardless

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[90] *Id.* § 4B1.2(e)(4) (emphasis added). Sections 2K1.3 and 2K2.1, which contain instructions for calculating the base offense levels for crimes involving explosive materials and firearms, respectively, use the same language to define a prior "felony conviction." *Id.* §§ 2K1.3 cmt. n.2, 2K2.1 cmt. n.1. Section 2L1.2, regarding the crime of unlawful entry, refers to a broader category of "felony offenses" than do Sections 2K1.3 and 2K2.1 but nonetheless defines such offenses to include those committed prior to age 18 using the same operative language. *Id.* § 2L1.2 cmt. n.1(B) ("Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.").

[91] *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/jurisdictional-boundaries (last visited Jan. 5, 2024) [hereinafter *Jurisdictional Boundaries*].

[92] *See id.*; Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 Cal. L. Rev. Circuit 92, 94 (2013).

[93] Miller v. Alabama, 567 U.S. 460, 486 (2012) ("[I]ndeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6.").

of the intention of the prosecuting jurisdiction. This dynamic raises a host of policy concerns over notice and fairness, which we discuss in Part III, *infra*. In this section, we describe the relevant precedent.[94]

i. Second Circuit Treats New York Youthful Offender Adjudications as Adult Convictions

Under New York law, "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense."[95] Despite the unambiguous statute, the Second Circuit disagrees and classifies such adjudications as adult convictions. This metamorphosis is the product of the specific design of New York's youthful offender procedure.

Until recently, New York prosecuted any individual over age 15 as an adult.[96] To avoid the full consequences of an adult conviction, 16-, 17-, and 18-year-olds were potentially eligible for relief under New York's youthful offender statute.[97] Under that law, an eligible individual's case proceeds in adult court, but when the individual pleads or is found guilty at trial, his conviction is then immediately vacated and replaced with a youthful offender finding.[98] All records of youthful offender adjudications are then sealed.[99] Youthful offender adjudications do not disqualify individuals from public employment, voting, and other civic privileges, and individuals need not disclose such judgments if, say, future job or housing applications ask about

[94] We start with the Second Circuit's interpretation of New York state law as a primary case study and then briefly mention similar circuit court holdings regarding the laws of other states, including Michigan, South Carolina, Florida, Alabama, and Massachusetts. This is not intended to be an exhaustive list of all affected jurisdictions.
[95] N.Y. CRIM. PROC. LAW § 720.35(1) (McKinney 2023).
[96] *Raise the Age*, N.Y. COURTS, https://www.nycourts.gov/courthelp/criminal/RTA.shtml (Dec. 23, 2019) [hereinafter *Raise the Age*].
[97] N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2023).
[98] *See* United States v. Driskell, 277 F.3d 150, 155 (2d Cir. 2002). In some situations, courts "must" grant a youthful offender finding. In others, judges have discretion to do so if it finds that "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record." N.Y. CRIM. PROC. LAW § 720.20(1).
[99] N.Y. CRIM. PROC. LAW § 720.35(2).

past convictions.[100] New York courts cannot use the adjudications to enhance sentences in subsequent cases.[101]

Under a "Raise the Age" law that took full effect on Oct. 1, 2019, New York raised the age of criminal responsibility to 18.[102] This reform makes most offenders below age 18 eligible to have their cases adjudicated in juvenile court, but youthful offender adjudications are still possible.[103] Since the law has been in effect, hundreds of cases involving individuals under 18 have remained in adult court.[104] In addition, the new law does nothing to erase youthful offender adjudications imposed on 16- and 17-year-olds before the reform. Therefore, these adjudications remain a live issue for many people later accused of a federal crime.

Nearly two decades before New York's "Raise the Age" law—and before the Supreme Court recognized that juveniles are entitled to more leniency at sentencing, as discussed in Part II, *infra*—the Second Circuit held that New York youthful offender adjudications should count as prior adult convictions for federal sentencing purposes. In *United States v. Driskell*, the Second Circuit reasoned that because youthful offenders in New York are tried and convicted in adult court before their convictions are vacated, the "substance" of their adjudications are more

[100] *Id.* § 720.35(1); Video interview with Donna Henken, Adolescent Intervention and Diversion Project Att'y, The Legal Aid Soc'y (Mar. 6, 2023).
[101] United States v. Matthews, 205 F.3d 544, 548 (2d Cir. 2000).
[102] N.Y. CRIM. PROC. LAW § 722 (McKinney 2023) (as added by L.2017, ch. 59, pt. WWW); *see also Raise the Age*, *supra* note 96.
[103] *Raise the Age Flowchart*, N.Y. COURTS, https://nycourts.gov/courthelp/pdfs/RTA_flowchart.pdf (last visited Jan. 6, 2024).
[104] *Juvenile Offender (JO) and Adolescent Offender (AO) Arrests, Court Case Outcomes and Youth Part Activity*, N.Y. STATE DIV. OF CRIM. JUST. SERV., https://www.criminaljustice.ny.gov/crimnet/ojsa/juv_off/index.htm. In 2022, 508 out of 3,427 cases involving 16- and 17-year-olds who committed a felony offense remained in adult court; in 2021, 449 out of 2,700 did so; in 2020, 243 out of 2,846; and in 2019, 157 out of 2,062. *Id.*

in line with an adult conviction "than the statutory term affixed to it by a state court."[105] The *Driskell* panel dismissed the argument that assigning criminal history points for youthful offender adjudications contravened the intent of the New York legislature. The youthful offender statute, the panel wrote, "emanate[s] from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts."[106] But it is not meant, in the Circuit's view, to eliminate the offender's "culpability" or shield the offender from consequences if he recidivates.[107]

The Second Circuit built on its reasoning in *Driskell* to hold in subsequent cases that youthful offender adjudications also count as adult convictions for purposes of calculating a federal defendant's base offense level[108] and designating that person a "career offender."[109] In *United States v. Sellers*, however, the Second Circuit rejected the argument that youthful offender adjudications could qualify as predicate convictions under the Armed Career Criminal

[105] 277 F.3d 150, 153–54 (2d Cir. 2002) (relying on United States v. Matthews, 205 F.3d 544, 548–49 (2d Cir. 2000), which held that a youthful offender adjudication does not operate as an expungement of a conviction).
[106] *Id*. at 156 (quoting People v. Drayton, 350 N.E.2d 377, 379 (N.Y. 1976)).
[107] *Id*. at 155–56 ("Setting aside a conviction may allow a youth who has slipped to regain his footing by relieving him of the social and economic disabilities associated with a criminal record. But if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.") (quoting *United States v. McDonald*, 991 F.2d 866, 872 (D.C. Cir. 1993)).
[108] United States v. Reinoso, 350 F.3d 51, 55 (2d Cir. 2003) ("There is no principled reason to distinguish between convictions that are considered for the purpose of calculating a defendant's criminal history category, and those used to calculate the base offense level.").
[109] United States v. Jones, 415 F.3d 256, 258 (2d Cir. 2005) ("While it is true that Jones may only have pleaded guilty because the judge had indicated that he would adjudicate him a youthful offender, this does not change the fact that Jones was convicted before receiving youthful offender status."); *see also* United States v. Parnell, 524 F.3d 166, 171 (2d Cir. 2008).

Act ("ACCA"), which contains language that differs in a key respect from that in the Guidelines.[110] The Circuit has not published a decision on this topic since *Sellers* in 2015.

ii. Sixth Circuit Counts Dismissals under Michigan's Holmes Youthful Trainee Act Toward a Defendant's Criminal History Score

Using similar logic to the Second Circuit, the Sixth Circuit has held that even when young people have charges dismissed pursuant to Michigan's Holmes Youthful Trainee Act ("HYTA"), the underlying offense can still be used to enhance that person's advisory Guidelines range if they are subsequently convicted in federal court.[111] The HYTA addresses a slightly older cohort of offenders than New York's youthful offender statute: defendants between ages 18 and 25 are eligible to be assigned the status of a youthful trainee.[112] Nonetheless, the two programs have the same purpose, which is to shield defendants from the lifelong collateral consequences for crimes they committed at a young age. Michigan law states that:

> assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and . . . the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.[113]

[110] United States v. Sellers, 784 F.3d 876, 879 (2d Cir. 2015) ("We hold that a drug conviction under New York law that was replaced by a YO adjudication is not a qualifying predicate conviction under the ACCA because it has been 'set aside' within the meaning of 18 U.S.C. § 921(a)(20) and New York law.").
[111] United States v. Shor, 549 F.3d 1075 (6th Cir. 2008) (interpreting MICH. COMP. LAWS § 762.11-.15 (2023)).
[112] MICH. COMP. LAWS § 762.11(2) (2023).
[113] *Id.* § 762.14(2).

To be assigned a youthful trainee, a young person must first plead guilty to a criminal offense.[114] The judge, however, does not enter a judgment of conviction.[115] If the individual successfully completes the trainee program, the original charges are dismissed.[116]

The Sixth Circuit held in *United States v. Shor* that because a guilty plea is a precondition for eligibility in the youthful training program, the underlying offense can be assigned criminal history points under the Guidelines.[117] In doing so, the panel referenced Section 4A1.2(f) of the Guidelines:

> Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. *A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered*, except that diversion from juvenile court is not counted.[118]

The Sixth Circuit has reaffirmed the *Shor* holding in more recent cases, solidifying that a guilty plea under the HYTA constitutes a "prior sentence" despite the contrary language and apparent intent of Michigan law.[119]

iii. <u>*Eleventh Circuit Rejects Language in South Carolina, Florida, and Alabama Laws to Hold that Youthful Offender Adjudications are Adult Convictions*</u>

The Eleventh Circuit likewise considers youthful offender adjudications under the laws of South Carolina, Florida, and Alabama to be adult convictions for federal sentencing purposes despite those states' contrary classifications. The first case in the Circuit to address this issue was

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[114] *Id.* § 762.11(2).
[115] *Id.*
[116] *Id.* § 762.14(1); *see also* United States v. Hill, 769 F. App'x 352, 354 (6th Cir. 2019) ("Under HYTA, certain defendants in Michigan are eligible to plead guilty and have their convictions dismissed if they complete the youthful trainee program.").
[117] 549 F.3d 1075, 1078 (6th Cir. 2008).
[118] *Id.* at 1077–78 (quoting U.S.S.G. § 4A1.2(f) (U.S. SENT'G COMM'N 2006) (emphasis added) (language still in effect as of 2023 Guidelines Manual)).
[119] *See, e.g.*, *Hill*, 769 F. App'x at 354.

United States v. Pinion.[120] In *Pinion*, the defendant challenged the use of a South Carolina youthful offender adjudication to designate him a career offender under the Guidelines.[121] Inclusion of his age-17 offense resulted in a then-mandatory Guidelines range of 360 months to life in prison.[122] Even though South Carolina had not prosecuted him as an adult, the Eleventh Circuit stressed the need "to take the inquiry to a level above that of mere semantics" and "focus on the nature of the proceedings, the sentences received, and the actual time served."[123] The Eleventh Circuit affirmed the use of his youthful offender adjudication to sentence him as a career offender.[124]

In *United States v. Wilks*, the Eleventh Circuit relied on its reasoning in *Pinion* to hold that the defendant's prior youthful offender adjudications in Florida count as predicates toward not only the career offender enhancement but also the Armed Career Criminal Act's mandatory 15-year minimum sentence.[125] Because *Wilks* was decided after the Supreme Court banned the use of the death penalty for juveniles in *Roper v. Simmons*,[126] the panel addressed the argument we make in Section II, *infra*:

> It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.[127]

[120] 4 F.3d 941 (11th Cir. 1993).
[121] *Id*. at 943.
[122] *Id*. at 942–43.
[123] *Id*. at 944.
[124] *Id*. at 944–45.
[125] 464 F.3d 1240, 1243 (11th Cir. 2006) (interpreting ACCA, 18 U.S.C. § 924(e)).
[126] 543 U.S. 551 (2005).
[127] *Wilks*, 464 F.3d at 1243.

Finally, in *United States v. Elliot*, the Eleventh Circuit held that youthful offender adjudications under Alabama law could count as career offender predicates despite the fact that, under state law, such adjudications "shall not be deemed a conviction."[128] In rejecting Alabama's classification, the court explicated that "[f]ederal law, not state law, controls the application of the Sentencing Guidelines."[129]

iv. First Circuit Charts a Different Path, Upholding Massachusetts' Distinction Between Youthful Offender Adjudications and Adult Convictions

The First Circuit ruled differently, reading the Guidelines' career offender provisions to require greater deference to how states classify judgments.[130] In *United States v. McGhee*, the defendant challenged the use of a youthful offender adjudication from when he was 15 to designate him a career offender.[131] Under Massachusetts law, youthful offenders are treated like adults in some ways and like juveniles in others. Youthful offenders can be indicted, they can be incarcerated, and their records are open to the public.[132] However, jurisdiction over such cases remains in juvenile court and the proceedings "shall not be deemed criminal proceedings."[133]

Faced with this inconclusive evidence, the court returned to the language in the Guidelines: for career offender purposes, a judgment for an offense committed before age 18 counts as a predicate only if "it is classified as an adult conviction under the laws of" that jurisdiction.[134] That language, the court reasoned, "undermin[es] any presumption in favor of a

[128] 732 F.3d 1307, 1313 (11th Cir. 2013) (quoting ALA. CODE § 15-19-7(a) (2023)).
[129] *Id*. at 1312 (quoting United States v. Madera-Madera, 333 F.3d 1228, 1231 n.2 (11th Cir. 2003)).
[130] United States v. McGhee, 651 F.3d 153, 158 (1st Cir. 2011).
[131] *Id*. at 156.
[132] *Id*. at 157.
[133] *Id*. at 157–58.
[134] *Id*. at 155 (quoting U.S.S.G. § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2006)).

federal standard that disregards state labels,"[135] such as that articulated by the Second Circuit in *United States v. Jones*[136] or the Eleventh Circuit in *Pinion*.[137] The court instead held that youthful offender adjudications may not be used as a career offender predicate.[138] "This is a judgment call," the panel wrote, "but Massachusetts' nomenclature clearly distinguishes between youthful offenders and adults, and to the extent that objective criteria apply, the treatment accorded under state law is significantly different than that given adult offenders."[139]

v. Summary

These case studies demonstrate how many states' youthful offender adjudications count as adult convictions for Guidelines purposes in subsequent federal cases. However, they also show that the circuits have not acted uniformly. Given this split, it is all the more important for the Commission to address the issue by amending the Guidelines.

PART II: THE SUPREME COURT'S "JUVENILES ARE DIFFERENT" JURISPRUDENCE AND THE UNDERLYING SCIENCE SUPPORT AMENDING THE GUIDELINES

The Guidelines' use of pre-18 priors to enhance the sentences of federal defendants stands in tension with the U.S. Supreme Court's "juveniles are different" jurisprudence. The Court has held "that children are constitutionally different from adults for purposes of

[135] *Id*. at 157.
[136] United States v. Jones, 415 F.3d 256 (2d Cir. 2005).
[137] United States v. Pinion, 4 F.3d 941 (11th Cir. 1993).
[138] *McGhee*, 651 F.3d at 158.
[139] *Id*.

sentencing" in a way that makes them "less deserving of the most severe punishments."[140] Put another way, the Court recognizes that juveniles categorically are less culpable than adults.

In reaching this conclusion, the Court has relied on behavioral and neuroscientific research that over the past 25 years has provided a nuanced understanding of why and when the behavior of adolescents differs from that of adults. In short, this research has revealed that while humans' capacity to reason and deliberate systematically matures by around age 16, our ability to exercise self-regulation, especially in socially and emotionally arousing contexts, does not mature for roughly another five years.[141] Adolescents, therefore, are at a developmental disadvantage compared to adults in resisting impulses and urges to engage in criminal behavior.[142]

The literature on adolescent development can be divided into three broad categories—cognitive, psychosocial, and neurobiological—each of which describes systematic patterns of maturation through the teenage years and, in some cases, beyond.[143] Cognitive research focuses on the basic faculties that support logical reasoning and thoughtful, informed decision making. Along these measures of intellectual abilities, adolescents do not differ meaningfully from adults.[144] Scholars have found that the cognitive capacities that facilitate logical reasoning, planning, and analytical thought plateau in early- to mid-adolescence.[145] Thus, by the time they are 15 to 17 years old, adolescents perform at adult levels on various tasks that test their ability

[140] Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).
[141] Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 ANN. REV. OF DEV. PSYCH. 21, 34 (2019).
[142] *Id*.
[143] *Id*. at 27.
[144] *Id*. at 28.
[145] *Id*.

to plan ahead or weigh the costs and benefits of risky behavior, such as riding with a drunk driver.[146] Likewise, that age cohort exhibits adult-like ability to make informed decisions in legal, medical, and research contexts.[147]

Psychosocial research, however, shows that despite their intellectual abilities, adolescents in emotionally arousing situations tend not to evince adult levels of self-control until well beyond their eighteenth birthday.[148] Whereas mental processes employed in emotionally neutral contexts are often called "cold" cognition, this area of research focuses on "hot" cognition—how adolescents in situations that hinder deliberate decision making are able to control their impulses, assess risks, resist coercive influences, and consider the future consequences of their decisions.[149] Compared to adults, adolescents into their twenties have lower impulse control, a greater tendency toward sensation seeking, a greater sensitivity to rewards, and a weaker ability to delay gratification.[150] Furthermore, "[t]here is extensive empirical support for the observation that youth act differently when they are among peers and friends than they do when they are alone,"[151] an important observation given that, unlike adults, most criminal offenses among teenagers occur in groups.[152]

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[146] *Id*.
[147] *Id*.
[148] *Id*. at 29; *see also* Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 LAW & HUM. BEHAV. 69, 69–70 (2019) (documenting a "maturity gap" between the timetables of intellectual and emotional development in both American and international samples).
[149] Icenogle et al., *supra* note 148, at 71.
[150] Elizabeth Scott & Laurence Steinberg, *In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk*, 44 LAW & SOC. INQUIRY 780, 782 (2019).
[151] Steinberg & Icenogle, *supra* note 141, at 29.
[152] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS IN COGNITIVE SCI. 63, 64–65 (2014).

Finally, neurobiological research approaches, which utilize functional magnetic resonance imaging to measure brain activity, reach results consistent with the findings from behavioral studies and provide a biological explanation for the developmental differences between adolescents and adults. Scientists attribute the psychological immaturity observed during adolescence to the differing timetables along which two important brain systems change—a model referred to as "maturational imbalance."[153] The brain system responsible for risk-taking and reward-seeking undergoes dramatic changes in early adolescence, but the system responsible for regulating impulses and thinking ahead is still undergoing maturation into the mid-twenties.[154] Faced with peer pressure, potential rewards, or other stressors, the emotional centers of the brain can "hijack" the less mature self-control system.[155] As one research team summarized, "in many respects and under certain circumstances, individuals between ages 18 and 21 are more neurobiologically similar to younger teenagers than had previously been thought."[156]

In light of these findings, psychologists have urged policymakers to set different age boundaries for different legal purposes: a lower age for matters in which cognitive capacities predominate (such as voting) and a higher age for matters in which psychosocial maturity plays a substantial role (like gambling).[157] The decision to commit crime falls into the latter category, as

[153] *Id*. at 30.
[154] *Id*. at 30-31; *see also* Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at *25-31, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239; Brief for Am. Med. Ass'n et al. as Amici Curiae Supporting Neither Party at *35, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237 ("the adolescent brain is biologically biased to engage in exploring new environments and experiences which can involve taking risks").
[155] Cohen & Casey, *supra* note 152, at 65.
[156] Steinberg & Icenogle, *supra* note 141, at 32.
[157] *See, e.g.*, *id*. at 34; Icenogle et al., *supra* note 148, at 82–83.

adolescents who engage in criminal behavior often do so under considerable stress, facing time pressures, and surrounded by peers.[158]

Armed with researchers' early findings about adolescent development, the Supreme Court set off a "juvenile sentencing revolution"[159] in 2005 with its landmark decision in *Roper v. Simmons*, banning as "cruel and unusual" the death penalty for pre-18 offenders.[160] *Roper* was significant as much for its holding as for its reasoning, which concluded that juveniles have "diminished culpability" compared to adults based on three broad observations about the nature of youth.[161] First, juveniles exhibit "a lack of maturity and an underdeveloped sense of responsibility."[162] Second, juveniles are more susceptible to negative influences and peer pressure, in part because they often "have less control, or less experience with control, over their own environment."[163] Third, "the character of a juvenile is not as well formed as that of an adult."[164] The Court supported its findings by citing an influential 2003 article by Professors Laurence Steinberg and Elizabeth Scott, who used emerging evidence from behavioral studies and neuroscience to argue that youth should not be held to the adult standard of criminal liability.[165]

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[158] Steinberg & Icenogle, *supra* note 141, at 34; Icenogle et al., *supra* note 148, at 71.
[159] Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1004 (2017) [hereinafter *Mending the Federal Sentencing Guidelines*].
[160] 543 U.S. 551, 578 (2005).
[161] *Id*. at 571.
[162] *Id*. at 569.
[163] *Id*.
[164] *Id*. at 570.
[165] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1009 (2003).

The Court subsequently extended the reach of *Roper* to other areas of juvenile sentencing. In *Graham v. Florida*, the Court forbid the imposition of a life-in-prison-without-parole ("LWOP") sentence on juvenile offenders who did not commit homicide.[166] In *Miller v. Alabama*, the Court outlawed mandatory LWOP for juveniles who *did* commit homicide.[167] And in *Montgomery v. Louisiana*, the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively to cases on state collateral review.[168] In both *Graham* and *Miller*, the Court emphasized that the behavioral and neuroscience research underpinning its reasoning in *Roper* had grown only more extensive in the intervening years.[169]

Although the Court's juveniles-are-different quartet addresses only death penalty and LWOP cases, numerous commentators have argued that there is no principled way to wall off the Court's key insight—that "children are constitutionally different from adults in their level of culpability"—from other areas of sentencing.[170] Indeed, this principle underpins our recommendation that the Commission stop counting pre-18 priors when calculating a federal defendant's Guideline range. The Court's reasoning, bolstered by developmental science, demands that the offense of an adolescent never be equated to that of an adult—as happens

[166] Graham v. Florida, 560 U.S. 48, 82 (2010).
[167] Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles").
[168] Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).
[169] *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *Miller*, 567 U.S. at 472 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").
[170] *Montgomery*, 577 U.S. at 213; Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at *33, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239 ("[T]here is no reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense."); *Mending the Federal Sentencing Guidelines*, *supra* note 159, at 1006 ("[T]here may be reason to believe that the Court's observations about the nature of adolescence apply just as vigorously to at least some noncapital and non-LWOP crimes.").

frequently under the current Guidelines.[171] What an adult did when he was 17 or younger is too attenuated from a developmental perspective to factor into the punishment he deserves for a later federal offense. In other words, an adult should be punished for what he did with a fully developed brain, not for what he did when developmental realities made him less able to resist impulses and think ahead.

PART III: THE USE OF PRE-18 PRIORS TO ENHANCE FEDERAL SENTENCES UNDERMINES THE LEGITIMACY OF THE GUIDELINES AND IS CONSTITUTIONALLY SUSPECT DUE TO A LACK OF NOTICE

The use of pre-18 priors to enhance federal sentences has pernicious consequences that undermine the legitimacy of the Guidelines. First, poor people of color are disproportionally punished by the current regime. This is reason alone to abandon it. Second, counting pre-18 priors is directly at odds with the goal of "sentencing uniformity" at the heart of the Guidelines. Third, the current regime raises constitutional problems related to notice. In the vast majority of cases where a federal defendant receives a harsher penalty due to a prior youthful offender adjudication, he was told as a teenager by his attorney and the presiding judge that his adjudication was not a conviction and would be sealed.

A. Counting Pre-18 Priors Disproportionately Harms People of Color.

Poor people of color, especially Black people, are overly policed, more strictly prosecuted, and fare worse with judges than any other definable group in the United States.[172] This is true even in today's federal system.[173] This systemic bias starts before age 18, meaning

[171] *See supra* Sections I.B–I.C.

[172] THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ ("African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences.").

[173] Chad M. Topaz et al., *Federal Criminal Sentencing: Race-Based Disparate*

that poor people of color are more likely to have juvenile or youthful offender adjudications than their white peers.[174]

The national data documenting this dynamic is robust and damning. In 2019, Black youth were nearly three times as likely as white youth to be referred to juvenile court for common age-appropriate infractions, such as getting in a fight at school.[175] As a result, Black youth comprised 15% of America's youth population that year but accounted for 35% of all delinquency cases handled by juvenile courts.[176] Even among youth already in the juvenile system, it has long been the case that youth of color—and Black youth in particular—are treated more harshly than their white peers.[177] For example, in 2019, cases involving youth of color were more likely to result in incarceration or a group home placement than those involving white youth.[178] These figures are in line with the results of studies from earlier years.[179]

The same racial disparities persist in the process by which local authorities select certain youth to prosecute as adults. In 2013, "[B]lack and American-Indian youth were . . . more likely

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Impact and Differential Treatment in Judicial Districts, HUMANS. AND SOC. SCIENCES COMMC'NS (June 29, 2023), https://www.nature.com/articles/s41599-023-01879-5 ("At the system-wide level, Black and Hispanic defendants receive average sentences that are approximately 19 months longer and 5 months longer, respectively.").

[174] *Racial and Ethnic Disparity in Juvenile Justice Processing*, OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity (last updated Mar. 2022) ("National data show that Black youths and other youths of color are more likely than white youths to be arrested, referred to court, petitioned after referral (i.e., handled formally), and placed in an out-of-home facility after being adjudicated.").

[175] Charles Puzzanchera et al., Youth and the Juvenile Justice System: 2022 National Report, NAT'L CTR. FOR JUV. JUST. 163–64 (Dec. 2022), https://ojjdp.ojp.gov/publications/2022-national-report.pdf ("Compared with their proportion in the population, Black youth are overrepresented at various juvenile justice decision points.").

[176] *Id*. at 145.

[177] *Id*. at 163.

[178] *Id*.

[179] *See, e.g.*, Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47, 51–52 (2016).

to be waived to criminal [adult] court for trial than white youth."[180] Consistent with that finding, a 2014 study in Florida found that Black adolescents comprised only about 27% of arrested youth but accounted for 51% of all transfers to the adult system.[181] Similarly, in California, Black youth in 2014 comprised only 5% of the state's population of 14- to 17-year-olds but were the subject of 27% of the cases that prosecutors filed directly in adult court.[182] White youth in California, meanwhile, accounted for 30% of the population but only 10% of the transfers.[183] Similar trends have been observed in Michigan and Arizona.[184]

The racial disparities described above are devastating for people of color with pre-18 priors who are later charged in federal court. As discussed, prior offenses lead to a higher criminal history score, offense level, and could lead to career offender status or the denial of safety valve relief. Because young people of color are being more aggressively policed and prosecuted, it follows that they start from a worse position in the federal criminal justice system.

This phenomenon contributes to racial disparities observed in federal sentencing data. In 2021, Black individuals comprised 12% of the country's population[185] but 23% of all federal defendants,[186] 37% of those in the top three criminal history categories,[187] and 58% of those

[180] *Id*. at 52–53.
[181] Alba Morales, *Branded for Life: Florida's Prosecution of Children as Adults Under its "Direct File" Statute*, HUM. RTS. WATCH 29–32 (April 2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf.
[182] Federle, *supra* note 179, at 59.
[183] *Id*.
[184] *Id*. at 58–59.
[185] *Black/African American Health*, U.S. DEP'T OF HEALTH & HUM. SERV., OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/blackafrican-american-health (last visited Jan. 5, 2024).
[186] U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 48 tbl. 5 (2022).
[187] U.S. SENT'G COMM'N, INTERACTIVE DATA ANALYZER, https://www.ussc.gov/research/interactive-data-analyzer (last visited Jan. 5, 2024).

designated career offenders.[188] Black defendants also qualify for safety valve relief less often than any other group because "Black offenders who commit drug offenses often do not qualify for the safety valve because of their criminal history."[189]

No longer counting pre-18 priors will not cure embedded racism and racial disparities in the juvenile and criminal justice systems. It is likely people of color will continue to be overrepresented in juvenile, state, and federal courts. That said, ending the use of pre-18 priors would be a critical and important step towards leveling the playing field for people of color charged with federal crimes.

B. Counting Pre-18 Priors Undermines the Guidelines' Goal of Uniformity in Sentencing.

Reduction of "unwarranted sentencing disparities" was a primary goal—perhaps *the* primary goal—of the Sentencing Reform Act of 1984 ("SRA").[190] The Guidelines, therefore, attempted to achieve uniformity: people with similar records found guilty of similar conduct should receive similar sentences.[191] However, in relying on state practices to classify prosecutions of adolescents as either juvenile or adult, the Guidelines as currently interpreted by

[188] U.S. SENT'G COMM'N, QUICK FACTS: CAREER OFFENDERS 1 (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf.

[189] U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 40 (July 2017).

[190] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) (describing legislative history of the SRA). An official at the Department of Justice explained in 1987 that "unwarranted sentencing disparity caused by broad judicial discretion is the ill that the Sentencing Reform Act seeks to cure." Letter from Stephen S. Trott, Associate Attorney General, on behalf of the U.S. Dep't of Just., to Hon. William W. Wilkins, Jr., Chairman, U.S. Sen'g Comm'n (Apr. 7, 1987). Coincidentally, as a judge on the Ninth Circuit Court of Appeals seven years later, Trott called for undoing the Guidelines, observing that "[i]n the pursuit of treating people equally, we have overdone it to the point where the cure is worse that the disease." Letter from Hon. Stephen S. Trott to Hon. Richard Conaboy, Chairman, U.S. Sen'g Comm'n (Nov. 9, 1994). The letters are reprinted in 8 FED. SENT'G REP. 196–99 (1995).

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

the majority of circuit courts expose federal defendants to arbitrarily harsh or lenient treatment depending upon geography alone.

The absurdity of the Guidelines' current approach to pre-18 priors is encapsulated in an anecdote related by a group of federal public defenders to the Commission in 2017:

> [I]n one Defender case, a defendant who committed a note job bank robbery [passing a note to a bank employee demanding money] at the age of 19 was sentenced as a career offender based on two prior convictions for struggles with police that occurred when he was 17. The priors counted as career offender predicates because at that time, all 17-year-olds were treated as adults in Massachusetts. If the offenses had occurred in neighboring Rhode Island, where the juvenile court has original jurisdiction over all young people under the age of 18, the defendant likely would not have qualified as a career offender. Indeed, if it simply had happened a few years later, after Massachusetts increased the jurisdiction of its juvenile courts to all young people under the age of 18, it is likely he would not have been deemed a career offender.[192]

Each state takes its own approach to how it classifies young offenders as juveniles or adults, thereby rendering impossible the Guidelines' goal of crafting a nationally uniform sentencing regime. To begin, four states differ on the age at which they set the upper boundary of juvenile court. The vast majority—46 states—set the maximum age of juvenile court jurisdiction at 17.[193] However, Georgia, Texas, and Wisconsin draw the juvenile/adult line at 16.[194] And in 2020, Vermont became the first state in the nation to expand juvenile court jurisdiction to 18-year-olds.[195]

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[192] Fed. Def. Sent'g Guidelines Comm., Comment Letter on Proposed Amendments for 2017 29–30 (Feb. 20, 2017), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170220/FPD.pdf.

[193] Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.

[194] *Id*.

[195] Calvin Cutler, *Vermont's 'Raise the Age' Juvenile Offender Law to Remain on Pause*, WCAX (Dec. 6, 2023), https://www.wcax.com/2023/12/06/vermonts-raise-age-juvenile-offender-law-remain-pause/. Vermont policymakers have since scuttled plans to raise the age of juvenile court jurisdiction even higher, to 20. *Id*.

The upper age-boundary for juvenile court tells only part of the story because "[a]ll states have statutes that make exceptions . . . by specifying when the offense of a juvenile may or must be considered the crime of an adult."[196] Which young people are excepted from juvenile jurisdiction and how that decision is made varies dramatically state to state.[197] Many states give juvenile court judges the authority to transfer a young person to adult court.[198] Other states have "statutory exclusion" laws that require transfer to adult court based on the nature of the offense or if the young person had ever been in adult court previously (known as "once an adult, always an adult" provisions).[199] Still other states allow prosecutors to decide.[200] Each jurisdiction implements one or more of these common practices with its own idiosyncratic variations. For example, some states allow "reverse waiver," in which young people start in adult court but can argue for transfer to juvenile court.[201] Others provide for "criminal blended sentences" in which adult courts retain jurisdiction over young people while imposing a juvenile-only disposition or a combination of juvenile and adult sanctions.[202] This is the category to which most "youthful offender" statutes belong.

Even if a young person is tried as a juvenile and not as an adult, most states' juvenile courts provide fewer constitutional protections—most notably the lack of trial by jury—than

[196] *Jurisdictional Boundaries*, *supra* note 91.
[197] *See generally id*. (in subsections "transfer provisions" and "compare transfer provisions"); *see also Transfer Provision Detail*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/about/jurisdictional-boundaries (last visited Jan. 5, 2024) [hereinafter *Transfer Provision Detail*].
[198] *Jurisdictional Boundaries*, *supra* note 91; *Transfer Provision Detail*, *supra* note 197.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*.

adult courts.[203] These informal proceedings, which vary state to state as to the procedural protections they provide juveniles, should not be relied on to enhance a future federal sentence.[204]

The wide variation among state practices illustrates why the Guidelines' current treatment of pre-18 priors must end. Two people charged with identical federal crimes who committed identical prior offenses as adolescents can have radically different Guidelines ranges based on the quirks of geography, timing, and luck. A 17-year-old treated as a juvenile in one state could be excluded from juvenile court jurisdiction in a neighboring state. Alternatively, a 17-year-old facing adult charges one year could be treated as a juvenile the next were his state to pass Raise the Age legislation, like New York.[205] Finally, a 17-year-old with a favorable judge, a lenient prosecutor, or a good attorney could avoid transfer to adult court, while another 17-year-

[203] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."). In reaching its decision in *McKeiver*, the Court conceded that "the fond and idealistic hopes of the juvenile court proponents . . . have not been realized," citing a scarcity of professional help, an inadequacy of dispositional alternatives, and a general lack of concern for young people as contributing to the system's failures. *Id.* at 543–44. In the ensuing decades, states have moved to much more punitive models of juvenile justice, further weakening *McKeiver*'s already-shaky foundation. *See* Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 613, 613 n. 26, 675 (2013) (discussing the move by several states to amend the purpose clause of their juvenile codes to incorporate the goal of punishment and to expand the consequences of a juvenile adjudication to include new "procrustean punishments" such as lifetime sex offender registration, potential enhancement of future criminal sentences, ineligibility for student loans, disqualification from public benefits, and ineligibility to enlist in the military).

[204] Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in A Post-*McKeiver *World*, 91 NEB. L. REV. 1, 4 (2012) ("[D]espite widespread criticism from commentators, the overwhelming majority of courts continue to rely on *McKeiver* as the basis for unjustifiably denying jury trials to delinquents facing punitive sanctions, which would trigger jury trial rights in adult criminal court.") (footnote omitted).

[205] *See supra* Section I.C.i.

old lacking those in the courtroom next door could be prosecuted as an adult. These examples do not even account for the racial disparities discussed above.

Randomness is at odds with the Guidelines' goal of uniformity in sentencing. The Commission should not allow a subset of federal defendants to be punished more severely based on the idiosyncratic laws of their home state's courts and their federal circuit's interpretation of those statutes. Instead, the Commission should amend the Guidelines with a clear and unambiguous rule: pre-18 priors do not count.

C. Counting Pre-18 Offenses Is Constitutionally Suspect Due to Lack of Notice.

When one of the authors worked as a state-level public defender at the Legal Aid Society in New York City, he was trained that youthful offender adjudications were not convictions, would not show up on rap sheets, and would not saddle young clients later in life with burdensome collateral consequences. Not once did he consider the severe ramifications for his clients who accepted youthful offender adjudications should they later be found guilty of a federal offense. Now in federal practice, the disbelief expressed by dozens of clients impacted by their past youthful offender adjudications confirms that he was not alone. The authors are deeply concerned that young people accepting youthful offender adjudications as part of plea deals are doing so because they are told they are not convictions and will be sealed. They receive no notice that these same sealed non-convictions may be counted as prior adult convictions in federal court and greatly enhance their federal sentences.

Moreover, federal defendants may not learn of the effect of their pre-18 priors until after they have already pleaded guilty in federal court. Prosecutors often become aware of the sealed adjudications only after the U.S. Probation Office files its Presentence Investigation Report

shortly before sentencing.[206] Beyond providing inadequate notice to defendants, a change in the Guidelines so late in a federal case creates challenge for the Government as well, as the legitimacy of the plea agreement and agreed-upon Guideline Range may be called into question by the sentencing court. The lack of notice—both at the time a juvenile agrees to a youthful offender adjudication and during a subsequent federal case's plea negotiation—is fundamentally unfair, constitutionally suspect, and bad public policy. The practice should end.

The authors set out to discuss this notice problem with state public defenders at three different New York City offices. Meetings with leaders at the Legal Aid Society,[207] the Neighborhood Defender Service of Harlem,[208] and the Bronx Defenders[209] revealed that none was aware that New York youthful offender adjudications could be used to enhance federal sentences under the Guidelines. As a result, their attorneys did not advise clients of this potential future consequence. Moreover, the leaders reported that, in their experience, New York State judges have never advised those they sentenced about this aspect of their plea.

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[206] For example, in New York, a person's youthful offender adjudications do not usually appear on his rap sheet because they are sealed. Similarly, prosecutors in the U.S. Attorney's Office for the Southern District of New York do not have access to a federal defendant's sealed youthful offense history. Because federal defendants typically believe those cases are not convictions and are sealed, they rarely reveal the prior offenses unless asked directly by their counsel. Thus, defense counsel and the Government frequently sign plea agreements, including an agreed-upon advisory Guidelines Range, that do not account for these offenses. The defendant is then shocked when the court, after receiving the Presentence Investigation Report, calculates a much higher Guidelines range than what he agreed to. At that point, the defendant cannot go back on his plea: the agreement stipulates that the U.S. Probation Office may find a different Guidelines range and the sentence will be determined solely by the court. However, had the defendant known his Guidelines range would be so much higher, he might not have pleaded guilty or sought a different offer than the one ultimately agreed to.

[207] Video interview with Donna Henken, Adolescent Intervention and Diversion Project Att'y, The Legal Aid Soc'y (Mar. 6, 2023).

[208] Video interview with Ann Matthews et al., Managing Dir., Crim. Def. Prac., The Bronx Defs. (Mar. 14, 2023).

[209] Video interview with Elizabeth Fischer et al., Managing Att'y, Crim. Def. Prac., Neighborhood Def. Serv. of Harlem (Mar. 15, 2023).

One attorney who works predominantly on immigration matters pointed out the anomaly of the Guidelines policy compared to a federal Board of Immigration Appeals precedent holding that New York youthful offender adjudications do not count as criminal convictions for immigration purposes.[210] Immigration consequences are an interesting parallel, as the Supreme Court requires notice in that context. In *Padilla v. Kentucky*, the Supreme Court held that "counsel must inform [a] client whether his plea carries a risk of deportation."[211] Concurring in the judgement, Justice Alito wrote, "By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise."[212] Here, the consequences are similarly severe. A single unknown youthful offender adjudication could increase a defendant's Guidelines significantly, especially if the adjudication makes him a career offender.[213]

The notice problem extends to juvenile adjudications, as opposed to just youthful offender adjudication. A survey of existing case law shows that federally charged individuals are not given adequate notice that federal courts can use their prior juvenile adjudications to enhance a federal sentence. In one Third Circuit case, the defendant argued that Section 4A1.2(d) of the Guidelines violated due process and was an unconstitutional *ex post facto* law because it considered juvenile adjudications that, at the time of those adjudications, the defendant believed could not be used against him at future proceedings.[214] In a Fourth Circuit case, the defendant

[210] Matter of Devison-Charles, 22 I. & N. Dec. 1362, 1373–74 (BIA 2000) ("There is simply no evidence that when Congress enacted a statutory definition of the term 'conviction,' it intended to thwart the federal and state governments from acting as *parens patriae* in providing a separate system of treatment for juveniles.").
[211] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
[212] *Id.* at 387.
[213] *See supra* Section I.B.
[214] United States v. Bucaro, 898 F.2d 368, 371–72 (3d Cir. 1990).

argued that the use of his juvenile adjudications violated due process "because he was not aware that confidential juvenile proceedings could be used to enhance future sentences."[215] And in a First Circuit case, a defendant contested the consideration of a juvenile prior that state law specifically said could not be considered in subsequent proceedings.[216]

The grievances raised in these cases are especially concerning given that so many young offenders lack counsel during their juvenile proceedings, making it highly unlikely that they fully understand the potential federal consequences of their legal decisions. Despite the Supreme Court's landmark 1967 ruling recognizing a right to counsel in juvenile proceedings,[217] "[i]t is an open secret in America's justice system that countless children accused of crimes are prosecuted and convicted every year without ever seeing a lawyer."[218]

Federal courts have not been receptive to challenges on due process grounds to Section 4A1.2(d) of the Guidelines, in part because they have failed to engage with the reality that juveniles are not advised of the potential federal consequences of their pre-18 priors. In each of the three appellate cases mentioned above, the court dismissed the defendants' arguments on

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[215] United States v. Daniels, 929 F.2d 128, 129 (4th Cir. 1991).
[216] United States v. Gray, 177 F.3d 86, 92 (1st Cir. 1999).
[217] In re Gault, 387 U.S. 1, 41 (1967).
[218] *Defend Children: A Blueprint for Effective Juvenile Defender Services*, NAT'L JUV. DEF. CTR. 10 (Nov. 2016), https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf. This occurs because, in many jurisdictions, children are routinely permitted—even encouraged—to waive their right to counsel without first consulting with an attorney. *Id.*; *see also* Karol Mason & Lisa Foster, *Guest Post: Some Juvenile Defendants Still Denied Justice Through Lack of Counsel*, WASH. POST. (Dec. 20, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/12/20/guest-post-some-juvenile-defendants-still-denied-justice-through-lack-of-counsel/ ("Many young people in detention facilities never had a lawyer appointed to represent them, and too often children are encouraged to waive their right to counsel even when doing so can hurt their chances of a fair hearing and a fair result."); Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1170 ("Studies in many states consistently report that juvenile courts adjudicate youths delinquent without the appointment of counsel.").

narrow technical grounds. In the Third Circuit, the court construed language in the Pennsylvania law at issue—that a juvenile adjudication can be used "in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report"—to provide constitutionally adequate notice.[219] In the Fourth Circuit, the court argued in dicta that because the Guidelines were enacted before the defendant's juvenile adjudication, he "was charged with notice that those juvenile adjudications could later be used for sentencing under federal law."[220] And in the First Circuit, the panel stated that even assuming the Maine law at issue prohibited the consideration of a juvenile adjudication in future proceedings, "that reading of the law would fall under the force of the Supremacy Clause."[221] The court wrote:

> Whether a particular offense falls within the federal guidelines' criminal history framework is a question of federal law, not state law. States enjoy a broad range of flexibility in choosing how they will treat those who offend their laws. But they may not dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes.[222]

These decisions do not honestly engage with the fact that young people do not receive notice of the potential federal consequences of their juvenile or youthful offender adjudications. For example, when one of the authors asks his clients if they have any pre-18 priors, they often respond to the effect, "Why does it matter? Those are sealed and not convictions." His clients are invariably shocked and dismayed to learn that such adjudications may have a profound effect on their Guideline calculations.

These clients are not to blame for their lack of awareness. They are ignorant of how the Guidelines treat pre-18 priors because their previous counsel was also unaware, or they did not

[219] *Bucaro*, 898 F.2d at 372–73.
[220] *Daniels*, 929 F.2d at 130.
[221] *Gray*, 177 F.3d at 93.
[222] *Id*. (internal quotation marks and citations omitted).

have counsel to begin with. If they were told anything during their juvenile or youthful offender proceedings, at least in New York, it was that the adjudication would not count as a conviction and would be sealed. State laws specifically advise them of the same. Given that young people do not receive notice of the ways in which their pre-18 priors can enhance a future federal sentence, it is deeply unfair and constitutionally suspect to allow this practice to continue.

PART IV: RECOMMENDATIONS

We recommend that the Commission amend the Guidelines to stop counting pre-18 priors to enhance a federal defendant's Guidelines or to bar safety valve relief. Because developmental realities render adolescents less culpable for their criminal behavior than adults, pre-18 priors should never count under the Guidelines. Pre-18 priors perpetuate racial disparities and inject arbitrariness into the federal criminal justice system. To continue counting them, especially for young people told by their attorneys that such offenses were not convictions, is bad public policy and constitutionally suspect.

Our proposal brings the Guidelines into harmony with modern constitutional doctrine on adolescent development, addresses equity concerns, promotes uniformity in sentencing, and responds meaningfully to the reality that young people lack notice about the Guidelines' treatment of such offenses.[223] As detailed below, the Commission has the legal authority to

[223] Even with age 18 as the generally accepted line of demarcation between childhood and adulthood (as established in *Roper* and subsequent cases), courts should consider that a person's brain is still developing well past the age of 18. Prominent juvenile justice scholar Barry C. Feld, for example, has long advocated that jurisdictions adopt a "youth discount" at sentencing to account for young people's diminished culpability. *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 322–25 (2013). Another commentator has argued in favor of a scheme that would extend to defendants up to age 25 a rebuttable presumption that they should be excused from society's harshest punishments—the death penalty, life imprisonment for nonhomicide offenses, and mandatory life without parole—on account of their youthfulness. Kelsey B. Shust, Comment, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J.

amend the Guidelines to implement our proposal. Even if the Commission declines to act, other legal actors can take steps now to mitigate the Guidelines' shortcomings.

A. The U.S. Sentencing Commission Has the Authority to Amend the Guidelines' Treatment of Prior Offenses Committed Before Age 18

The Commission is made up of seven voting members appointed by the President and confirmed by the Senate who serve staggered six-year terms.[224] No more than four members of the Commission can be members of the same political party, and at least three must be federal judges.[225] The Attorney General, or the Attorney General's designee, and the Chair of the U.S. Parole Commission serve as *ex officio*, nonvoting members of the Commission.[226]

The Commission has the statutory authority to revise how the Guidelines count offenses committed before age 18 in sentencing. It is empowered by Congress to promulgate sentencing guidelines and policy statements for federal sentencing courts;[227] to periodically "review and revise" those guidelines;[228] and to submit proposed amendments to Congress no later than May 1 each year.[229] At least four members must approve any change to the Guidelines before the edits

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CRIM. L. & CRIMINOLOGY 667, 698–99 (2014). The Guidelines could incorporate these insights by assigning fewer criminal history points for crimes committed before age 25. We encourage the Commission to study such a change for later Guidelines amendments.

[224] *Organization*, U.S. SENT'G COMM'N (last visited Jan. 6, 2024), https://www.ussc.gov/about/who-we-are/organization. The current commissioners are Judge Carlton W. Reeves (Chair), Judge Luis Felipe Restrepo (Vice Chair), Laura E. Mate (Vice Chair), Claire Murray (Vice Chair), Judge Claria Horn Boom (Commissioner), Judge John Gleeson (Commissioner); and Candice C. Wong (Commissioner). *About the Commissioners*, U.S. SENT'G COMM'N (last visited Jan. 6, 2024), https://www.ussc.gov/commissioners.

[225] *Id*.

[226] *Id*. Jonathan J. Wroblewski represents the Attorney General's Office and Patricia K. Cushwa represents the Parole Commission. *About the Commissioners*, *supra* note 224. The Commission should consider adding a representative of the federal defender offices as a third *ex officio* member.

[227] 28 U.S.C. § 994(a).

[228] *Id*. § 994(o).

[229] *Id*. § 994(p).

are submitted to Congress, which has a 180-day review period to modify or disapprove of the proposed amendment.[230] Absent action of Congress to the contrary, the proposed amendments become effective on the date specified by the Commission—typically November 1 of the same year.[231]

The Commission considered excluding pre-18 priors from Guidelines calculations once before, in 2016.[232] At that time, it did not act. Shortly thereafter, it was hamstrung in its efforts to make any revisions at all. Between 2019 and July 2022, the Commission lacked the necessary quorum to promulgate amendments to the Guidelines.[233] In August 2022, the U.S. Senate finally confirmed a full slate of seven new commissioners, and the Commission proposed a slew of amendments that went into effect November 1, 2023.[234] Now that the Commission again has quorum, it should turn its attention back to pre-18 priors.

Recently, the Commission announced it is indeed studying this very issue again.[235] In its December 2023 Proposed Amendments, which are due to be finalized in May 2024, the Commission invited public comment on three potential options to change how the Guidelines

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[230] SIDHU, *supra* note 13, at 3.
[231] *Id.*
[232] Sentencing Guidelines for United States Courts, 81 Fed. Reg. 92003, 92010–11 (proposed Dec. 19, 2016). The Commission considered no longer counting juvenile adjudications or, in the alternative, any offense committed prior to age eighteen. *Id.*
[233] SIDHU, *supra* note 13, at 1.
[234] *Id.*; *Adopted Amendments (Effective November 1, 2023)*, U.S. SENT'G COMM'N (Apr. 27, 2023), https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2023. The Commission adopted meaningful changes, including a two-point offense level reduction for certain offenders with zero criminal history point and limits on the use of "status points" to increase an offender's criminal history score for having committed the instant offense while on probation, on supervised release, or in other circumstances.
[235] *Proposed Amendments to the Sentencing Guidelines*, U.S. SENT'G COMM'N 13–38 (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf [hereinafter *2023 Proposed Amendments*].

count pre-18 priors.[236] In Option 1, the Commission would exclude certain juvenile sentences from receiving two criminal history points but leave the remainder of the current system intact.[237] In Option 2, the Commission would exclude all juvenile sentences from being considered in the calculation of criminal history points, leaving only pre-18 priors where the person was convicted as an "adult."[238] In Option 3, the Commission would fully adopt this article's primary recommendation : pre-18 priors would no longer be considered under any Guidelines provision.[239] For example, Section 4A1.2(d) would read, "Sentences resulting from offenses committed prior to age eighteen are not counted."[240]

B. How the Commission Should Amend the Guidelines

The Commission should adopt Option 3 of its proposed amendments regarding youthful individuals. Options 1 and 2 fail to meaningfully address the myriad of problems described in Sections II and III, *supra*. Sealed youthful offender adjudications, for example, must not

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[236] *Id.* The Commission also proposes amending Section 5H1.1 of the Guidelines to allow for a downward departure due to a youthfulness. *Id*. at 38. Under the proposal, a sentencing court should consider: "(1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision- making, and resistance to peer pressure, is generally not developed until the mid-20s"; and "(2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals." *Id.* The authors fully endorse this proposed amendment.

[237] *Id.* at 15, 17–20. Currently, the Guidelines add two criminal history points under §4A1.2(d) for each juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense.

[238] *Id.* at 15–16, 21–25.

[239] *Id*. at 16, 26–37.

[240] *Id.* at 27. Following this language, the Commission is also considering adding a phrase that pre-18 priors still "may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))." *Id*. The authors respectfully suggest that this phrase would be better placed in the commentary, specifically U.S.S.G. § 4A1.2 cmt. n.7, which is titled "Offenses Committed Prior to Age 18." The Guidelines do not elsewhere direct judges in the main text to affirmatively consider upward departures, and it is not necessary to do so here. Moreover, as discussed below, judges may prefer to rely on Section 3553(a) in weighing a defendant's pre-18 priors as part of his "history and characteristics." 18 U.S.C. § 3553(a)(1).

continue to count against federal defendants, as they upend plea deals, dramatically enhance Guideline ranges, bar safety valve relief, and surprise defendants with career offender status—all despite the fact that such adjudications are classified by state law as sealed non-convictions.[241] Only Option 3 addresses the serious and urgent problems in federal sentencing law that we have identified.

Should the Commission agree with our recommendation that no pre-18 prior be considered under the Guidelines' enhancement provisions, the Guidelines must be amended in several ways. Our proposed amendments largely track the Commission's and are appended to this article.[242] In effect, these amendments allow the Guidelines to be fully consistent with the principle that sentences resulting from offenses committed prior to age eighteen are not counted for any purpose. These changes can be implemented through the Commission's normal amendment cycle; it would not require action from Congress other than to abstain from affirmatively blocking the amendments.[243]

[241] *See supra*, Section I.C.
[242] *See* Appendix.
[243] The Commission asks whether implementing Option 3 would exceed its authority because some of the provisions were "promulgated in response to [Congressional] directives, such as 28 U.S.C. § 994(h)." *See 2023 Proposed Amendments*, *supra* note 235, at 36. The answer is clearly "no." Section § 994(h) calls on the Commission to create the career offender guidelines as promulgated in U.S.S.G. § 4B1.1, which requires a Guideline range "at or near the maximum term" for a federal defendant who commits a crime of violence or controlled substance offense and has "two or more prior felonies, each of which is a . . . crime of violence" or a controlled substance offense. Critically, "prior felony conviction" is defined at U.S.S.G. § 4B1.2(e)(4). Because it is the Guidelines that define the term and not the statute, the Commission is well within its authority to make clear that the definition of a prior felony conviction that can count as a career offender predicate encompasses only those offenses committed after age 18.

C. Other Legal Actors Can Take Steps Now to Mitigate the Guidelines' Shortcomings

Whether or not the Commission heeds our proposal to amend the Guidelines, other legal actors can take immediate steps to address the constitutional and policy-based problems with the Guidelines' treatment of pre-18 priors.

First, we recommend that both criminal defense attorneys and judges implement trainings on the Guidelines' treatment of pre-18 priors so they can address these issues through their advocacy and sentencing decisions. Defense attorneys at both the state and federal levels would benefit from such trainings. Attorneys representing individuals under 18 at the state level, for example, should be aware of dispositions that will be particularly harmful should their clients one day pick up a federal case, and they should advocate for an alternate disposition if possible. Federal defense attorneys, meanwhile, can use the arguments presented in this article to educate judges as to why the Guidelines may overstate the severity of their clients' criminal history. They can also ensure they know their client's youthful offender history before agreeing to any plea deal with the Government.

Likewise, judges at both the state and federal levels should understand how pre-18 priors are counted against defendants under the Guidelines. This knowledge could encourage state juvenile judges, for example, to limit dispositions of confinement so as not to trigger Section 4A1.2(d)'s two-point enhancement in a subsequent federal case. It may also prompt some state judges, whether juvenile or adult, to advise young defendants that while certain adjudications cannot later be used against them under state law, federal law is likely less forgiving. Trainings for federal judges, meanwhile, would encourage them to examine critically the Guidelines' current treatment of pre-18 priors.

Second, we encourage federal judges to grant both departures and variances to give proper weight to pre-18 offenses. Section 4A1.3(b) allows judges to depart downward from the Guidelines range "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[244] Judges may use this provision to disregard pre-18 conduct if they agree with the arguments laid out in this article. Additionally, courts may, pursuant to 18 U.S.C. § 3553(a), grant variances to a lower sentence if the judge agrees, as a matter of policy, that pre-18 offenses should not be used to enhance a later federal sentence.[245] Judges need not—and should not—adhere to the Guidelines if doing so perpetuates constitutionally suspect outcomes that defy the Guidelines' own stated policy objectives. Regardless of action by the Commission, federal judges should make it a practice to sentence individuals without considering offenses they committed as an adolescent.

D. Amending the Guidelines Will Not Foreclose Federal Judges from Considering Pre-18 Priors in Sentencing.

Should the Commission agree and amend the Guidelines as outlined above, judges may still consider pre-18 priors in crafting a federal sentence. Section § 3553(a)(1) requires the Court to consider "the history and characteristics of the defendant" in every single case.[246] Assuming the U.S. Probation office continues to include a defendant's pre-18 priors in its Presentence Investigation Reports, judges will be able to weigh those offenses in the context of the

[244] U.S.S.G. § 4A1.3(b)(1).
[245] *See* Kimbrough v. United States, 552 U.S. 85, 91, 101 (2007) ("The Government acknowledges that the Guidelines are now advisory and that, as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.") (internal quotation marks omitted); *cf.* Spears v. United States, 555 U.S. 261, 265–66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.").
[246] 18 U.S.C. § 3553(a)(1).

defendant's life and consider whether they merit additional punishment. As long as the court justifies its sentence by reference to Section 3553(a)'s sentencing factors, that sentence will be entitled to deference by a reviewing court.[247] Courts may also depart upward, as the Commission suggests, by relying on Section 4A1.3(a).[248]

Therefore, our recommendation will not prevent judges from considering pre-18 priors in making their sentencing decisions. Our recommendations will instead create a starting point under the Guidelines that is more equitable and uniform across the country.

CONCLUSION

Thousands of federal defendants each year face enhancements to their advisory Guideline ranges or are denied relief from draconian mandatory minimums because of the Guidelines' recidivism provisions, which penalize defendants for pre-18 priors. Given that the Guidelines continue to hold considerable sway over the decisions of sentencing judges, this approach adds years in prison time because of prior offenses that individuals committed when they were children under the law. It is past time for this injustice to end.

First, the use pre-18 priors to enhance subsequent federal sentences flies in the face of the Supreme Court's juveniles-are-different jurisprudence, which is animated by the insight that adolescents are less culpable for their crimes on account of their immaturity. Second, counting pre-18 priors is not equitable given that young people of color are far more likely than white youth to be involved in the justice system before their eighteenth birthday. Third, the Guidelines' reliance on highly variable state practices to distinguish between juvenile and adult priors injects arbitrariness into the sentencing process. Fourth, adolescent offenders are not on notice that their

[247] *Gall*, 552 U.S. at 49–53.
[248] *See 2023 Proposed Amendments*, *supra* note 235, at 27.

juvenile or youthful offender adjudications may be used against them later. In fact, they are told the opposite—that these adjudications are sealed non-convictions.

While defenders and judges can take steps to mitigate these failures, it is ultimately the Commission that can make the most meaningful change, and it can do so as early as this year. We recommend that the Commission adopts Option 3 and categorically ends the practice of counting pre-18 priors. The Guidelines are the authoritative statement of federal sentencing policy. Modern science, fairness in sentencing, and public policy all demand our proposed amendments.

There may be some judges, prosecutors, and commentators who disagree with this proposal and think that because of recidivism, deterrence, or any number of other factors, pre-18 priors should still be considered. To that, we say: they can be. Even if the Commission implements our recommendation, the Guidelines remain advisory, and judges will retain broad discretion to impose a sentence they believe appropriate in light of the defendant's history, background, and the other sentencing factors listed in 18 U.S.C. § 3553(a). If a judge thinks a longer sentence is warranted because of past misconduct, even if not counted by the Guidelines, she may vary upward.

In the end, Congress assigned to the Commission the duty to establish federal sentencing policies that "provide certainty and fairness," "avoid[] unwarranted sentencing disparities," and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[249] Our proposal meets each of these aims. Now that the Commission is back in action following a three-and-a-half-year hiatus, it should update the Guidelines to end the policy of counting prior offenses committed before a person turned 18.

[249] 28 U.S.C. § 991(b).

[END]

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APPENDIX

Proposed edits to the U.S. Sentencing Guidelines to implement the Article's recommendations. The Appendix is cited in footnote 242.

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

2023

This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2023, and earlier.

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)–(e), (h), (i), (l)–(o), (p)(2), 844(d), (g), 1716, 2283; 26 U.S.C. § 5685.

Application Notes:

1. "***Explosive material(s)***" include explosives, blasting agents, and detonators. *See* 18 U.S.C. § 841(c). "Explosives" is defined at 18 U.S.C. § 844(j). A destructive device, defined in the Commentary to §1B1.1 (Application Instructions), may contain explosive materials. Where the conduct charged in the count of which the defendant was convicted establishes that the offense involved a destructive device, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) if the resulting offense level is greater.

2. For purposes of this guideline:

   "***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

   "***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

   "***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. ~~A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).~~

3. For purposes of subsection (a)(4), "***prohibited person***" means any person described in 18 U.S.C. § 842(i).

4. "***Felony offense***," as used in subsection (b)(3), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

5. For purposes of calculating the weight of explosive materials under subsection (b)(1), include only the weight of the actual explosive material and the weight of packaging material that is necessary for the use or detonation of the explosives. Exclude the weight of any other shipping or packaging materials. For example, the paper and fuse on a stick of dynamite would be included; the box that the dynamite was shipped in would not be included.

6. For purposes of calculating the weight of explosive materials under subsection (b)(1), count only those explosive materials that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any explosive material that a defendant attempted to obtain by making a false statement.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. ~~A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).~~

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **Definition of "Prohibited Person".**—For purposes of subsections (a)(4)(B), (a)(6), and (b)(5), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. **Application of Subsection (b)(2).**—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **In General.—**

(A) **"Ordered Deported or Ordered Removed from the United States for the First Time".—**For purposes of this guideline, a defendant shall be considered "ordered deported or ordered removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.

(B) **Offenses Committed Prior to Age Eighteen.—**Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age. ~~unless such conviction is classified as an adult conviction under the laws of the juris-diction in which the defendant was convicted~~.

2. **Definitions.—**For purposes of this guideline:
"***Crime of violence***" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance. "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

(e) Add **1** point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. **§4A1.1(a).** Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. *See* §4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~under this subsection only if it resulted from an adult conviction~~. *See* §4A1.2(d).

   A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

   A~~n adult or juvenile~~ sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense~~. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

~~An adult or juvenile~~ sentence imposed for an offense committed prior to the defendant's eighteenth birthday is not counted ~~only if imposed within five years of the defendant's com-mencement of the current offense~~. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

4. **§4A1.1(d).** In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in §4B1.2(a). *See* §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(d) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(d) because the sentence for the second robbery already resulted in an additional point under

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
~~Juvenile status offenses and truancy~~
Local ordinance violations (except those violations that are also violations under state criminal law)
Loitering
Minor traffic infractions (*e.g.*, speeding)
Public intoxication
Vagrancy.

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

Sentences resulting from offenses committed prior to age eighteen are not counted.

(1) ~~If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add **3** points under §4A1.1(a) for each such sentence.~~

(2) ~~In any other case,~~

(A) ~~add **2** points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;~~

(B) ~~add **1** point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).~~

(e) APPLICABLE TIME PERIOD

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

~~(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).~~

(f) DIVERSIONARY DISPOSITIONS

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered~~, except that diversion from juvenile court is not counted~~.

(g) MILITARY SENTENCES

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(k) REVOCATIONS OF PROBATION, PAROLE, MANDATORY RELEASE, OR SUPERVISED RELEASE

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2~~(d)(2) and~~ (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* §4A1.2(e)(1)); and (B) ~~in the case of any other confine-ment sentence for an offense committed prior to the defendant's eight-eenth birthday, the date of the defendant's last release from confine-ment on such sentence (*see* §4A1.2(d)(2)(A)); and (C)~~ in any other case, the date of the original sentence (*see* §4A1.2~~(d)(2)(B) and~~ (e)(2)).

(l) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of §4A1.1(e), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of §4A1.1(e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

However, because predicate offenses may be used only if they are counted "separately" from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (*e.g.*, $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

7. **Offenses Committed Prior to Age Eighteen (Full text replaced for formatting purposes).**—Offenses committed prior to age 18 do not count pursuant to §4A1.2(d). Nonetheless, the criminal conduct underlying any conviction resulting from offenses committed prior to age eighteen may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

8. **Applicable Time Period.**—Section 4A1.2~~(d)(2) and~~ (e) establishes the time period within which prior sentences are counted. As used in §4A1.2~~(d)(2) and~~ (e), the term "***commencement of the instant offense***" includes any relevant conduct. *See* §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

    Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. **Application of Subsection (c).—**

(A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) **Local Ordinance Violations.**—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check.**—"***Insufficient funds check***," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 262–265); November 1, 1990 (amendments 352 and 353); November 1, 1991 (amendments 381 and 382); November 1, 1992 (amendment 472); November 1, 1993 (amendment 493); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2011 (amendment 758); November 1, 2012 (amendment 766); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2018 (amendment 813); November 1, 2023 (amendment 821).

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for juvenile, foreign, and tribal convictions).

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(v) A previous sentence for a serious offense committed before age eighteen.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.—**

(A) **Examples.**—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(d) INCHOATE OFFENSES INCLUDED.—The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) ADDITIONAL DEFINITIONS.—

(1) FORCIBLE SEX OFFENSE.—"***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) EXTORTION.—"***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) ROBBERY.—"***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(4) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. ~~A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an~~

~~adult conviction if the defendant was expressly proceeded against as an adult).~~

Commentary

Application Notes:

1. **Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".**—For purposes of this guideline—

   Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

   Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

   Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

   Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

   A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798); November 1, 2023 (amendment 822).

Arnold & Porter

February 15, 2024

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

Re: Proposed 2023 Amendments to the Federal Sentencing Guidelines Regarding Acquitted Conduct

Dear Judge Reeves:

On behalf of Dayonta McClinton, we respectfully submit the following comments on the United States Sentencing Commission's ("Commission") December 26, 2023 proposed amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the Sentencing Guidelines.

I. Dayonta McClinton's Case

Dayonta was the minor at the center of the highly anticipated acquitted-conduct sentencing case that reached the Supreme Court last Term in *McClinton v. United States*, 143 S. Ct. 2400 (2023), and which was cited frequently in comments submitted to the Commission last spring in connection with the Commission's proposed amendments on acquitted-conduct sentencing during the 2022-2023 cycle.[1] As Justice Sotomayor summarized in her opinion, "[t]he prosecution in this

[1] *See* Federal Public and Community Defenders Comments on Acquitted Conduct Sentencing 4 (Mar. 14, 2023); Statement of Melody Brannon, Federal Public Defender for the District of Kansas on Behalf of the Federal Public and Community Defenders, on Acquitted Conduct Sentencing 3 n.6, 8 n.31 (Feb. 24, 2023); Practitioners Advisory Group Comments on Proposed Amendments to the Sentencing Guidelines 34-35 (Mar. 14, 2023); Americans for Prosperity Comments on Proposed Amendments to the Sentencing Guidelines nn.xiii, xv (Mar. 10, 2023); Fair Trials Comments Regarding the 2023 Proposed Amendments to the Sentencing Guidelines 2 n.9 (Mar. 14, 2023); Families Against Mandatory Minimums Comments on Proposed 2023 Amendments to the Federal Sentencing Guidelines 28 n.112, 29 n.118 (Mar. 14, 2023); National Association of Criminal Defense Lawyers Comments on Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary 22 n.116, 24 n.124 (Mar. 14, 2023); New York City Bar Association Comments on Proposed Amendment to the Guidelines Manual Regarding Acquitted Conduct 2 n.3 (Mar. 13, 2023); Judge Nancy Gertner's Comments on Proposed amendments for the amendment cycle ending May 1, 2023 6 n.20 (Mar. 14, 2023).

case argued that Dayonta McClinton, then 17 years old, shot and killed his friend in a dispute over the proceeds of a pharmacy robbery. The jury unanimously acquitted him of killing his friend and convicted him only of robbing the pharmacy." *Id.* at 2401 (Sotomayor, J., respecting the denial of cert.). The government's case against Dayonta for the murder of his best friend was weak and was based entirely on the testimony of government witnesses, all of whom were cooperating in an effort to reduce lengthy prison sentences of their own. One of the cooperating witness's girlfriends had been cheating on him with the murder victim and the girlfriend of another cooperator had been cheating on him with Dayonta. The jury deliberated for just a few hours before acquitting Dayonta of the murder, rejecting the self-serving testimony of the government's cooperating witnesses and crediting Dayonta's theory that the cooperators had framed him for a murder they had themselves committed. Despite the jury's acquittal, "however, something happened that might strike the average person as quite strange. At [Dayonta's] sentencing for the robbery conviction, the prosecution again argued that [Dayonta] had killed his friend. When the judge agreed, this caused [Dayonta]'s Sentencing Guidelines range to skyrocket." *Id.* Dayonta's "Guidelines range had initially been approximately five to six years. Yet taking into account the killing, the judge sentenced McClinton to 19 years in prison," *id.*, more than tripling his sentence, which was greater than the sentence of every other cooperating witness and robbery participant combined.

Dayonta appealed his sentence, arguing that the use of acquitted conduct to calculate his sentence violated the Fifth and Sixth Amendments' guarantees of due process and a jury trial. The court of appeals affirmed, holding that Dayonta's arguments were barred by *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), and "[t]he holdings in this circuit [that] have followed this precedent," under which "the murder was relevant conduct that could be used to calculate [Dayonta's] sentence." *United States v. McClinton*, 23 F.4th 732, 736 (7th Cir. 2022). But the court of appeals observed that Dayonta's "contention is not frivolous," and had "preserve[d] for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." *Id.* at 735. The court of appeals noted, however, that, "[u]ntil such time as the Supreme Court alters [*Watts*'s] holding, we must follow its precedent." *Id.*

Dayonta petitioned the Supreme Court for review on June 10, 2022. The United States Department of Justice opposed the petition, arguing, among other things, that the Court's review of the constitutional issues raised in Dayonta's petition was unnecessary because "the Sentencing Commission could promulgate guidelines to preclude such reliance" on acquitted conduct at sentencing. U.S. Br. in Opp. at 5, *McClinton v. United States*, No. 21-1557 (Oct. 28, 2022), 2022 WL 16553087. The Supreme Court seemed poised to finally resolve the constitutional questions that have long troubled Supreme Court Justices and "grant certiorari to put an end to the unbroken string of cases disregarding" the Constitution and the Court's precedents. *Jones v. United States*, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial

of cert.); *see also, e.g.*, *Watts*, 519 U.S. at 170 (Stevens, J., dissenting) (decrying the idea "that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved" as "repugnant" to the Constitution); *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (calling the issue of "[acquitted] conduct" a "question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system" that "ought to be confronted by a reasoned course of argument, not by shrugging it off," as "to increase a sentenced based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("It is far from certain whether the Constitution allows" "a district judge [to] . . . increase a defendant's sentence . . . based on facts the judge finds without the aid of a jury."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) (referring to acquitted-conduct sentencing as "unsound" and noting there are "good reasons to be concerned about the use of acquitted conduct at sentencing"); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (noting "[t]he oddity . . . that courts are still using acquitted conduct to increase sentences" after *United States v. Booker*, 543 U.S. 220 (2005), held that "the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt*"). But eight days before Dayonta's case was set to be conferenced by the Justices, the Commission published its preliminary proposed amendments relating to acquitted conduct. The Court accordingly held Dayonta's petition in abeyance pending the Commission's consideration of these amendments.

After receiving public comment, the Commission voted on April 5, 2023 to adopt and send to Congress amendments to the Sentencing Guidelines that did not address the use of acquitted conduct at sentencing. In particular, the Commission remarked that it had "received an immense amount of comment on [its] proposals regarding acquitted-conduct sentencing," which "affirmed to all Commissioners that the question of '[w]hat conduct judges can consider when using the guidelines' is . . . of foundational and fundamental importance to the operation of the entire federal justice system," which demanded "a little more time before [the Commission could] com[e] to a final decision on such an important matter." *Remarks as Prepared for Delivery by Chair Carlton W. Reeves* 22-23 (Apr. 5, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf (quotation marks omitted). The Commission advised that it "intend[ed] to resolve questions involving acquitted conduct next year" in 2024. *Id.* at 23.

The Justices appeared prepared to grant the writ and take up the issue of acquitted-conduct sentencing. But, relying on the Commission's declaration of intent to resolve questions concerning

acquitted-conduct sentencing next year, the Court denied Dayonta's petition and "den[ied] certiorari in a series of similar cases involving acquitted-conduct sentencing" that were being held behind Dayonta's lead case. *See McClinton*, 143 S. Ct. at 2403 & n.5 (Sotomayor, J., respecting the denial of cert.); *id.* (Kavanaugh, J., joined by Gorsuch and Barrett, JJ., respecting the denial of cert.).

Justice Sotomayor called the constitutional issues raised by "the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence" "important questions that go to the fairness and perceived fairness of the criminal justice system." *McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., respecting the denial of cert.). In particular, Justice Sotomayor focused on three fundamental problems infecting acquitted-conduct sentencing. First, she noted that "it is questionable that a jury's refusal to authorize punishment is consistent with the judge giving the defendant additional years in prison for the same alleged crime" because "the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue." *Id.* "So far as the criminal justice system is concerned, the defendant has been set free or judicially discharged from an accusation; released from a charge or *suspicion* of guilt." *Id.* (quotation marks omitted). Second, Justice Sotomayor explained that "[t]here are also concerns about procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury coupled with a lower standard of proof." *Id.* at 2402. And third, Justice Sotomayor explained that "acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system." *Id.* at 2402-03. "[T]he woman on the street would be quite taken aback to learn about this practice," as would "jurors themselves" after learning that their "verdicts [were] . . . not given their proper weight," as the "defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the [prosecutor's] office would have liked them to have been found guilty." *Id.* at 2403 (quotation marks omitted). Despite these "important questions," Justice Sotomayor agreed that Dayonta's petition should be denied and that these questions be deferred for a future case, because "[t]he Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year." *Id.* "If the Commission does not act expeditiously or chooses not to act, however, . . ." Justice Sotomayor warned, "this Court may need to take up the constitutional issues presented." *Id.*

Justices Kavanaugh, Gorsuch, and Barrett echoed Justice Sotomayor's statement. They described "[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range . . ." as "rais[ing] important questions." *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of cert.). But because "the Sentencing Commission is currently considering the issue," they determined that "[i]t [was] appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct." *Id.*

The Commission's important work and careful consideration of the complex issues raised by the proposed amendments concerning acquitted-conduct sentencing is no doubt commendable. But, with respect, rather than inch the nation closer to doing away with the practice of acquitted-conduct sentencing, the Commission's work set those efforts back. After decades of inaction by the Commission, the Court was finally poised to resolve the question, and the Commission's modest proposal scuttled that effort and doomed Dayonta (and the many others like him whose cases were pending before the Court) to an additional 13 years in prison for a crime of which a jury of his peers unanimously acquitted him.

II. Comments on the Commission's Proposed Amendments

A. The Commission Should Apply Any Acquitted-Conduct Sentencing Amendment Retroactively

To begin with, the Commission should provide that any amendment it makes to prohibit the use of acquitted conduct at sentencing would apply retroactively to individuals like Dayonta, whose sentences were improperly enhanced based on conduct of which they were acquitted by a jury.

Retroactivity would further the purposes of any amendment, which is to ensure that sentences are not inconsistent with the findings of juries, reaffirm the jury's role as the "circuitbreaker in the State's machinery of justice," *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004), indorse the "finality" and "unassailabil[ity]" accorded to acquittals, *Yeager v. United States*, 557 U.S. 110, 122-23 (2009) (quotation marks omitted), and restore the public's confidence "that justice is being done, a concern that is vital to the legitimacy of the criminal justice system," *McClinton*, 143 S. Ct. at 2402-03 (Sotomayor, J., respecting the denial of cert.). As noted above, numerous respected jurists have questioned the constitutionality of acquitted conduct sentencing, as well as its fairness. In Dayonta's own case, 17 more distinguished jurists added their voices to the growing chorus of those questioning the practice. *See* Br. of 17 Former Federal Judges as *Amici Curiae* at 1, *McClinton v. United States*, No. 21-1557, 2022 WL 3357692 (Aug. 10, 2022) (appended hereto as Exhibit A). Those interests apply equally to all criminal defendants, whether sentenced before or after any amendment is enacted. Without retroactive application, tens of thousands of criminal defendants will continue to serve sentences that are impossible to square with these interests and which are based on considerations that the Commission will have concluded are impermissible. Retroactivity would also promote sentencing equity for individuals like Dayonta by enabling them to seek a sentencing reduction based on the change to the law to eliminate such unjust outcomes.

Fairness concerns particularly counsel in favor of retroactive application here. The federal government was able to persuade the Supreme Court *not* to grant review in Dayonta's case (or one

of the many similar companion cases that were pending at the same time) in large part by emphasizing that the "Court's intervention" was not "necessary to address" the problem of acquitted-conduct sentencing at the federal level because "the Sentencing Commission could promulgate guidelines to preclude such reliance." *See* U.S. Br. in Opp. at 15, 2022 WL 16553087. In voting to deny review, several of the Justices *specifically invoked* the possibility of a Guidelines amendment. *See McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of cert.); *id.* (Kavanaugh, J., respecting the denial of cert.). It would be deeply unfair and unjust if the prospect of a Guidelines amendment defeated Dayonta's efforts to obtain relief under the Constitution in the Supreme Court, but that amendment did not apply to Dayonta and the others whose petitions were denied.

Such an amendment could make a significant difference in defendants' sentences. Dayonta's case, for example, illustrates the potential impact of an amendment. His guideline total offense level was initially 24, which, given his criminal history category of III, carried a guideline range of approximately 5 to 6 years. But after the judge considered conduct of which the jury acquitted him, Dayonta's final offense level nearly doubled to 43, which caused his guideline range to "skyrocket" to a recommended range of life imprisonment. *See McClinton*, 143 S. Ct. at 2401 (Sotomayor, J., respecting the denial of cert.). Dayonta was ultimately sentenced to 19 years' imprisonment, more than triple the high end of the guideline range he faced without considering acquitted conduct.

The administrative burden of applying the amendment retroactively would be minimal. Courts would simply resentence based on a newly computed offense level and related guideline range calculated, which will typically be found in the presentence investigation report when the defendant has lodged an objection to the use of acquitted conduct in calculating his or her sentence. And in many cases like Dayonta's, courts will be able to reference a presentence investigation report that was initially prepared by the U.S. Probation Office without accounting for acquitted conduct. In both instances, this would zero out altogether any potential difficulties. Defendants who go to trial represent a tiny fraction of the sentencings in federal court. *See* U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines, Proposed Amendment: Acquitted Conduct* 40 (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf. Whatever burden might be thrust on the federal system through retroactive application, that burden will be short-lived, as any increase in motion practice for resentencing based on an amendment will quickly level off. And to the extent the Commission identifies any administrative burdens, those burdens could be easily managed with a short delay in the effective date of the amendment, which would allow courts and agencies additional time to prepare.

B. The Commission Should Adopt an Amendment That Eliminates Acquitted-Conduct Sentencing

The Commission should adopt amendments that would *eliminate altogether* the use of acquitted conduct at sentencing. None of the Commission's current proposals satisfies that objective. Because Option 1 of the Commission's proposed amendments comes closest, we urge the Commission to adopt a form of that proposal, rather than Options 2 and 3, which merely *limit* consideration of acquitted conduct at sentencing.

We commend the Commission for its proposal of Option 1, which is the only proposal presently considered that would achieve the Commission's goal of curtailing the use of acquitted-conduct sentencing. Option 1 would prohibit sentencing judges from using acquitted conduct to determine a defendant's guideline range. That proposal, however, would appear to continue to allow sentencing judges to enhance a defendant's sentence within the guideline range based on acquitted conduct. Continuing to authorize such sentencing enhancements even within the guideline range is difficult to reconcile with the fairness, constitutional, and public-confidence concerns that animate the proposed amendments. As discussed in greater detail below, there is no principled reason why acquitted conduct should constitute "relevant conduct" for purposes of determining a sentence within the guideline range when it is prohibited from being considered to determine the guideline range itself. And it certainly would not resolve "the constitutional issues presented." *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of cert.). As 17 former federal Article III judges recently opined, "[n]o alleged conduct upon which a jury has acquitted a defendant should be used to enhance the defendant's penalty for any crime." Br. of 17 Former Federal Judges as *Amici Curiae* at 2-3, 2022 WL 3357692. We thus urge the Commission to modify Option 1 to make clear that acquitted conduct is not relevant conduct for purposes of determining the guideline range or determining the defendant's guideline sentence.

Options 2 and 3, by contrast, suffer from numerous infirmities and are relatively toothless means of addressing the problems of acquitted-conduct sentencing. Option 2 would merely add an application note alerting sentencing judges that a downward departure from the guideline range *may* be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction. Under Option 2, sentencing judges would presumptively continue to impose sentences considering conduct the jury determined should not be the basis for criminal punishment, and the burden would be on the defendant to try to persuade the judge to exercise its discretion to reach a different outcome. Respectfully, this would not meaningfully change the status quo: the current Guidelines already permit sentencing judges to depart downward under such circumstances, as evidenced by Dayonta's sentence here, which was

the result of a downward variance from a sentence of life imprisonment to *merely* 19 years. And despite that downward variance, acquitted conduct still *more than tripled* Dayonta's sentence.

Option 3, too, falls short. Option 3 would continue to allow sentencing judges to override a jury's verdict and consider acquitted conduct in calculating a defendant's sentence as long as they use a slightly higher standard of proof—one lower than juries use. While preferrable to Option 2, this proposal likewise does little to preserve "the role of the jury in preserving individual liberty and preventing oppression by the government." *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring). This still allows the government a "second bite at the apple," in which "the Government almost always wins by needing only to prove its (lost) case to a judge by" clear and convincing evidence, a standard below that traditionally used for imposing criminal liability for a crime. *See United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). There is also no principled reason why the sentencing judge should consider acquitted conduct found by a standard below that applied by the jury that heard the defendant's case.

All three options, as currently framed, fall short of the goals of the Sentencing Reform Act of "assur[ing] that sentences are fair both to the offender and to society." 17 S. Rep. 98-225, 98th Cong., 2d Sess. at 39 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3222. "Reliance upon acquitted conduct at sentencing undermines the legitimacy of the criminal justice system." Br. of 17 Former Federal Judges as *Amici Curiae* at 14, 2022 WL 3357692. Half-measures do little to address the constitutional, fairness, or public-interest considerations that motivated the Commission to revisit the question of acquitted-conduct sentencing in the first place. Juries will continue to question why they had to miss work for jury duty if judges continue to punish defendants even after a dozen of the defendant's carefully screened peers unanimously conclude the government's proof does not warrant criminal sanctions. *See McClinton*, 143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of cert.); Br. of 17 Former Federal Judges as *Amici Curiae* at 5, 2022 WL 3357692 ("Just as people attach significance to the fact of a jury's conviction, they expect a jury's acquittal to be a significant event as well."). And the "perception" of the federal sentencing regime as "Kafkaesque" by defendants, courts, and the public "will persist." *See* Br. of 15 Former Federal Judges as *Amici Curiae* at 5, 2022 WL 3357692 (quotation marks omitted).

Moreover, if the Commission adopts Options 2 or 3 in particular, "the constitutional issue will remain," *see McClinton*, 143 S. Ct. at 2403 (Alito, J., concurring in the denial of cert.), as sentencing judges will continue to be authorized to enhance defendants' sentences based on crimes that "the jury has formally and finally determined that the defendant will not be held criminally culpable for," *id.* at 2401 (Sotomayor, J., respecting the denial of cert.). If the Commission adopts either, it will have failed to "resolve questions around acquitted-conduct sentencing," leaving the "important questions that go to the fairness and perceived fairness of the criminal justice system" for the "Court . . . to take up." *Id.*

III. Conclusion

The Commission's current proposals, while an improvement over the status quo, do not go far enough, as they each, to varying degrees, accord sentencing judges discretion to consider acquitted conduct to enhance a defendant's sentence. Continuing acquitted-conduct sentencing will do nothing to resolve the constitutional questions that confront the Supreme Court. We thus encourage the Commission to adopt amendments that (1) eliminate, rather than limit, the use of acquitted conduct to calculate a defendant's sentence, and (2) apply retroactively to the sentences of defendants like Dayonta McClinton.

We thank the Commission for its time and consideration of our comments in this important matter.

Respectfully submitted,

/s/ John P. Elwood

/s/ Elie Salamon

Counsel for Dayonta McClinton

Exhibit A

No. 21-1557

In the
Supreme Court of the United States

DAYONTA MCCLINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF OF 17 FORMER FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE [1]

Amici are 17 former Article III judges who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair both in practice and appearance. Collectively, they served roughly 300 years in the federal judiciary. Based on their experience as Article III judges, Amici submit this brief to emphasize the unfairness of the sentence in this case. The district court relied upon acquitted conduct to essentially quadruple the defendant's sentencing range, and its decision reflects a more widespread problem in the criminal justice system.

McClinton's sentence was justified by the district court in large measure by judge-found facts, determined by a preponderance of the evidence, and based on charges upon which McClinton was acquitted. McClinton was convicted of two charges, robbing a pharmacy of roughly $68 worth of merchandise and brandishing a firearm while doing so, which alone would have resulted in a recommended sentence of 57-71 months' imprisonment (total offense level 23). Pet. at 7-8. But the district judge increased that sentencing range more than four-fold by finding by a preponderance of the evidence that McClinton had subsequently robbed and murdered a coconspirator, charges upon which the jury had acquitted him. Reliance upon this acquitted conduct placed McClinton at the maximum total offense level 43, with a

[1] No counsel for a party authored this brief in whole or in part and no person other than Amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received the required notice of this brief and have provided their written consent. A full list of amici appears in the Appendix to this brief.

corresponding recommendation of life imprisonment, but the district judge varied downward to impose a sentence of 228 months' imprisonment. *Id.* at 8-9. In imposing the sentence, the district judge candidly acknowledged that his finding of murder was "the driving force in this sentence."[2] Even with this significant downward variance, McClinton's ultimate sentence was roughly three times higher based on the district court's consideration of acquitted conduct than it would have been based on the jury's verdict alone. These sorts of excessive sentences, driven by district courts' reliance upon acquitted conduct, are common.[3]

Amici believe that there is a simple and straightforward solution to this problem, consistent with this Court's line of cases that extends from *Apprendi v. New Jersey*, 530 U.S. 466 (2000). No alleged conduct upon which a jury has acquitted a defendant should

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[2] At the sentencing hearing, the district court explained: "Mr. McClinton's relevant conduct as a member of the conspiracy includes the murder of Malik Perry. . . . I would also note that the driving force in this sentence is not what he's been convicted of, actually. It's the relevant conduct." The judge later addressed the standard of review, explaining that "the sentence was being driven by the relevant conduct, that is, only by a preponderance of the evidence." App.42a, 45a.

[3] Recent petitions for certiorari challenging the use of acquitted conduct at sentencing reveal that the practice often results in substantially longer sentences. *See, e.g.*, Petitions for a Writ of Certiorari, *Allums v. United States*, No. 21-996, 2022 WL 135418 (quadrupling a sentence based on acquitted conduct); *Gaspar-Felipe v. United States*, No. 21-882, 2021 WL 5930606 (same); *Osby v. United States*, No. 20-1693, 2021 WL 2337153 (tripling a sentence); *Ludwikowski v. United States*, No. 19-1293, 2020 WL 2510293 (same); *Asaro v. United States*, No. 19-107, 2019 WL 3302460 (more than doubling a sentence); *Cabrera-Rangel v. United States*, No. 18-650, 2018 WL 6065310 (tripling a sentence).

be used to enhance the defendant's penalty for any crime.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seven years ago, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the need for this Court "to put an end to the unbroken string of cases disregarding the Sixth Amendment" by enhancing sentences based on acquitted conduct, proclaiming: "This has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (dissenting from denial of *certiorari*). Four years ago, then-Judge Kavanaugh reiterated that "there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness," and he implored the Supreme Court to "fix it." *United States v. Brown*, 892 F.3d 385, 415 (D.C. Cir. 2018) (dissenting in part).[4] Yet, as this petition

[4] *See also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that reliance upon acquitted conduct "seems a dubious infringement of the rights to due process and to a jury trial"); *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) (Kavanaugh, J.) ("we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence"); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (explaining that it is an "oddity," given the *Apprendi* rule, that "courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received"). Similarly, then-Judge Gorsuch noted the *Jones* dissent, explaining, "[i]t is far from certain whether the Constitution allows" using acquitted conduct at sentencing. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) *see also United States v. Medley*, 34 F.4th 326, 336 (4th Cir. 2022) (noting "a growing number of critics of this practice"). Petitioner has extensively documented the

illustrates, the practice continues, although a split in the lower courts has emerged, restoring a meaningful jury trial right in at least some state courts. *See State v. Melvin*, 258 A.3d 1075, 1094 (N.J. 2021) (finding reliance upon acquitted conduct at sentencing violates the federal and New Jersey constitutions); *People v. Beck*, 939 N.W.2d 213, 225-26 (Mich. 2019) (adopting the "minority position" shared by the Supreme Courts of New Hampshire and North Carolina that reliance upon acquitted conduct at sentencing violates federal due process) (citing *State v. Marley*, 364 S.E.2d 133 (N.C. 1988), and *State v. Cote*, 530 A.2d 775 (N.H. 1987)). A similar split exists among federal district courts where some, like the district court, below rely upon acquitted conduct at sentencing, while other federal district courts refuse to do so. *See, e.g.*, *United States v. Mendoza*, No. 20-450, 2022 WL 894700, at *2 (2d Cir. Mar. 28, 2022) (summary order) (noting that the district judge "had 'problems' with 'the notion that acquitted conduct can be taken into account'" at sentencing and declined to do so). These splits warrant this Court stepping in to ensure that constitutional rights are respected uniformly across the country.

Not only is this case an ideal vehicle for restoring an even application of the Fifth and Sixth Amendments across this country, the Seventh Circuit specifically encouraged this Court to address this issue. The Seventh Circuit explained that although McClinton's constitutional challenge to enhancing his sentence based on acquitted conduct was foreclosed by "clear precedent, McClinton's contention is not frivolous." App.3a. Rather, the Seventh Circuit explained that McClinton "preserves for Supreme Court review

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widespread criticism by other members of the judiciary and scholars of sentencing based on acquitted conduct. Pet. at 13-15.

an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations." App.3a-4a. "But despite the long list of dissents and concurrences on the matter," the Seventh Circuit believed this Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), was controlling and explained that, "[u]ntil such time as the Supreme Court alters its holding, we must follow its precedent." App.4a; *see also United States v. Karr*, No. 21-90219, 2022 WL 1499288, at *1 n.1 (5th Cir. May 12, 2022) (per curiam) ("Distinguished jurists have called *Watts* into question."). With the Courts of Appeals believing their hands are tied by this Court's decision in *Watts*, this Court's intervention is the only way the Framers' vision of the Fifth and Sixth Amendments can be restored.

Amici believe this case can be decided narrowly, in a simple and straightforward manner that would greatly restore the right to a jury trial to its constitutionally-intended status. This Court explained that *Apprendi* adopted a "bright-line rule" in response to "the need to give intelligible content to the right of jury trial." *Blakely v. Washington*, 542 U.S. 296, 305, 308 (2004). Giving "intelligible content" to the jury trial right meant in that setting: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 490). That principle is controlling here.

Giving "intelligible content" to the jury trial right also requires a necessary bright-line rule that no

penalty for any crime should be enhanced based on alleged conduct that was *rejected* by the jury through an acquittal. Quite simply, no court can respect a jury's verdict by ignoring it. This Court should now make explicit what should be implicit in the *Apprendi* rule: No alleged conduct upon which a jury has acquitted a defendant can be used to enhance the defendant's penalty for any crime.

ARGUMENT

I. REVIEW WILL HELP TO ENSURE THAT SENTENCING COURTS RESPECT JURY FINDINGS

This Court has often remarked that "justice must satisfy the appearance of justice." *Marshall v. Jerrico*, 446 U.S. 238, 243 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Just as people attach significance to the fact of a jury's conviction, they expect a jury's acquittal to be a significant event as well. Where, as occurred in this case, a jury convicts a defendant on some counts and acquits the defendant on others, but the judge concludes the defendant is probably guilty of all those crimes and sentences the defendant as though he had been convicted of even the acquitted conduct—tripling his sentence—both the appearance and reality of justice suffer.

A. There is Little Historical or Constitutional Support for Relying on Acquitted Conduct

There is little historical support for sentencing courts relying upon acquitted conduct, as it is a relatively recent phenomenon. *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1444, 1452 (2011) (explaining there was no

apparent sentencing based on acquitted conduct before 1970, and fewer than 10 cases addressed the issue prior to the enactment of the federal Sentencing Guidelines, but there were 93 cases in the decade that followed, and the practice continues). When our country was founded, the criminal code was far simpler, with relatively few offenses, and the public was well aware of the specific penalties that attached to a conviction. Thus, "[w]hile the judge formally imposed the sentence, the jury's judgment was often outcome-determinative." Judge Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 Ohio St. L.J. 935, 937 (2010). In a very real sense, then, the jury's verdict literally dictated the sentence that would be imposed.

Still, every U.S. Court of Appeals has concluded that reliance upon acquitted conduct at sentencing is appropriate based solely on this Court's decision in *Watts*. Pet. at 18 n.2. That is remarkable weight to give a case that was GVRed and decided "without the benefit of oral argument or merits briefing," McCusker Murray, 84 St. John's L. Rev. at 1456, particularly because, as Justice Kennedy noted, "the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system," *Watts*, 519 U.S. at 170 (dissenting).

Since the Court's decision in *Watts* and the inappropriate weight it has been given, the issue is no longer percolating through the federal courts. Without the Court's guidance in this case, the practice will continue; acquitted conduct may come into play in criminal sentencings that take place almost every day in every federal courthouse, and the "unbroken string of cases disregarding the Sixth Amendment," as described by Justice Scalia, will continue to grow longer.

Jones, 135 S. Ct. at 9 (dissenting from denial of *certiorari*). This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). That is precisely the case here.

B. Giving Intelligible Content to the Jury's Role Requires the Sentencing Court To Respect Jury Findings

Trials matter because they have consequences, and those consequences are particularly serious for a criminal defendant who may face a sentence of incarceration or even death. The Founders knew that and, given their distrust of government, ensured that the people could serve as a check on the power of the government by requiring criminal trials be decided in a "public trial, by an impartial jury." U.S. Const. amend. VI. As *Apprendi* emphasized, the Sixth Amendment ensures that "*the truth of every accusation*" must be unanimously confirmed under the watchful eye of the public before a criminal defendant can be convicted and punished. 530 U.S. at 477 (emphasis in *Apprendi*) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)).

This Court's decision in *Apprendi* and the cases that expanded upon its holding have provided a "substantial role for the twentieth century jury—namely, a role in sentencing offenders." Gertner, 71 Ohio St. L.J. at 935. Those cases provide that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond

a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

This Court explained that a "bright-line rule" is necessary "to give intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305, 308. As Justice Scalia explained, the Sixth Amendment jury trial guarantee "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (concurring) (emphasis in original). And the Court itself has confirmed: "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306-07 (emphasis in original).

The jury's verdict is what validates the legitimacy of a sentence and must dictate the basis for the sentence. *See* Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. Crim. L. & Criminology 809, 843 (1998) ("When the legislature statutorily classifies specific conduct as criminal, it can only punish that behavior by recourse to the criminal justice system established by the Constitution. A conviction is a necessary prerequisite to punishment based on that conduct. While not always an accurate barometer of factual guilt, conviction symbolizes legal guilt, thereby legitimizing the government's authority to deprive a person of his life, liberty or property.").

By contrast, "when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punishment would follow." *United States v. Pimental*, 367 F. Supp. 2d 143, 150

(D. Mass. 2005) (Gertner, J.) (quoting Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 433 (1999)). Given that an acquittal is the *only* way for criminal defendants to legally vindicate themselves, those acquittals must be respected. *See* McCusker Murray, 84 St. John's L. Rev. at 1464. The "admission of prior acquittals in sentencing undermines the claim of the criminal justice system to be doing justice, and thus its broader legitimacy." *Id.* at 1463.

C. Enhancing Sentences Based on Acquitted Conduct Violates the Sixth Amendment

The respect afforded a jury verdict should be the same whether that verdict is guilty or an acquittal. "It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." *Pimental*, 367 F. Supp. 2d at 150 (citation omitted).

While similar problems arise when a sentencing judge considers uncharged conduct, the legal and legitimacy issues are different. Enhancing a defendant's sentence based on acquitted conduct is not only something that the jury's verdict "failed to authorize," it relies upon "facts of which the jury expressly disapproved." *Id.* at 152. "[C]onsider[ing] acquitted conduct trivializes 'legal guilt' or 'legal innocence,'" *id.*, resulting in the "judicial nullification of juries," Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 273

(2009). The "intelligible content" of the jury's verdict is rendered hollow.

II. REVIEW IS NECESSARY TO PROTECT THE APPEARANCE OF JUSTICE AND LEGITIMACY OF THE COURTS

Sentencing based on acquitted conduct is defended through a legal sleight of hand: The judge is merely sentencing a defendant for the crime of conviction, and the sentence imposed is within "the statutory sentencing range for the offense of conviction alone." *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*). In other words, the sentencing judge is not sentencing the defendant for his acquitted conduct, but merely imposing a harsher sentence upon the crime of conviction because the judge determined (by a mere preponderance of the evidence) that the defendant is really guilty of the acquitted conduct too.

Notwithstanding the formal argument, the reality of the situation is obvious, especially in this case. McClinton was convicted of stealing $68 worth of goods and brandishing a weapon, but the judge also found by a preponderance of the evidence that he had committed a separate robbery and murder, even though the jury had acquitted him of those charges. Had the district judge confined the sentencing decision to the crime of conviction, McClinton would have faced a recommended sentencing range of 57-71 months. But by finding that McClinton had committed murder, despite the jury's acquittal on that charge, the district judge more than *tripled* the sentence by ordering McClinton imprisoned for 228 months. In a very real sense, this 228-month sentence is a sentence for murder, despite McClinton's

acquittal on that charge, and it yields a "perverse result." *See Watts*, 519 U.S. at 164 (Stevens, J., dissenting) (describing reliance upon acquitted conduct to elevate a sentencing guideline range from 15-21 months to 27-33 months as a "perverse result").

Nor should a defendant take any comfort that the statutory maximum will provide meaningful protection. Most federal crimes have a statutory maximum of at least five years, and many commonly-charged crimes carry much higher statutory maximums. For example, the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, carry 20-year and, in some cases, 30-year statutory maximums. These statutes are in liberal use by federal prosecutors. Prosecutors view these statutes as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980)).

In any event, the maximum sentence that can constitutionally be imposed is not necessarily the statutory maximum; rather, post-mandatory Sentencing Guidelines, appellate courts "consider the substantive reasonableness of the sentence imposed." *Gall v. United States*, 552 U.S. 38, 51 (2007). Thus, unreasonable sentences are invalidated even when they are below the statutory maximum. *See, e.g.*, *United States v. Singh*, 877 F.3d 107, 116-17 (2d Cir. 2017); *United States v. Chandler*, 732 F.3d 434, 437, 440 (5th Cir. 2013); *United States v. Cruz-Valdivia*, 526 F. App'x 735, 737 (9th Cir. 2013); *United States v. Paul*, 561 F.3d 970, 973-75 (9th Cir. 2009) (per curiam). Moreover, addressing as-applied Sixth Amendment challenges, Justice Scalia claimed that this Court's jurisprudence leaves the door "open for a defendant to

demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 U.S. at 60 (concurring); *see Rita v. United States*, 551 U.S. 338, 375 (2007) (Scalia, J., concurring in part and concurring in the judgment).

As Justice, then-Judge, Kavanaugh explained: "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Bell*, 808 F.3d at 928 (concurring in denial of rehearing *en banc*). Justice Kavanaugh certainly raised the question that is presented to the Court here:

> If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?

Id.

While Amici agree that this broader question should be answered by the Court holding that all fact-finding necessary to support a sentence be found by a jury beyond a reasonable doubt, this case can be resolved more narrowly: acquitted conduct should not be considered at sentencing precisely because it was rejected by a jury.

Amici agree with Judge Millett that "allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-

trial guarantee." *Id.* at 929 (concurring in denial of rehearing *en banc*). The reason is simple: "before depriving a defendant of liberty, the government must obtain permission from the defendant's fellow citizens, who must be persuaded themselves that the defendant committed each element of the charged crime beyond a reasonable doubt." *Id.* at 930. Thus,

> allowing judges to materially increase the length of imprisonment based on facts that were *submitted directly to and rejected by* the jury in the same criminal case is too deep of an incursion into the jury's constitutional role. "[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved."

Id. (emphasis in original) (quoting *Pimental*, 367 F. Supp. 2d at 152). The judge is "directly second-guessing the jury," and that is "demeaning of[] the jury's verdict." Gertner, 32 Suffolk U. L. Rev. at 422.

Reliance upon acquitted conduct at sentencing undermines the legitimacy of the criminal justice system. That was aptly illustrated by an angry juror who wrote a district court upon learning that the prosecution was seeking an increased sentence based on acquitted conduct:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we

> see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty.

United States v. Canania, 532 F.3d 764, 778 n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting juror's letter to a federal district court judge). That letter undoubtedly captures the sentiment of most people who discover this practice. Not surprisingly, defendants and sentencing courts have similarly described this reliance upon acquitted conduct as "Kafkaesque." Judge Nancy Gertner, *Against These Guidelines*, 87 UMKC L. Rev. 49, 55 n.33 (2018). That perception—grounded in reality—will persist until this Court puts an end to the practice of allowing acquitted conduct to be considered at sentencing.

The time has come for this Court to reject this practice, definitively, once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 10, 2022

APPENDIX

LIST OF SIGNATORIES

Judge Mark W. Bennett (Ret.)—District Judge (1994–2015, Chief Judge 2000–2007), Senior Judge (2015–2019), U.S. District Court for the Northern District of Iowa; Magistrate Judge (1991–94), U.S. District Court for the Southern District of Iowa

Judge Dennis M. Cavanaugh (Ret.)—District Judge (2000–2014), U.S. District Court for the District of New Jersey; Magistrate Judge (1993–2000), U.S. District Court for the District of New Jersey

Judge Christopher F. Droney (Ret.)—Circuit Judge (2011–2019), Senior Judge (2019–2020), U.S. Court of Appeals for the Second Circuit; District Judge (1997–2011), U.S. District Court for the District of Connecticut

Judge Jeremy D. Fogel (Ret.)—District Judge (1998–2014), Senior Judge (2014–2018), U.S. District Court for the Northern District of California

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994–2008), Senior Judge (2008–2013), U.S. District Court for the Western District of Texas

Judge Nancy Gertner (Ret.)—District Judge (1994–2011), Senior Judge (2011), U.S. District Court for the District of Massachusetts

Judge John Gleeson (Ret.)—District Judge (1994–2016), U.S. District Court for the Eastern District of New York

Judge Richard A. Holwell (Ret.)—District Judge (2003–2012), U.S. District Court for the Southern District of New York

Judge Barbara S. Jones (Ret.)—District Judge (1995–2012), Senior Judge (2012–2013), U.S. District Court for the Southern District of New York

Judge Timothy K. Lewis (Ret.)—Circuit Judge (1992–1999), U.S. Court of Appeals for the Third Circuit; District Judge (1991–1992), U.S. District Court for the Western District of Pennsylvania

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010–2021), U.S. Court of Appeals for the Eleventh Circuit; District Judge (2000–2010), U.S. District Court for the Northern District of Georgia

Judge A. Howard Matz (Ret.)—District Judge (1998–2011), Senior Judge (2011–2013), U.S. District Court for the Central District of California

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996–2003), Magistrate Judge (1976–1980), U.S. District Court for the District of New Jersey

Judge Shira A. Scheindlin (Ret.)—District Judge (1994–2011), Senior Judge (2011–2016), U.S. District Court for the Southern District of New York; Magistrate Judge (1982–1986), U.S. District Court for the Eastern District of New York

Judge Kevin H. Sharp (Ret.)—District Judge (2011–2017, Chief Judge 2014–2017), U.S. District Court for the Middle District of Tennessee

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010–2018), Senior Judge (2018–2019), U.S. Court of Appeals for the Third Circuit; District Judge (1994–2010, Chief Judge 1999–2006), U.S. District Court for the Middle District of Pennsylvania

Judge T. John Ward (Ret.)—District Judge (1999–2011), U.S. District Court for the Eastern District of Texas

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Jl Angell, Presbyterian

Topics:

Youthful Individuals

Acquitted Conduct

Comments:

Juvenile criminal history

Brain science has evolved and so too should our sentencing practices. We know that individuals under the age of 18 are more likely to be impulsive and not understand the consequences of their actions. Moreover, juvenile adjudications are subject to different procedures across the country, and it is unjust to bake such inconsistencies into a federal standard.

The Commission should not consider any sentence imposed for an individual under eighteen in the instant criminal history score. I support Option 3 which entirely excludes these convictions from the criminal history score.

Acquitted conduct

Defendants expect to be sentenced for their convictions. No one expects to be sentenced based on charges they are found not guilty of.

I support Option 1 of the acquitted conduct proposal because it would eliminate the use of acquitted conduct at sentencing. When the jury finds a defendant not guilty, it is unjust to use the acquitted conduct to calculate the guideline sentence. Doing so undermines the jury verdict. It also undermines trust in the fairness and accuracy of the trial system.

Ending the use of acquitted conduct and excluding juvenile convictions from adult criminal history scores can help bolster faith in the rule of law and our system of justice.

Thank you.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Betty Bash, Ordained minister

Topics:

Rule for Calculating Loss

Comments:

The minimum mandatory guidelines should not be a one size fits all. Too many young men with non violent crimes are becoming more criminalize but this guideline where they could be a productive part of the community prividing services and paying taxes apposed to we the people paying for their upkeep, they would pay. Don't throw the book at ones that can be guided to new beginnings instead of a life behind bars.
Too many lives wasted and too many families suffer at the discretion of the judge and processacurters wanting to gain another win on their ladder to success . Success is a word called rehabilitation! We are losing an entire generation that could become productive citizens. An alternative is armed forces which is starving for recruits to fill much needed vacancies. All lives matter and a gift from God. I respectfully ask that the guidelines be reviewed . The life you save by a second chance could one day be your loved one.

Submitted on: February 21, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Robert Batey, Stetson University College of Law

Topics:

Youthful Individuals

Acquitted Conduct

Comments:

Now retired with emeritus status, I was a professor of law for over thirty years. As a former teacher of both Juvenile Law and Sentencing, I strongly support adoption of these two proposals.

The juvenile court system is a fundamental recognition that those under a certain age should not be held responsible for their otherwise criminal acts. Of course, this recognition should continue at adult sentencing.

Sentencing consideration of acquitted conduct is rightly considered an abomination by the ordinary citizen. It should have been prohibited long ago.

Submitted on: February 8, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Bob Elmendorf, Quakers

Topics:

Youthful Individuals

Comments:

Youthful offenders, most of whom come from one parent families and are not fully emotionally developed at the time of their offense, should be awarded shortened sentences with early parole or better yet counseling and treatment without incarceration which is not supportive and does not equip a restive youth to fit in a society which has advantages the youth was denied. Education should be provided up to and through college. It's cheaper and more effective than prison.

Submitted on: February 2, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Issa Ghannoum, Virginia Commonwealth Muslim Student Association

Topics:

Acquitted Conduct

Comments:

I support option 1 of the Sentencing Commission's proposal in regards to the acquitted conduct because it would eliminate a defendant's sentence from being enhanced for conduct a jury has found him not guilty of. It would also protect his constititutional right. Using acquitted conduct undermines the jury's verdict and the fairness and integrity of our justice system. Acquitted conduct should not be used whether federal, state, tribal, or juvenile.

Acquitted Conduct itself sentences an individual to a death sentence when used in a sentencing code and guidelines. This magnitude injustice has always been target toward minorities whom can't afford the best legal defense to litigate and file procedures of American jurisprudence that will reveal their acquitted conduct has been revised for corporal punishment. I sincerely request that the judicial system as well as the United States Senate and Congressmen withdraw acquitted conduct from their judicial sentencing guidelines. I pray that judicial citizens of society acknowledge human rights violation that has been imposed against individuals who have a criminal record. I strongly recommend that the U.S. sentencing committee will withdraw acquitted conduct code. I thank you for your time and attention for evaluating this message of withdrawing acquitted conduct.

This is especially important for the case of Samuel Manning (Prison Number: 57039-083). The acquitted conduct code should be changed for his case.

Submitted on: February 20, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Randee Golder, Randee J. Golder, Esq.

Topics:

Acquitted Conduct

Comments:

I have had 2 trials where acquitted conduct was used to calculate Guidelines. Both times, the result ended up punishing my client for going to trial even though he won on almost all of his positions. Nothing does more to undermine the right to jury trial than punishing for acquitted conduct.

Submitted on: December 21, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Daniel Daniel, Halimi Law Firm

Topics:

Rule for Calculating Loss

Comments:

e proposed amendment to the sentencing guidelines, ostensibly aimed at harmonizing loss calculations, appears more as an attempt to circumvent the Third Circuit's ruling in Banks, rather than fostering uniformity and fairness in sentencing. The amendment's push to enshrine "intended loss" calculations, contrary to Congressional intent and Supreme Court directives, risks inflating sentences based on speculative figures. This approach not only undermines judicial discretion but also deviates from the principle of leniency in the face of ambiguity, as emphasized by the Third Circuit. Such a move would exacerbate disparities in sentencing, particularly when considering the significant portion of cases—estimated at 20% in 2022—affected by intended loss calculations. This figure, while seemingly minor, represents a substantial number of individuals when viewed in the broader context of white-collar prosecutions. The Commission's focus on a small sample, rather than a comprehensive review, further calls into question the amendment's rationale and its disregard for the broader implications on sentencing equity.

Submitted on: February 22, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Cynthia Hill, Born again believer

Topics:

Rule for Calculating Loss

Youthful Individuals

Acquitted Conduct

Circuit Conflicts

Miscellaneous

Technical

Simplification of Three-Step Process

Comments:

Time for individuals extended to long and not only them but their families, we all have made a error but most of these calls are affecting black families. For more details please reach out. A second chance is entitled to every one.

Submitted on: February 21, 2024

Sandra Day O'Connor College of Law
Arizona State University

February 21, 2024

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

Re: Proposed Amendment on Youthful Individuals (U.S.S.G. §4A1.2(d))

Dear Chair Reeves, Vice Chairs, and Commissioners:

I write to provide comments on the Commission's proposed amendment on youthful individuals. I am an associate professor of law at the Sandra Day O'Connor College of Law at Arizona State University. My research focuses on young people in the juvenile and criminal systems. I submit this comment in my individual capacity, and not on behalf of the law school, Arizona State University, or any other organization.

My comments focus on Part A of the proposed amendment: "Computing Criminal History for Offenses Committed Prior to Age Eighteen."[1] There are three options that the Commission proposed. Of the three options, I recommend that the Commission adopt Option 3. Most notably, Option 3 should be selected to "amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score."[2] My recommendation for this amendment is based on three key reasons: (1) it is consistent with developmental and neuroscience research regarding young people; (2) it ensures uniformity across jurisdictions; and (3) it decreases the risk of discrimination based on race, ethnicity, or class.

1. Consistent with Developmental and Neuroscience Research

First, Option 3 of the proposed amendment of §4A1.2(d) is aligned with developmental and neuroscience research that shows that young people have less culpability for offenses and greater capacity for change. The Supreme Court's reliance on such research in their landmark decisions from 2005 to 2016 that interpreted youth

[1] *Proposed Amendments to the Sentencing Guidelines*, UNITED STATES SENTENCING COMMISSION 17 (Dec. 26, 2023).

[2] *Id.* at 16, 26–35.

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sentencing and interrogation under the Eighth and Fifth Amendments[3] helped usher in a new legal framework for youth under the age of 18. Increasingly, legislators, courts, and policymakers are relying "on a large body of psychological and biological research on child and adolescent development, as well as research on effective policies" to create, implement, and interpret laws, regulations, and policies that impact youth.[4] This developmental and neuroscience research not only helps ensure the wellbeing of youth, but also advances of interests of society, including promoting societal and community wellbeing in a cost-effective manner.[5]

Option 3 of the proposed amendment is most consistent with developmental and neuroscience research regarding young people. Laurence Steinberg—a developmental psychologist whose work was relied on by the Supreme Court in *Roper v. Simmons*[6]—has continued to show that young people's overall development during the ages of 10 to 25, including their ongoing brain development, affects their impulses, risk-taking behavior, and capacity to change.[7] He labeled this entire stage as "adolescence,"[8] with the age of 19 to 25 labeled as "late adolescence and the transition to adulthood" or "young adulthood."[9] Other scholars refer to the time from age 19 to 25 as emerging adulthood.[10] Given the significant changes in development and "heightened brain plasticity" from age 10 to age 25, Steinberg concluded that this timeframe is "probably our last *significant* window of opportunity"[11] to change people and put them on a path towards well-being.[12] While acknowledging that all people have the potential to change, he emphasized the crucial and limited opportunity we have to "put individuals on a healthy pathway and to expect

[3] Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); J.D.B. v. North Carolina, 564 U.S. 261 (2011); Miller v. Alabama, 567 U.S. 460 (2012); Montgomery v. Louisiana, 577 U.S. 190 (2016).

[4] Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1398, 1401 (2020)

[5] *Id.* at 1412.

[6] 543 U.S. at 569, 570, 573.

[7] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 17, 84 (2015).

[8] *Id.* at 5.

[9] LAURENCE STEINBERG, YOU AND YOUR ADOLESCENT, THE ESSENTIAL GUIDE FOR AGES 10-25 9, 18 (2011).

[10] *See, e.g.,* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 470–76 (2000); Larry J. Nelson & Laura M. Padilla-Walker, *Flourishing and Floundering in Emerging Adult College Students,* 55 EMERGING ADULTHOOD 67, 67–68 (2013).

[11] STEINBERG, AGE OF OPPORTUNITY, *supra* note 7, at 17.

[12] *Id.* at 3 (emphasis added).

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our interventions to have substantial and enduring effects."[13] Modifying the calculation of the criminal history score to exclude all sentences from offenses that were committed before a young person turned 18 years old is an important step in the right direction to put young people on a path to wellbeing and healthy development.

2. Uniformity Across Jurisdictions

Second, the proposed amendment of §4A1.2(d) under Option 3 ensures uniformity across jurisdictions and increases judicial efficiency. This issue implicates two areas of the law that have wide variability: (1) the maximum age of juvenile court jurisdiction, and (2) laws regarding the prosecution and sentencing of youths as adults. By amending §4A1.2(d) to prohibit the consideration of offenses prior to the age of 18 in the criminal history score, there will be greater fairness and uniformity on the impact of these two types of laws. Moreover, federal courts do not have to delve into the intricacies of state laws to determine if the offense in question is indeed a juvenile delinquency offense or resulted in a juvenile sentence.

Regarding the first issue, states have set different ages for the maximum age of juvenile court jurisdiction. While most states have adopted the age of 17 years old as the maximum age, it is not universal, and many of the changes have been recent. For example, Georgia, Texas, and Wisconsin are three remaining states that set the maximum age of juvenile court jurisdiction to 16 years old, meaning that youth who are 17 years old or older are prosecuted as adults in criminal court.[14] Currently, Georgia has pending legislation to raise the age of juvenile court jurisdiction to 17 years old.[15]

Furthermore, many of the changes to the maximum age of juvenile court jurisdiction occurred recently. Since 2007, eleven states raised the age that youth presumptively qualify for juvenile court jurisdiction to age 17 (or under the age of 18).[16] It was also only in 2017 that New York and North Carolina changed their maximum age

[13] *Id.* at 17.

[14] Nickolas Bagley, *Bringing More Teens Home: Raising the Age Without Expanding Secure Confinement in the Youth Justice System*, YOUTH TODAY (June 25, 2021), https://youthtoday.org/2021/06/bringing-more-teens-home-raising-the-age-without-expanding-secure-confinement-in-the-youth-justice-system/.

[15] Russ Bynum, *Georgia House Votes To Prosecute 17 Year Olds As Juveniles*, AP NEWS (Mar. 6. 2023), https://apnews.com/article/georgia-legislature-juvenile-crime-general-assembly-85d83ff9ed922a87398114d68ca98bd3.

[16] Nickolas Bagley, *Bringing More Teens Home: Raising the Age Without Expanding Secure Confinement in the Youth Justice System*, YOUTH TODAY (June 25, 2021), https://youthtoday.org/2021/06/bringing-more-teens-home-raising-the-age-without-expanding-secure-confinement-in-the-youth-justice-system/.

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of juvenile court jurisdiction from 15 years old to 17 years old,[17] meaning that prior to 2017, youth who were aged 16 or older were barred from juvenile courts. Afterwards, New York, as well as Michigan and Vermont raised their maximum age of juvenile court jurisdiction to age 18.[18] Vermont also seeks to incrementally increase the age of juvenile court jurisdiction to 20 years old for most crimes.[19]

As shown by the ongoing legislative activity in Georgia and raise-the-age campaigns,[20] it is possible that laws will continue to change. By adopting the proposed language in Option 3, there will be greater uniformity across the United States in how these prior offenses are treated for purposes of calculating one's criminal history score. There will also be greater uniformity and fairness amongst defendants with a prior offense from the *same* state, regardless of the year that it was committed. For example, a sixteen-year-old who was successfully prosecuted in North Carolina in 2015 would have a criminal conviction and sentence, while a sixteen-year-old today would very likely have a juvenile delinquency adjudication (assuming that there was no transfer to criminal court). Courts will not need to be concerned about the variabilities within the same state due to changes in the law.

Ideally, Option 3 should allow for an expansive approach to exclude *both* a prior offense that was committed before the age of 18, *and* juvenile sentences for those age 18 or older if the state allowed for them. This would be most aligned with current developmental and neuroscience research which shows that the development that occurs during the ages of 18 to 25 is very similar to the early adolescent stage. It would also not be difficult to implement since the default rule—excluding offenses committed prior to age 18—would cover nearly all offenses. However, if this change is not possible, then the proposed language stated in Option 3 would be the best choice amongst the possible choices.

Next, regarding the second issue, there is great variability in the laws that govern when youths may be tried as adults. There are differences amongst states in whether a juvenile judge may transfer a case from juvenile court to criminal court, such as discretionary, presumptive, or mandatory waivers.[21] There are differences amongst state

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[17] Marcy Mistrett, *New York and North Carolina Are The Last States To Raise The Age of which Children can be Funneled Through their Adult Jails and Prisons*, CAMPAIGN FOR YOUTH JUSTICE (July 21, 2017), http://www.campaignforyouthjustice.org/campaigns/item/new-york-and-north-carolina-are-the-last-states-to-raise-the-age-of-which-children-can-be-funneled-through-their-adult-jails-and-prisons.

[18] Katie Dodd, *Why All States Should Embrace Vermont's Raise the Age Initiative*, COALITION FOR JUVENILE JUSTICE (Jul. 22, 2020), https://www.juvjustice.org/blog/1174.

[19] Lael E.H. Chester, Ruth T. Shefner, & Vincent Schiraldi, *Emerging Adult Justice*, CRIMINAL JUSTICE 17, 19 (2024).

[20] *See, e.g.*, Raise the Age Wisconsin, https://raisetheagewi.org.

[21] OJJDP, *Juvenile Justice System Structure & Process*: *Youth Tried as Adults*, *Statistical Briefing*

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statutes that either allow or require youth to be tried as an adult in criminal court, such as statutory provisions, "once an adult, always an adult" provisions, or statues that leave this decision to prosecutorial discretion.[22] There are also various mitigating provisions in different states, such as "reverse waivers" (which is when a criminal court is allowed or required to send a case back to juvenile court) and blended juvenile/criminal sentences.[23]

Moreover, this issue continues to attract much legislative attention, thus increasing the chance that laws regarding youths being tried as adults will continue to change. For example, legislators in Maryland[24] and Missouri[25] have proposed bills that would make it more difficult to prosecute youths as adults in criminal court. Meanwhile, in other states such as North Carolina[26] and Indiana,[27] legislators have passed laws or proposed bills that give more authority for prosecutors to charge certain offenses against youths in criminal court.

This wide variability in laws regarding youths tried as adults, including laws that pertain to blended criminal-juvenile sentences, would not pose an issue for purposes of federal sentencing if the Commission were to adopt Option 3. There would be uniformity both across jurisdictions and intra-jurisdiction, for the same reasons that apply to the issue of the maximum age of juvenile court jurisdiction. Adopting this amendment also would not raise federalism issues since the proposed amendment would only affect federal sentencing procedures, and would not otherwise change the underlying state offense or state sentence.

Book (Apr. 18, 2022), https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp.

[22] *Id.*

[23] *Id.*

[24] Vincent Hill, *New Bill Would Prevent Teens From Being Charged As Adults In Serious Crimes*, WBFF FOX 45 (Feb. 17, 2023), https://foxbaltimore.com/newsletter-daily/new-bill-would-prevent-teens-from-being-charged-as-adults-in-serious-crimes.

[25] Rudi Keller, *Missouri Bill Ends Crack Penalty Disparity, Raises Age For Trying Youths As Adults,* MISSOURI INDEPENDENT (May 30, 2023), https://missouriindependent.com/2023/05/30/missouri-bill-ends-crack-penalty-disparity-raises-age-for-trying-youths-as-adults/.

[26] Chelsea Donovan, *More Teens To Be Tried, Treated As Adults Under New NC Law*, WRAL NEWS (Aug. 20, 2023), https://www.wral.com/story/more-teens-to-be-tried-treated-as-adults-under-new-nc-law/21017789/.

[27] Katrina Pross, *Bill Could Lead To More Adult Charges For Juvenile Crimes*, WFYI (Feb. 21, 2023), https://www.wfyi.org/news/articles/bill-could-lead-to-more-adult-charges-for-juvenile-crimes.

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3. Decreases Discrimination on Race, Ethnicity, and Class

Lastly, Option 3 addresses and minimizes discrimination based on race, ethnicity, and class. Youth of all ages commit crimes and offenses, but poor minority youth are more likely to be prosecuted or adjudicated, and receive harsher sanctions. A recent literature review and data analysis by the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) under the Department of Justice, concluded that data shows that "youths of color are more likely than white youths to be arrested and subsequently go deeper into the juvenile justice system."[28] In particular, Black, American Indian, and Alaska Native youths experience the highest disparities.[29] This is consistent with other scholars' and researchers' observations about the more punitive responses that poor youth of color experience in the juvenile and criminal systems.[30] For example, even with declines in the overall incarceration of youth, black youth are detained, committed, or incarcerated at 4.7 times the rate of white youth.[31] Also, even though the number of youth tried as adults has decreased significantly in the past twenty years, youth of color still are overrepresented in the population of youths who are tried as adults.[32]

Our society continues to exhibit bias against minority youth, often viewing them as older and more mature than they are. For example, in one study, university students stated that children of all races were equally innocent from zero to nine years old, but viewed black children from age 10 or older as "significantly less innocent" than other children.[33] In another study, participants saw pictures of black youth who allegedly committed a felony.[34] University students added 4.53 years to the child's actual age, while

[28] Jeree Michele Thomas & Mel Wilson, CAMPAIGN FOR YOUTH JUSTICE, *The Color of Youth Transferred to the Adult Criminal Justice System: Policy & Practice Recommendations*, available at http://www.campaignforyouthjustice.org/research/cfyj-reports/item/the-color-of-youth-transfer-the-adultification-of-black-youth-in-the-criminal-justice-system.

[29] *Id.*

[30] KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021); Namita Tanya Padgaonkar, et al., *Exploring Disproportionate Minority Contact in the Juvenile Justice System Over the Year Following First Arrest*, 31 J. OF RESEARCH ON ADOLESCENCES, 317–34 (2020).

[31] Joshua Rovner, *Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT (Dec. 12, 2023), https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/.

[32] Dave Collins, *In Historic Shift, Far Fewer Teens Face Adult US Courts*, AP NEWS (Jun. 6, 2022), https://apnews.com/article/juvenile-justice-reform-fewer-teens-in-adult-court-bdc54ff4d14026c82a305ddf212e4c1c; John Kelly, *Estimate Shows Adult Court Is Increasingly Rare Destination for Youth*, THE IMPRINT (Nov. 9, 2021), https://imprintnews.org/youth-services-insider/estimate-shows-adult-court-is-increasingly-rare-destination-for-youth/60281.

[33] Phillip Ateeba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 529–30 (2014).

[34] *Id.* at 529-35.

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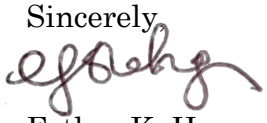
law enforcement officers increased the age by 4.59 years.[35] In other words, black youth were viewed as older and less innocent in these studies.

The amendment which prohibits the consideration of offenses prior to age 18 in the criminal history score guards against bias, and also provides some protection against prior instances of bias that may have resulted in certain youths being tried and sentenced as adults in criminal court, rather than as children in juvenile court.

For all these reasons, I recommend that the Commission adopt Option 3 for Part A of the Proposed Amendment. Thank you in advance for taking my comments into consideration.

Sincerely,



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[35] *Id.* at 529-35.

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GIVING AN ACQUITTAL ITS DUE: WHY A QUARTET OF SIXTH AMENDMENT CASES MEANS THE END OF UNITED STATES v. WATTS AND ACQUITTED CONDUCT SENTENCING

Lucius T. Outlaw III [a1]

***174** In 2007, Mr. Joseph Jones, Mr. Desmond Thurston, and Mr. Antwuan Ball exercised their Sixth Amendment right to require the government prove to a Washington, D.C. jury that they were guilty beyond all reasonable doubt of multiple offenses arising from their alleged involvement with a crack-dealing gang. [1] The three defendants were charged with conspiracy to distribute crack, distribution of crack (multiple counts), and various violent crime and racketeering offenses. [2] At trial, the government's proof included recordings of the defendants selling crack, testimony from former defendants turned cooperators, and testimony from witnesses who had purchased crack from the three defendants. [3] On November 28, 2007, the jury convicted the three men of the distribution charges, but acquitted them of the conspiracy, racketeering, and violent crime charges. [4]

Despite the acquittal on the conspiracy charge, the sentencing judge leveraged the distribution convictions to find by a preponderance of the evidence that the defendants' "crimes were part of a common scheme to distribute crack." [5] The judge then determined, again using the preponderance standard, that the scheme involved sales of over 500 grams of crack for Mr. Jones, and 1.5 kilograms of crack for the other two defendants. [6] Based on these findings, the judge increased the three defendants' sentencing exposure under the Federal Sentencing Guidelines from between 27 and 71 months imprisonment, to 324 to 405 months for Mr. Jones, 262 to 327 months for Mr. Thurston, and 292 to 365 months for Mr. Ball. [7] The judge varied below the enhanced ranges to impose prison sentences of 180 months for Mr. Jones, 194 months for Mr. Thurston, and 225 months for Mr. Ball. [8]

The three defendants appealed their sentences on the basis that "their sentences violated their Sixth Amendment right to trial by jury because they were based, in part, on [their] supposed involvement in the very conspiracy that the jury acquitted them of participating in." [9] While the D.C. Circuit "underst[oo]d why appellants find sentencing on acquitted conduct unfair," the law allowed it, so the appellate court found no fault with sentences the three defendants received. [10]

This outcome shocks the conscience of the average layperson whose knowledge of the criminal justice system likely begins and ends with "innocent until proven guilty." That is because what allowed this outcome is a dirty secret of the criminal justice system: *United States v. Watts. Watts* allows judges to sentence multi-count defendants for conduct underlying acquitted counts. [11] It is an allocation of judicial power that (for most) provokes visceral protestation. Yet, it is a practice that has continued largely unabated before and after the Supreme Court blessed it in *Watts* over 17 years ago.

Many commentators and scholars have written how acquitted conduct sentencing violates the intent and spirit of the Fifth and Sixth Amendments. This article takes this ***173** common analysis one step further, by arguing that a quartet of Supreme Court Sixth Amendment cases are a Constitutional bar to acquitted conduct sentencing. With *Apprendi v. New Jersey,* [12] *Blakely v. Washington,* [13] *United States v. Booker,* [14] and more recently, *Alleyne v. United States,* [15] the Supreme Court reinforced, clarified, and extended the line in the sand that separates the power and reach of the bench from the province of the jury. Taken together, this "max-min quartet" firmly establishes that a judge's sentencing power begins and ends with the jury and

the reasonable doubt standard. [16] More importantly, they provide the means to force the Sixth Amendment confrontation that the Supreme Court deftly avoided in *Watts*--a confrontation that *Watts* cannot survive.

SENTENCING REFORM ACT OF 1984 AND THE BIRTH OF THE GUIDELINES

Before examining *Watts* and the max-min quartet, it is important to understand the judicial context and environment that allowed *Watts* and acquitted conduct sentencing to emerge and survive, despite contradicting bedrock principles of the American criminal justice system.

For nearly a century prior to 1984, the federal system employed an indeterminate sentencing model that approached crime as a moral disease to be cured through rehabilitation. [17] Indeed, the model "was premised on a faith in rehabilitation." [18] Judges, supported by parole officers, were viewed as experts of the disease, and were therefore vested with broad discretion to fashion sentences that provided sufficient time to cure defendants through rehabilitation. [19]

During this time, judicial sentencing authority and practice were largely unregulated and unchecked. The majority of federal criminal statutes had open-ended punishment ranges or merely set the maximum numbers of years a defendant could be sentenced to prison. [20] Judges had unquestioned discretion to sentence a defendant anywhere within the statutory limits. [21] Appellate courts took a hands-off approach and interjected themselves only when a sentence exceeded the statutory limits or reflected a gross abuse of discretion. [22] This unfettered respect for judicial discretion extended even to death sentences. [23] A judge's sentence, for the most part, was final and absolute. [24] It was only with the introduction of federal parole in 1910, did Congress reduce (somewhat) judicial sentencing power. [25]

By the 1970s, "this model of indeterminate sentencing eventually fell into disfavor." [26] The model, and unchecked judicial sentencing discretion, came under increasing criticism from academics and legislators from both the political left and right. [27] To the conservative right, judges were using their unchecked discretion to impose lenient, disparate, and inconsistent sentences that allowed dangerous, repeat offenders to escape sufficient terms of imprisonment. [28] For the liberal left, the problem was a growing disparity in the sentences handed to minorities compared to the lighter sentences white defendants received for comparable crimes. [29]

After a decade of many fits and starts (and failures) to revamp sentencing policy, the contrasting concerns of the political left and right converged with the passage of the Sentencing Reform Act of 1984 (hereinafter the "SRA"). [30] The SRA was a near complete overhaul of federal sentencing policy and practice. [31] Most notably, the SRA was the abandonment of the indeterminate model in favor of a determinate model that Congress believed would yield consistent and proportionate sentences, and ease the public's confusion and concern about sentencing lengths. [32] To be the engine of this new model, the SRA created the United States Sentencing Commission (hereinafter the "Commission"), ***175** and charged it with crafting the federal sentencing guidelines (hereinafter the "Guidelines"). [33]

The SRA also shifted the focus of sentencing from rehabilitation to punishment and deterrence. [34] More bluntly, the SRA was the legislative rejection of the premise that prison was for rehabilitation. [35] Indeed, Congress made its rejection clear by limiting judicial discretion to the sentencing factors specified by Congress, of which rehabilitation is one of many, and one that is not highly valued. [36]

MODIFIED REAL OFFENSE SENTENCING UNDER THE GUIDELINES

It took the Commission nearly three years to draft the Guidelines and for Congress to approve them. At the start, the Commission's critical decision was whether to base the Guidelines on the charged offense or the "real" offense. [37] In a "charge offense" system, a defendant is sentenced solely on the offense of conviction (and his criminal record) without considering the particulars of the defendant's criminal conduct. [38] Charge offense sentencing restrains judicial discretion and promotes sentencing consistency, but at the expense of particularized sentencing, which recognizes that criminal offenses are committed with varying degrees of culpability and that not all defendants are the same.

In contrast, under a "real offense" system, a defendant's sentence is based on the particulars and specifics of his criminal conduct, the context of the conduct, and who was involved with or injured by the conduct. [39] The advantage of real offense sentencing is that it allows a judge to tailor a sentence specifically to the circumstances that aggravate or mitigate a particular criminal act. The downside is that real offense sentencing fosters sentencing disparity--a defendant's sentence is largely determined by which judge the defendant draws and how the judge subjectively views the defendant and the defendant's conduct.

The Commission initially pursued a real offense system. [40] However, this effort "proved unproductive" as the Commission failed to find a "practical way to combine and account for the large number of diverse harms arising in different circumstances." [41] The ***176** Commission was also unable to devise a simple and efficient system that would not result in the sentencing disparities the SRA was enacted to prevent. [42]

The Commission eventually settled on a modified real offense system that incorporates elements of charge offense sentencing. [43] This hybrid system is employed today. It consists of base offense levels for every federal offense and pre-set offense level increases (and a few decreases) based on contextual factors. The base offense level with the adjustments produce a final offense level that ranges from one to forty-three. [44] Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction. [45] A defendant's total number of criminal history points determines into which of the six criminal history categories he falls. [46] Using the Guidelines' sentencing table, the intersection point of a defendant's the final offense level and his criminal history category yield his presumptive sentencing range. [47]

RELEVANT CONDUCT

A central tenet of real offense sentencing is that sentencing judges are free to set a term of imprisonment, within the statutory maximum, based on the specific conduct of the defendant and all that resulted from the conduct. In real offense sentencing a judge is not limited by the elements of the offense of conviction. The "modified" approach of the Guidelines incorporates this tenet by allowing judges to sentence a defendant based on "relevant conduct." [48] Relevant conduct extends outside and beyond the elements of the offense of conviction, as well as the offense itself. [49] Relevant conduct can consist of facts related to the criminal conduct underlying the conviction, uncharged conduct, dismissed charges, the conduct of others done "in furtherance of the jointly undertaken criminal activity," or (the focus of this Article) acquitted conduct. [50]

To encapsulate "relevant conduct" the Guidelines enumerate a number of "specific offense characteristics" and "applicable general adjustments" consisting of particular mitigating or aggravating circumstances that increase (or at times decrease) a defendant's offense level by a prescribed number of levels. [51] The number of adjustments ***177** is fixed, and in some ways limited, because to account for "every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect." [52] However, for egregious conduct that falls through the cracks, the Guidelines encourage judges to increase a defendant's offense level or sentence a defendant above his presumed guideline range. [53]

Relevant conduct sentencing under the Guidelines mirrors the statutory directive from Congress that "[n]o limitation shall be placed on the information concerning the background, character, and *conduct* of a person convicted of an offense which a [court] may receive and consider for the purpose of imposing an appropriate sentence." [54] Relevant conduct sentencing, therefore, is essentially without boundaries or limits. One such absent border is the reasonable doubt standard. The preponderance of evidence standard reigns for sentencing. [55] It is a standard that is free from the purposefully burdensome constraints and obligations of the reasonable doubt standard, in favor of a standard where a splinter over 50% exposes a defendant to an enhanced sentence. [56] Once the door of conviction is opened, a defendant is left to answer for his entire life up to that moment, regardless of how tenuous the link to the offense of conviction, and regardless that the proof would fail to convince a jury.

UNITED STATES V. WATT

In two cases decided together in 1997 as *United States v. Watts*, [57] the Supreme Court established that a sentencing court may consider acquitted conduct otherwise proven under the preponderance standard at sentencing to determine a defendant's sentence. [58]

In *Watts*, police found cocaine base and two loaded firearms in separate parts of Watts's home. [59] At trial, Watts was convicted of possessing with the intent to distribute cocaine base, but acquitted of the using a firearm in relation to the drug offense. [60] In the companion case, Putra was captured on videotape selling cocaine to a government informant on two separate occasions (May 8, 1992 and May 9, 1992). The jury convicted ***178** her of the distribution count for the May 8th transaction, but acquitted her for the May 9th transaction. [61] During the sentencing phase in both cases, the district court found that Watts and Putra had engaged in the conduct underlying the acquitted offenses, and used this "relevant conduct" to increase their respective final offense levels under the Guidelines. [62] For Watts, the adjustment consisted of a two-level bump for possession of a gun in connection with a drug offense. [63] For Putra, the court aggregated the amount of drugs from the May 8th and May 9th transactions to determine her offense level. [64] In both cases, the Ninth Circuit vacated the sentences and remanded for resentencing, on the ground that it was improper to punish the defendants for facts and offenses that the jury rejected with their acquittals. [65]

The Ninth Circuit's decisions created a circuit split. [66] In response, the Supreme Court took up *Watts* and *Putra*. The Court resolved the split by reversing and remanding both Ninth Circuit decisions by way of a short *per curiam* opinion that was issued without full briefing or oral argument. [67]

The Supreme Court's starting point was the "longstanding principle" codified by § 3661 and pre-dating the Guidelines, that "sentencing courts have broad discretion to consider various kinds of information," including conduct that may not have resulted in a conviction. [68] The Court noted that the Guidelines expressly adopted and incorporated this principle. [69] In the Court's view, this "longstanding principle" plus the Guidelines' broad embrace of "relevant conduct," created an expansive pool of sentencing conduct that includes acquitted conduct. [70]

Next, with a quick stroke of the pen, the Court dismissed any thought that acquitted conduct sentencing runs afoul of double jeopardy protections. The Court explained that it is "erroneous" to confuse punishing a defendant for a crime for which he was acquitted, with sentencing enhancements that increase a term of imprisonment because of the manner in which defendant committed the crime. [71] According to the Court, sentencing based on acquitted conduct is the latter, and therefore does not implicate double jeopardy. [72]

The Court ended its short opinion by clarifying what an acquittal means. Contrary to the Ninth Circuit's view in *Watts* and *Putra*, the Court explained that a "not guilty" verdict is not a rejection of any facts or a finding that the defendant is actually

***179** innocent.[73] To the Court, a "not guilty" verdict is narrow, specific, and "merely proves the existence of a reasonable doubt as to [a defendant's] guilt" because the government failed to prove at least one essential element of the offense beyond a reasonable doubt.[74] Therefore, to the Court, an acquittal provides no barriers to the government "relitigating an issue when presented in a subsequent action governed by a lower standard of proof."[75]

Justices Stevens and Kennedy issued separate dissents. Justice Kennedy took issue with the Court's decision to render an opinion without full briefing and oral argument.[76] Justice Stevens' criticism was more substantive and critical.[77] Justice Stevens methodically dismantled the majority's legal reasoning to show why neither the Court's "prior cases nor the text of [§ 3661] warrants this perverse result."[78] And he ended his dissent with a strong rebuke of what he saw as the majority's betrayal of the principles of constitutional criminal jurisprudence.[79]

THE COSTS OF ACQUITTED CONDUCT SENTENCING

Any discussion about the costs of acquitted conduct sentencing must start with the depreciation of the jury's primacy in our criminal justice system. The right to a jury trial is "fundamental to our system of justice"[80] whose importance is "hard to overemphasize."[81] Indeed, it is a civil right that the Founding Fathers agreed was absolutely necessary even though they disagreed about the size and role of the federal government.[82] Acquitted conduct sentencing undermines and devalues the role of the jury, and mocks the jury's historical roots and prominence by "trivializ[ing] 'legal guilt' or 'legal innocence'--which is what a jury decides."[83] Indeed, the practice "severs the connection between verdict and sentence," "thwarts the express will of the jury," and jeopardizes the jury's power to serve as the bulwark between the accused and the government.[84]

The next conspicuous cost is that acquitted conduct provides prosecutors with a second-bite at the apple of punishment under circumstances that substantially disfavor the defendant.[85] The forum of sentencing advantages the government--one fact-finder (judge) ***180** 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 defendant is already guilty of something.[86] It is against this backdrop that acquitted conduct sentencing allows prosecutors to present the same evidence rejected by the jury (or even was deemed inadmissible at trial) to establish that a defendant deserves an enhanced prison sentence for conduct the jury did not find supported a guilty verdict. In effect, after failing before a jury, the prosecution is allowed a "mini-trial" to re-ligate the issue under more favorable circumstances.[87] And "[w]ith this second chance at success, the Government almost always wins."[88]

A related cost is that acquitted conduct sentencing empowers and emboldens prosecutors to charge additional offenses with the intent of establishing "guilt" at sentencing (under more favorable conditions) rather than at trial. In other words: charge inflation. Take for instance a prosecutor who believes (or rather desires) that five charges could apply to a defendant's conduct, but recognizes that only two charges can be proven beyond a reasonable doubt. In this scenario, acquitted conduct sentencing encourages the prosecutor to pursue all five charges because only one conviction is needed to open the door at sentencing to any of the charges rejected by the jury.[89] In addition to the costs in prison years, charge inflation contributes to pleas through cost-benefit coercion. A defendant facing multiple charges not only has to weigh whether she can emerge successful at trial, but also the added penalty exposure posed by charges she can beat under the reasonable doubt standard, but may lose under the preponderance standard at sentencing. More often than not, the result of this calculation is that the potential years of imprisonment after trial, even if the defendant is able beat some of the charges, far outweighs the plea offer provided by the government.

Finally, another cost are the potential sentencing disparities that the Guidelines are designed to prevent. Not all judges engage in acquitted conduct sentencing, and the judges that do engage in the practice, do not do so in a uniform manner. Disparities

are a inescapable consequence of defendants who appear before judges who reject acquitted conduct sentencing and those who embrace it in varying degrees.

MAX-MIN QUARTET

As the central thesis of this Article is based on the "max-min quartet" of *Apprendi*, *Blakely*, *Booker*, *and Alleyne*, a brief overview of the four cases is warranted.

Apprendi v. New Jersey [90]

Apprendi was arrested for firing several shots into the home of a black family who recently moved into an all-white neighborhood. During post-arrest questioning, Apprendi stated that he fired into the house because the occupants were "black in color" ***181** and he did not "want them in the neighborhood." [91] He was subsequently charged by a New Jersey grand jury with 23 counts for the shootings and unlawful weapon possession. [92] None of the charged counts referred to New Jersey's hate crime statute.

Pursuant to a plea agreement, Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of possession of an antipersonnel bomb. New Jersey law set a penalty range of five to ten years for the firearm possession counts, and three to five years for the antipersonnel bomb count. [93] Under the plea agreement, the state reserved the right to seek an enhanced sentence under New Jersey's hate crime statute, while Apprendi reserved the right to claim that a hate crime enhancement violated the Constitution. [94]

The trial court held an evidentiary hearing on the state's motion in support of the hate crime enhancement. The judge found by a preponderance of the evidence that the enhancement was warranted. [95] Apprendi was sentenced to 12 years for one of the firearm possession counts (or two years over the ten-year maximum), and to shorter concurrent sentences for the remaining two counts. [96]

Apprendi appealed arguing that for the hate crime enhancement to apply, the Constitution's due process clause required the government to prove the bias motive to a jury guided by the reasonable doubt standard. The state appellate court and the New Jersey Supreme Court rejected Apprendi's argument. Both courts of review relied heavily on *McMillan v. Pennsylvania* to find that the hate crime enhancement was a sentencing factor, rather than an element or separate offense requiring the reasonable doubt standard. [97]

The Supreme Court, however, sided with Apprendi. The Court held that New Jersey's hate crime statute violated due process because it allowed a judge to increase a sentence beyond the statutory maximum based on the preponderance of the evidence. [98] In reaching this decision, the Court started with the premise that "taken together" the Sixth Amendment's trial rights and the Fourteenth Amendment's due process rights "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" [99]

The Court then explored the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties." [100] For years since the nation's founding, according to the Court, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court ...." [101] The Court acknowledged that trial practices can "change in the course of centuries ***182** and still remain true to the principles" of the Founding Fathers. [102] But, the Court stressed, this "practice

must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt." [103]

With these principles in mind, the Court proceeded to reject all three arguments put forward by New Jersey in support of its statute. The state's first argument was that the hate crime statute's biased purpose penalty was a "traditional sentencing factor" and not an "element" of a separate hate crime offense. [104] To the Court, characterizing "biased purpose" as just a sentencing factor regarding motive, greatly undervalued its legal significance. "By its very terms, this statute mandates an examination of the defendant's state of mind--a concept known well to the criminal law as the defendant's *mens rea*." [105] And a defendant's intent, or *mens rea*, "is perhaps as close as one might hope to come to a core criminal offense 'element.'" [106]

The state's second argument--*McMillan* allows a legislature to authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence--was equally unavailing. The Court read *McMillan* to frown on a legislature allowing a judge to significantly increase a defendant's maximum penalty using the preponderance of the evidence standard. [107] Moreover, it was of no Constitutional consequence to the Court, that the New Jersey legislature placed the hate crime enhancer within the sentencing provisions of the state's criminal code. The placement did "not define its character," which the Court found resembled an element rather than a sentencing factor. [108]

The Court used few words to dispatch the state's final argument - that *Almendarez-Torres v. United States* extended *McMillan*'s holding to the New Jersey statute. [109] To the Court, the two situations were far too different. *Almerdarez-Torres* concerned recidivism, which does not relate to the commission of the offense itself. New Jersey hate crime statute, conversely, "goes precisely to what happened in the 'commission of the offense.'" [110]

In sum, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [111]

*183 *Blakely v. Washington* [112]

Four years later, the Supreme Court used *Apprendi* to invalidate another state's use of sentencing factors to enhance a defendant's sentence beyond the statutory maximum. [113] In *Blakely*, the defendant pled guilty to second-degree kidnapping involving domestic violence and use of a firearm stemming from a violent episode involving his estranged wife. Under Washington state law at the time, second degree kidnapping was a class B felony with a 10-year imprisonment limit. [114] Another state law limited the punishment for second degree kidnapping with a firearm to a range of 49 to 53 months imprisonment, unless a judge found compelling and exceptional reasons to impose a sentence exceeding the range. [115]

During the sentencing hearing, Blakely's wife recounted the graphic details of the kidnapping. [116] Having found that Blakely acted with "deliberate cruelty", the judge rejected the state's recommendation for a sentence within the 49 to 53 month range, and instead imposed a sentence of 90 months (or 37 months beyond the standard maximum). [117]

When the case reached the Supreme Court, Washington state argued that there was no *Apprendi* violation because the relevant statutory maximum was not 53 months, but rather the 10-year maximum for class B felonies under state law. [118] The Supreme Court rejected the argument head-on, and set a bright-line rule for what constitutes the "statutory maximum" under *Apprendi*: Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* .... In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may

impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. [119]

The Court then used this bright line rule to find Blakely's 90-month sentence constitutionally infirm. It was particularly important to the Court that the judge could not have imposed the 90-month sentence based on the admitted facts in Blakely's guilty plea. [120] Because the judge needed to find additional facts, beyond those admitted by ***184** Blakely (or found by a jury), to impose the enhanced sentence, the Court held that the 90-month sentence ran afoul of the Constitution and *Apprendi*. [121]

After finding the 90-month sentence was invalid, the Court addressed *Apprendi*'s critics. The Court explained that for "[t]hose who would reject *Apprendi,"* there were two unsound alternatives. [122] The first alternative "is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase punishment--may be found by the judge." [123] The Court quickly deemed it "absurd" to follow this path, because the jury would cease to "function as [the] circuitbreaker in the State's machinery of justice," and judges and the State would have unlimited punishment power. [124]

The second alternative "is that legislatures may establish legally essential sentencing factors *within limits*--limits crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.'" [125] The Court's problem with this alternative was the subjectivity of determining whether a sentencing factor exceeds constitutional limits and improperly expands the role of the judge. [126] This subjectivity, in the Court's mind, is inconsistent with the Sixth Amendment's empowerment of the jury (which reflects the founders' fear of the power of government and judges). [127]

The Court then made clear that its decision was not about the constitutionality of determinate sentencing, but rather "about how it can be implemented in a way that respects the Sixth Amendment." [128] In response to critics (such as Justice O'Connor), the majority felt it was of no consequence that determinate sentencing schemes involve less judicial fact-finding than indeterminate sentencing schemes. [129] What was important to the majority was whether determinate sentencing schemes involve more *judicial power* than jury fact-finding, and therefore requiring more diligent protection of Sixth Amendment trial and jury rights. [130]

United States v. Booker [131]

Booker is well known for transforming the Guidelines into a provider of advisory sentences rather than mandatory ones. What is often lost is that the decision rested on the Supreme Court extending *Apprendi* to the Guidelines to find that Booker's enhanced sentence violated his Sixth Amendment right to a jury trial.

Booker was convicted at trial of possessing with the intent to distribute 50 grams of crack, which triggered a 10-year mandatory minimum sentence. [132] Booker's guideline range was 210 to 262 months imprisonment based on his criminal history and the evidence ***185** at trial that his conduct involved 92.5 grams of crack. [133] At sentencing the trial judge concluded by a preponderance of the evidence that Booker's conduct involved an additional 556 grams of crack. [134] Based on this finding, the Guidelines required Booker to receive a sentence between 360 months and life imprisonment. [135] The trial judge sentenced Booker to the low-end of the range--360 months in prison. [136]

Booker's appeal presented two questions to the Supreme Court. The first was "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the [Guidelines] based on the sentencing judge's determination of fact (other than a prior conviction) that was not found by the jury or admitted by the defendant[?]" [137] If the answer was "yes," the second

question concerned the proper remedy--whether the Guidelines as whole had to be scrapped as unconstitutional or could parts of the Guidelines be excised to save the rest. [138]

The Court answered "yes" to the first question. In delivering the majority opinion, Justice Stevens relied heavily on *Apprendi* and *Blakely* to hold that "[a]ny fact (other than a prior conviction) that leads to a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond all reasonable doubt." [139] According to Justice Stevens, those cases (and other similar cases) made clear that a defendant has a "right to have a jury find the existence of 'any particular fact' that the law makes essential to his punishment." [140]

Nonetheless, the Court resisted rendering the entire Guidelines unconstitutional, primarily because of all the efforts behind the passage of the SRA. In speaking for the Court on the second question, Justice Breyer announced the Court's remedy for saving the Guidelines from constitutional purgatory was to surgically remove the provisions that rendered the Guidelines mandatory. [141] Justice Breyer explained that this approach, above all other alternatives, would allow the Sixth Amendment rights of defendants to live in concert with the determinate sentencing scheme Congress desperately wanted. [142]

Alleyne v. United States [143]

While *Apprendi* and *Blakely* firmly established the limits of judicial fact-finding to impose a sentence beyond a statutory maximum, questions remained about the constitutional limits of judicial fact-finding to increase a defendant's minimum sentence. Two years after *Apprendi*, the Supreme Court temporarily settled the questions with its *Harris v. United States* decision, which held that judges remained free to find facts to set or increase a mandatory minimum faced by a defendant. [144] *Harris*'s lifespan came to a ***186** screeching halt in 2013 with the *Alleyne* decision.

Alleyne and an accomplice robbed a store manager on his way to deliver the store's daily deposits at a local bank. During the robbery, Alleyne's accomplice approached the manager with a gun. [145] A jury convicted Alleyne of multiple offenses related to the robbery, including using or carrying a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)), which carries various mandatory minimum penalties based on how the firearm was used during the crime. [146]

The jury's verdict form did not indicate that Alleyne or his accomplice "brandished" the firearm during the robbery. [147] Yet based on the presentence report that recommended the seven-year "brandishing" penalty for Allyene, and evidence presented at trial, the trial court imposed the seven-year mandatory minimum sentence for brandishing on the § 924(c) count. [148] The court dismissed Allyene's objection to the sentence on the ground that under *Harris*, brandishing was a sentencing factor that the court could find by a preponderance of the evidence without violating the Constitution. [149]

The Supreme Court used *Alleyne* to re-examine whether *Harris* was consistent and compatible with *Apprendi*. The Court concluded that it was not. [150] In reaching this conclusion, the Court started with the principle that the "touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." [151] To the Court, the failure of *Harris* to extend this principle to facts increasing a mandatory minimum sentence was inconsistent with *Apprendi's* definition of "elements," which "necessarily includes not only facts that increase the ceiling, but also those that increase the floor." [152] As the Court recognized, a fact that sets or increases a mandatory minimum "aggravates the punishment" just as it does when it increases a statutory maximum. [153] And therefore, to pass constitutional muster "[f]acts that increase the mandatory minimum sentence are ... elements and must be submitted to the jury and found beyond a reasonable doubt." [154]

After establishing the bright line rule, the Court further explained why *Harris* had to give way to *Apprendi*. To the Court, *Harris* violated the principle established by "common-law and early American practice," and embodied in *Apprendi*, that facts that increase the prescribed penalties a defendant faces are elements of the offense. [155] It does not matter whether the facts increase the floor of the prescribed penalties, as opposed to the ceiling, because it "is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." [156] What is key for Sixth Amendment purposes, according to the Court, is that facts that increase or ***187** trigger a mandatory minimum "aggravate" a defendant's punishment because there is a "heighten[ed] loss of liberty associated with the crime." [157] Therefore the *Harris* decision's attempt to limit *Apprendi* only to facts increasing a statutory maximum was without sound legal footing, and the "principle applied in *Apprendi* applies in equal force to facts increasing the mandatory minimum." [158]

The Court then disparaged the reasoning in *Harris* that a judge is constitutionally permitted to impose a enhanced mandatory minimum if the enhanced sentence is within the statutory range of the offense of conviction found by a jury (or agreed to pursuant to a plea agreement). [159] To the *Alleyne* Court, "[i]t is no answer to say that a defendant could have received the same sentence with or without the fact." [160] The key inquiry, the Court explained, is always whether a fact "alters the legally prescribed punishment so as to aggravate it" and is therefore an element of the offense that must be submitted to the jury. [161]

WHY THE MAX-MIN QUARTET SPELLS THE END FOR *WATTS*

Inexplicably, what has been largely lost over the years is that in *Watts* the Supreme Court did not address whether the Sixth Amendment posed a barrier to acquitted conduct sentencing. [162] Since *Watts*, many circuits have addressed the issue, and unfortunately have concluded that acquitted conduct sentencing is consistent with the Sixth Amendment. [163] However, a number of these decisions rest on a misunderstanding that *Watts* addressed the Sixth Amendment issue in favor of acquitted conduct sentencing, [164] and others were decided before the max-min quartet was complete. [165] Whatever the circumstances or reasoning, these decisions must be re-examined in the full light of the max-min quartet. [166]

To understand how and why the max-min quartet should put an end to acquitted conduct sentencing, it is best to start with the circumstances where there can be no ***188** dispute. [167] First, the max-min quartet, specifically *Apprendi*, is a complete bar to using acquitted conduct to extend a sentence beyond the statutory maximum of conviction. Second, the quartet (specifically *Blakely*) bars a sentencing judge from using acquitted conduct to extend a statutory maximum. Finally, the quartet, (specifically *Alleyne*) bars the use of acquitted conduct to establish or increase a mandatory minimum sentence.

What is unresolved is the grey middle: judges using acquitted conduct to extend a prison sentence within the statutory maximum of the offense of conviction, without regard to an applicable mandatory minimum. So why does the max-min quartet put an end to judges using acquitted conduct in this area? The short answer is that the max-min quartet firmly reinforces bedrock and interdependent principles underneath the Sixth Amendment's trial rights, and these principles are irreconcilable with allowing a sentencing judge to transform offense elements rejected (or not found beyond reasonable doubt) by a jury into sentencing factors that extend a defendant's term of imprisonment--even if the sentence is within statutory limits. These principles are:
1) The Constitution demands that a jury find a defendant guilty of all the elements of the crime with which he/she is charged.

2) The character of a sentencing enhancer defines whether it is an offense element or a sentencing factor.

3) If a sentencing enhancer is an element then it must be submitted to the jury and found beyond a reasonable doubt, or admitted by the defendant.

4) A judge's sentencing authority is derived from, and limited by a jury's verdict.

5) The sentencing range faced by a defendant is defined by, and limited to the facts found by the jury beyond a reasonable doubt, or admitted by a defendant.

Together, the principles reflect the Supreme Court's intent through the max-min quartet to protect and embolden the jury's power to not only resolve the question of guilt or innocence, *but also to find the facts essential to punishment.* The max-min quartet puts to rest the belief and practice that a conviction, without specific findings by a jury, automatically exposes a defendant to enhanced and extended penalties, mandatory penalties, and extended statutory maximums.

But these principles reflect a more subtle intent that is important for the argument presented here. The max-min quartet is part of an ongoing process to dismantle the practice of prosecutors and judges doing an end-run around the Sixth Amendment's promise that a conviction on jury-found facts must always precede punishment. [168] Without a conviction, a judge has *no* power to impose punishment. The max-min quartet reinforces not only the premise that a judge's sentencing power is dependent on a conviction, but also that a conviction does not grant a judge cart-blanche sentencing power. In short, the ***189** clear implication of the max-min quartet is that a "judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance a defendant's sentence." [169]

To look at it another way, it makes no logical or constitutional sense, that the max-min quartet prohibits a judge from using a fact rejected by a jury to impose a mandatory minimum sentence, but permits a judge to use a jury rejected fact to impose a sentence that is *multiple times* what the defendant would otherwise receive under the Guidelines if not for that fact. Take for instance the *Jones* case discussed in the opening of this article. Certainly the trial judge could not have sentenced the defendants to a crack mandatory minimum sentence of 5 or 10 years for the acquitted conspiracy count. Yet, the judge found no barrier to using "facts" underlying the acquitted conspiracy count to bump the defendants' sentences from between 27 and 71 months imprisonment to between 180 and 225 months imprisonment--sentences well-above the crack mandatory minimums. It is a paradox that strains all credulity, and more importantly, renders jury acquittals meaningless.

This illogical paradox is amply reflected in a decision soon after *Booker: United States v. Magallenez*. In that case, the defendant was convicted by a jury of conspiring to distribute methamphetamine. [170] On a special verdict interrogatory, the jury attributed between 50 and 500 grams of methamphetamine to the defendant. [171] At sentencing, however, the trial judge attributed 1200 grams to the defendant and increased his sentence accordingly under the Guidelines. [172]

Relying on *Booker* (decided after Magallanez had been sentenced), the Tenth Circuit held it was error for the trial court "to increase Mr. Magallanez's sentence beyond the maximum authorized by the jury verdict through mandatory application of the Guidelines to judge-found facts" using the preponderance standard. [173] Yet, the circuit court rejected the defendant's argument that "under *Blakely* and *Booker*, the district court was required to accept the jury's special verdict of drug quantity for purposes of sentencing, rather than calculating the amount for itself." [174] According to the appellate court, because of *Watts*, a sentencing court "maintained the power to consider the broad context of a defendant's conduct, even when a court's view of the conduct conflicted with the jury's verdict." [175] Therefore, "[a]pplying the logic of *Watts* to the Guidelines system as modified by *Booker*, we conclude that when a district court makes a determination of sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard." [176]

Although it does not involve acquitted conduct, *Magallanez* reflects the Kafkaesque world that is criminal sentencing jurisprudence under *Watts*. On one hand the Tenth Circuit chided the sentencing court for increasing a sentence beyond facts found by a jury ***190** under the then-mandatory-Guideline scheme, but in the same breath said the trial court was permitted to do the exact same thing under the "advisory" Guidelines. We are now in a tail-wags-the-dog situation where the force of a jury verdict under the Sixth Amendment is dictated and limited by the force of the Guidelines, and not the other way around.

This leads to common rebuttal to Sixth Amendment challenges to acquitted conduct sentencing: that because *Booker* rendered the Guidelines advisory, the Sixth Amendment is not implicated when a trial judge relies on facts rejected by a jury to select a sentence within the statutory maximum for the offense of conviction. [177] The simple response to this argument is that the max-min quartet does not disturb this premise unless the judicially discovered "fact" is an element of an offense that was not found (or rejected) by the jury. An element is not stripped of its character, weight, and significance, once a jury is released following the verdict. [178] In today's advisory-Guidelines era, "all facts are not equal ... especially not facts that amount to separate crimes." [179] What differentiates acquitted conduct facts, and thereby implicates the Sixth Amendment, is that they "are not facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising different crimes." [180]

A more probing response is that acquitted conduct sentencing turns *Booker* onto itself and strips away the Sixth Amendment protections it was supposed to reinforce. [181] The common understanding is that *Booker* gave judges back some of the sentencing discretion that had been taken away by the SRA and the Guidelines. What is often lost is that *Booker* also provided increased constitutional protections to federal criminal defendants facing sentencing. [182] Through *Booker*, the Supreme Court erected a Sixth Amendment wall between defendants and judicial fact-finding at sentencing. This wall limits a judge's sentencing authority to the "maximum authorized by the facts established by a plea of guilty ... or proved to a jury beyond a reasonable doubt." [183] The purpose of this wall is to protect defendants from *fait accompli* sentences based on fact-finding at sentencing under a less demanding standard of proof. In other words, "Just because the jury has authorized *a* punishment [with a guilty verdict] does not mean that the jury has authorized *any* punishment." [184] *Booker*, therefore, restricts the sentencing power of judges relative to the defendant, as much as it expands judicial power in relation to the Guidelines.

Acquitted conduct sentencing betrays the former purpose. It is directly counter to *Booker*'s intent for judges to use acquitted conduct to extend the sentence range ***191** authorized by the Guidelines. It is of no constitutional importance *to a defendant* that the Guidelines are "advisory" as opposed to "mandatory" if the trial judge enhances the defendant's guideline range based on jury rejected "facts" that constitute elements of an acquitted offense, *and then impose a sentence within that enhanced range*. The outcome--a sentence longer than sanctioned by the jury--is the same. Under the max-min quartet, this backdoor sentencing not only implicates the Sixth Amendment, it runs afoul of it.

As one court explained, it is nonsensical for *Booker*, when it comes to acquitted conduct, to afford defendants *less* Sixth Amendment protections under an advisory Guidelines scheme:
If the Guidelines are mandatory, "what the jury verdict authorized" means a sentence framed by the facts tried-- *excluding* aggravating enhancements to that offense and surely excluding aggravating relevant conduct if those facts did not form part of the jury's verdict. With advisory Guidelines, when the trial judge is not required to accept a sentence driven by enhancements or relevant conduct, "what the jury verdict authorized" means a sentence just within the statutory maximum.

However, when a count considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize, it considers facts of which the jury expressly disapproved. Nor is it enough to hark back to the idea that they jury "only decides guilty beyond a reasonable doubt, while the judge decides facts by a fair preponderance of the evidence." The argument is circular: The fair preponderance standard made sense in the context of fully indeterminate sentencing. It does not make sense in this hybrid regime where rules still matter, and certain facts have important, if not dispositive, consequences. [185]

Moreover, to claim that there is no Sixth Amendment violation because *Booker* rendered the Guidelines advisory is to ignore the "controlling influence" of the Guidelines. [186] The Guidelines remain the "Federal Government's authoritative view of appropriate sentences for specific crimes," [187] and through a series of post-*Booker* rulings, the Supreme Court has ensured that the Guidelines remain so. Accordingly, the Guidelines are the "starting point and the initial benchmark" for all sentence

determinations, [188] and failure to properly calculate a defendant's guideline range constitutes procedural error. [189] And once a defendant's guidelines are calculated, a within-guideline sentence may be presumed reasonable, and any departure or variance must be explained. [190] Indeed, a judge ***192** "varies from a Guidelines sentence at his or her own peril." [191] "And so, in effect, the Guidelines, with respect to 'acquitted conduct,' remain very much mandatory." [192]

By slapping an "advisory" sticker on them, *Booker* did not "deprive the Guidelines of force as the framework for sentencing." [193] Since the Guidelines remain the dominant sentencing force post-*Booker*, when a judge uses facts rejected (or not found) by a jury to "alter the prescribed range of sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment," the Sixth Amendment is certainly implicated. [194] In short, when it comes to the Guidelines, as one court noted, "[w]e cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important." [195]

A related common justification for acquitted conduct sentencing, is that the practice is consistent with the Sixth Amendment so long as the resulting sentence is within the statutory maximum of the offense of conviction. In other words, the offense of conviction is the jury's authorization of a sentence up to or equal to the statutory maximum based on facts found by the sentencing judge. However, the "jury authorization" argument rests on the premise that a *jury's verdict authorizes punishment*. A not guilty verdict is the most conspicuous expression of a jury's grant (rather withholding) of sentencing authority. "The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, and yet specifically withholds, that authorization." [196] Certainly no one would argue that the Sixth Amendment and other constitutional protections are not barriers to a judge sentencing a defendant who was acquitted of *all* charges, just because the judge found the government proved its case by a preponderance of the evidence. So it is absurd that an acquittal looses the effect of withholding sentencing authority just because it is in the company of a guilty verdict. [197]

*** * * ***

The max-min quartet reaffirms the principle that a criminal offense is a collection of individual elements, and elements are a collection of facts that must be proven beyond a reasonable doubt. Under the quartet, once an element, always an element. [198] A not guilty ***193** verdict does not, and cannot, recast an offense element into something less substantial, which can be found by a sentencing judge, using a lesser standard of proof, to extend a prison sentence. [199] Such re-labeling, as the Supreme Court forcefully asserted in *Booker*, is "irrelevant for constitutional purposes." [200] And under the quartet, it is of no import whether the sentence imposed using acquitted conduct facts falls within the range allowed by statute. All that matters is the jury has not provided authority for such a sentence, and the acquitted conduct facts expose a defendant to an aggravated prison sentence that he would otherwise not face. [201]

TURNING THE TIDE--JUSTICE SCALIA THE KEY?

The key to ending acquitted conduct may lie with an unlikely source--Justice Antonin Scalia. Through his dissent in *Jones*, Justice Scalia forcefully called on the Supreme Court to reach a definitive decision on judicial fact-finding during sentencings, and chided the Court for passing on the opportunity *Jones* permitted to do so:

We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable--thereby exposing the defendant to the longer sentence--is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

For years, however, we have refrained from saying so .... the Courts of Appeal have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. This has gone on long enough. [202]

While the tone is suggestive, Justice Scalia's dissent does not explicitly say which way he would vote if the issue were properly before the Court. One must remember that Justice Scalia concurred with the majority decision in *Watts*. [203] However, a Scalia dissent a few years prior to the *Jones* case suggests that the Justice's comfort with acquitted conduct sentencing has dissipated over time.

In *Oregon v. Ice*, the Supreme Court held that the Sixth Amendment allowed states, such as Oregon in this instance, to assign to judges, rather than juries, the role of finding facts needed to impose consecutive, rather than concurrent, sentences for multiple offenses. [204] In dissenting, Justice Scalia argued that *Apprendi* was an uncompromising barrier to a sentencing scheme where judge-found facts were "'essential to' the punishment ... imposed." [205]

***194** Justice Scalia took aim at the majority's effort to limit *Apprendi* to "only to the length of a sentence for an individual crime and not to the total sentence for a defendant." [206] The majority's faulty logic, according to Justice Scalia, was a betrayal to the "pains" the Supreme Court had taken "to reject artificial limitations upon the facts subject to the jury-trial guarantee." [207] These efforts "made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime." [208]

Together, Justice Scalia's dissents in *Oregon* and *Jones* provide cautious optimism that the Justice is ready to embrace an unambiguous and unyielding rule that the jury (and only the jury) is permitted to find facts necessary to extend a prison sentence regardless of the statutory limit. Or, he at least wants the Supreme Court to resolve the issue once and for all.

If the acquitted conduct sentencing does come before the Supreme Court again, who would side with Justice Scalia (assuming he is ready to end acquitted conduct sentencing)? Among the current ranks, Justices Ginsburg and Thomas joined Scalia's *Jones* dissent, and Chief Justice Roberts and Justice Thomas joined his *Oregon* dissent. [209] Assuming they all continued to follow Justice Scalia's lead, there would be at least four votes for ending acquitted conduct sentencing.

One could speculate about which justice could provide the crucial fifth vote. However, that speculation must be tempered by the reality of the vote to deny review of the *Jones* case. Although the denial order did not reveal how the justices voted, since it takes just four justices to grant review, it seems clear that the six justices that did not join Scalia's dissent voted for denial. This is not a good sign for those, including this author, eager to see the Supreme Court put an end to acquitted conduct sentencing.

CONCLUSION

"The Founders were keenly aware, though, that 'the jury right could be lost not only by gross denial, but by erosion.'" [210] *Watts* was a monumental breach of the Sixth Amendment, and its erosive effect on defendants' jury rights continues unabated. Acquitted conduct sentencing devalues to worthlessness the jury's role in measuring whether the government has met its burden at trial, and empowers and encourages prosecutors to over-charge knowing that one guilty verdict will supersede any not guilty verdicts a jury renders. It is practice that indeed is a "jagged scar on our constitutional complexion." [211]

For too long, courts have rested on *Watts* to justify this invidious practice. In *Watts*, however, the Supreme Court side-stepped the Sixth Amendment and the barrier it poses to acquitted conduct sentencing. It is a maneuver that is no longer available now that the max-min quartet has fortified the line between judge and jury, and re-invigorated the ***195** role of the Sixth

Amendment in sentencing. Armed with the max-min quartet, now is the time for a direct Sixth Amendment assault on acquitted conduct sentencing "in order to again ensure that the 'right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government."' [212]

Footnotes

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1 United States v. Jones, 744 F.3d 1362, 1365, 1368 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 8 (2014). Only Mr. Jones and Mr. Ball were charged with the violent crimes. *See id* at 1365 n1.

2 *Id.* at 1365 & n.1.

3 *Id.* at 1365.

4 *Id.* at 1365 & n.1.

5 *Id.* at 1365.

6 *Id.* at 1365-66.

7 *Id.*

8 *Id.*

9 *Id.* at 1368.

10 *Id.* at 1369; The Supreme Court denied the defendants' petition for writ of certiorari. Jones v. United States, 135 S. Ct. 8 (2014). The denial, and Justice Scalia's dissent, is discussed later in this article.

11 519 U.S. 148, 149 (1997).

12 530 U.S. 466 (2000).

13 542 U.S. 296 (2004), *reh'g denied*, 542 U.S. 961 (2004).

14 543 U.S. 220 (2005).

15 133 S. Ct. 2152 (2013).

16 *See* cases cited *supra* notes 12-15.

17 *See* Mistretta v. United States, 488 U.S. 361, 363-66 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing."); *see also* Tapia v. United States, 131 S. Ct. 2382, 2383, 2386 (2011) (citing and quoting *Mistretta*, 488 U.S. at 363); *see also* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993).

18 *Tapia*, 131 S. Ct. at 2386; *see also Mistretta*, 488 U.S. at 363 ("Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable rehabilitation ....").

19 *See Mistretta*, 488 U.S. at 363-64. *Tapia*, 131 U.S. at 2386 ("If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had a spent a third of his term behind bars, they could order his release.").

20 *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

21 Jones v. United States, 327 F.2d 867, 869-70 (D.C. Cir. 1963) ("It is clear beyond peradventure that this court had and has no control over a sentence which comports with the applicable statute, 'even though it be a death sentence.' Nor may we reduce or modify a sentence nor require a trial judge to do so.") (quoting Rosenberg v. United States, 344 U.S. 889, 890 (1952)); United States v. Lowery, 335 F. Supp. 519, 521 (D.D.C. 1971) ("It is clear that absent a manifest abuse of discretion, and provided the trial judge complies with the applicable statute, his discretion in sentencing cannot be infringed upon."); Stith & Koh, *supra* note 20, at 225.

22 Stith & Koh, *supra* note 20, at 226, 245; *see also Mistretta*, 488 U.S. at 364.

23 *See, e.g.*, *Rosenberg*, 344 U.S. at 889-90 (1952) ("A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of the Court to revise.") (discussing congressional action in 1911 abolishing the right to an appeal).

24 *Lowery*, 335 F. Supp. at 521 ("Initially, it cannot be gainsaid that in matters relating to sentencing the trial court has virtually absolute, if not unfettered discretion.").

25 Stith & Koh, *supra* note 20, at 226-27 ("[P]arole authorities were assigned the task of determining the actual release date for most federal prisoners ... With the advent of federal parole, federal prison sentences became partially indeterminate.") (explaining that parole reduced judicial sentencing power).

26 Tapia v. United States, 131 S. Ct. 2382, 2387 (2011); *see also* Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 271 (2012).

27 *See* Leonard & Dieter, *supra* note 26, at 271; *see also* S. Rep. No. 98-225, at 41 (1983) (Conf. Rep.) ("The absence of a comprehensive federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants."); *See also* Stith & Koh, *supra* note 20, at 228. Perhaps the most influential critic was Marvin Frankel, a well-respected former federal judge and former Columbia law school professor. *Id.* In 1972, while serving on the bench, Judge Frankel published *Criminal Sentences: Law Without Order*, which zealously criticized judicial "wholly unchecked and sweeping" sentencing authority and called for the creation of a "Commission on Sentencing" responsible for establishing "binding" sentencing guides. *Id.* Judge Frankel's views and his book would serve as the model and inspiration for the Sentencing Reform Act of 1984, *Id.*

28 *See* S. Rep. No. 98-225, at 44-45; *see* Leonard & Dieter, *supra* note 26, at 271; *see* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 374 (2010).

29 *See* S. Rep. No. 98-225, at 65; *see also Tapia*, 131 S. Ct. at 2387; *see* Leonard & Dieter, *supra* note 26, at 271.

30 *See* S. Rep. No. 98-225, at 65 ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."); *see also Tapia*, 131 S.Ct. at 2387. See Stith & Koh, *supra* note 20, for a discussion of the comprehensive legislative history of the SRA.

31 Burns v. United States, 501 U.S. 129, 132-33 (1991) ("The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes."); *see also* S. Rep. No. 98-225, at 65, ("[The SRA] meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain.").

32 *See* Setser v. United States, 132 S. Ct. 1463, 1474-75 (2012); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1190 (1993); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2013) [hereinafter "U.S.S.G."]. In passing the SRA, Congress sought "honesty in sentencing", "to avoid the confusion and implicit deception" of indeterminate sentencing, and "reasonable uniformity." *Id.* [Note: The sentencing guidelines are referred throughout this Article as the "Guidelines"].

33 *Mistretta*, 488 U.S. at 367-68 (1989); *Tapia*, 131 S. Ct. at 2387; *see also* S. Rep. No. 98-225 at 63 ("[The SRA] creates a United States Sentencing Commission whose duty is to promulgate sentencing guidelines and policy statements."); Lear, *supra* note 32, at 1190.

34 *Mistretta*, 488 U.S. at 367 ("[The SRA] rejects imprisonment as a means of promoting rehabilitation ... and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals.") (citation omitted); *see also* Lear, *supra* note 32, at 1190-91.

35 *See* United States v. Irey, 612 F.3d 1160, 1228-29 (11th Cir. 2010); *see also* S. Rep. No. 98-225, at 40 ("The sentencing provisions of current law were originally based on a rehabilitation model .... Recent studies suggest that this approach has failed, and most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate bases for sentencing.").

36 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1998 (1984) (codified as 18 U.S.C. § 3582) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."); *see generally Tapia*, 131 S. Ct. 2382 (holding that the SRA precluded a sentencing court from lengthening a defendant's prison term to promote rehabilitation); *but see* 18 U.S.C.A. § 3553(a)(2)(D) (West 2010) ("[T]o provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.").

37 *See* U.S.S.G., *supra* note 32, §1A1.4(a) ("One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct ... or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ....").

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 Lear, *supra* note 32, at 1194; Leonard and Dieter, *supra* note 26, at 273; The Commission characterization of the system as a charge offense system that "contains a significant number of real offense elements," U.S.S.G., *supra* note 37, §1A1.4(a), is belied by the real offense adjustments and considerations that are built into or accompany nearly every factor for determining a defendant's sentencing range, from his base offense level, *see, e.g.*, U.S.S.G., *supra* note 37, §4A1.1(d) (requiring the addition of two criminal history points if the defendant committed the instant offense while under any criminal justice sentence such as probation or parole). On its face and in practice, the Guidelines are a real offense system that has elements of a charge offense system.

44 *See generally* U.S.S.G., *supra* note 37, §1B1.1(a); *see also id.* §2A1.1(a).

45 *Id.* § 1B1.1(a).

46 *Id.*

47 *Id.*

48 *Id.* § 1B1.3.

49 *Id.*; *see also id.* § 5K2.21 (allowing a court to "depart upward" for dismissed or uncharged conduct).

50 *Id.* § 1B1.3(a)(1). However, the Guidelines do not explicitly provide that acquitted conduct is "relevant conduct." Indeed, the Guidelines provide only a bland and passive endorsement of acquitted conduct sentencing. *See id.* § 6A1.3 cmt. background ("In determining relevant facts, sentencing judges are not restricted to information that would be admissible at trial.") (citing *Watts* in support of the Guidelines' sentencing policy).

51 *Id.* § 1B1.3. The number of enumerated offense adjustments is fixed, and in some ways limited. For the Commission to account for the nearly unlimited variations and variables of conduct and harm would have rendered the Guidelines too complex, dense, and unworkable. *See id.* § 1A1.4(a) ("[N]o practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did [the Commission] find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases.").

52 *Id.* §1A1.3.

53 *See, e.g., id.* §§ 5K2.0-5K2.17.

54 18 U.S.C.A. § 3661 (West 2014) (emphasis added); *see also* U.S.S.G., *supra* note 37, § 1B1.4 (adopting § 3661). It is important to note that § 3661's broad unrestricted scope is not fully embraced by the Guidelines. In contrast to § 3661, the Guidelines discourage or limit a judge from considering a defendant's education, vocational skills, drug or alcohol dependence, gambling addiction, employment record, family ties, race, sex, national origin, creed, religion, socio-economic status, disadvantaged upbringing in determining a sentence or decreasing a defendant's offense level. *See Id.* § 1B1.4 cmt. background; *Id.* §§ 5H1.2-5H1.6, 5H1.10, 5H1.12.

55 *See* McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process); *see also* U.S.S.G., *supra* note 37, § 6A1.3 cmt. background ("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 the application of the guidelines to the facts of a case.").

56 *See*, United States v. Watts, 519 U.S. 148, 156-57 & n.2 (1997).

57 *Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra. Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra. Id.* at 149.

58 In *Williams v. New York*, the Supreme Court opened the door to acquitted conduct sentencing by affirming a trial judge's imposition of the death sentence after the jury recommended a life sentence for the defendant's first degree murder charge. 337 U.S. 241, 252 (1949). The Supreme Court held that it is consistent with due process and proper under New York law, for the trial judge to rely on additional information obtained by the probation department, but not presented to the jury, to impose a harsher punishment than had been recommended by the jury. *Id.* at 242-43.

59 *Watts*, 529 U.S. at 149.

60 *Id.* at 149-50.

61 *Id.*

62 *Id.* at 150-51.

63 *Id.* at 150 (citing U.S.S.G. § 2D1.1(b)(1) for triggering the bump).

64 *Id.* at 150-51.

65 *Id.*

66 *Id.* at 149 ("Every other Court of Appeals has held that a sentencing court may [consider acquitted conduct], if the Government establishes that conduct by a preponderance of the evidence.").

67 *Id.* at 170-71 (Kennedy, J., dissenting) ("For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court's failure to do so, I dissent.").

68 *Id.* at 151 (majority opinion).

69 *Id.* at 152-53 (citing and discussing U.S.S.G. §1B1.3 and 1B1.4).

70 *Id.* at 151-53.

71 *Id.* at 154. In making the point, the Court relied solely on *Witte v. United States*, 515 U.S. 389 (1995). In *Witte*, the defendant pled guilty to a marijuana distribution charge, but was sentenced based on a guideline range that was calculated by including uncharged conduct involving cocaine importation. *Id.* at 389. The defendant was later indicted for the cocaine importation conduct. The Supreme Court held that the later indictment was not barred by double jeopardy because the sentencing court's use of the uncharged cocaine conduct in increased sentence for the marijuana charge did not constitute "punishment" for the cocaine conduct. *Id.*

72 *Watts*, 519 U.S. at 154.

73 *Id.* at 155.

74 *Id.* (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

75 *Id.* at 156 (quoting Dowling v. United States, 493 U.S. 342, 343 (1990)).

76 *Id.* at 170 (Kennedy, J., dissenting).

77 *Id.* at 159-70 (Stevens, J., dissenting).

78 *Id.* at 164.

79 *Id.* at 169-70 ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.").

80 Duncan v. Louisiana 391 U.S. 145, 153 (1968).

81 United States v. White, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting).

82 *See, e.g.*, THE FEDERALIST NO. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."); *See also* Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[T]he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.").

83 United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

84 United States v. Mercado, 474 F.3d 654, 662-64 (9th Cir. 2007) (Fletcher, J., dissenting); *see also* United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) ("Stated differently, the jury is essentially ignored when it disagrees with the prosecution."), *overruled in part by* United States v. Kaminski, 501 F.3d 655, 657 (6th Cir. 2007). This outcome is not only "nonsensical" but violates the letter and spirit of our country's criminal jurisprudence. *Id.*

85 *See* 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, 182-83 (1996); *see also Coleman*, 370 F. Supp. 2d at 672; *see also* United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Government gets the proverbial 'second bite at the apple' during sentencing to essentially retry those counts on which it lost.").

86 *Coleman*, 370 F. Supp. 2d at 672 ("[C]onsideration of acquitted conduct skews the criminal justice system's power differential much in the prosecution's favor.").

87 *Id.* at 672-73.

88 *Canania*, 532 F.3d at 776.

89 United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990) ("[Relevant conduct sentencing] obviously invite[s] the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.") (quoting United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990)) (Merritt, J., dissenting).

90 530 U.S. 466 (2000).

91 *Id.* at 469 (noting that Apprendi later retracted the statement).

92 *Id.*

93 *Id.* at 469-470.

94 *See id.* at 468-69. New Jersey's hate crime statute provided for an "extended term" of imprisonment if the trial judge found under the preponderance standard that a defendant committed the crime to intimidate a person or group because of the person's or group's race, color, gender, or other protected classes. *Id.*

95 *Id.* at 470-71.

96 *Id.* at 471.

97 477 U.S. 79, 91 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process).

98 *Apprendi*, 530 U.S. at 491-92, 497.

99 *Id.* at 476-77 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

100 *Id.* at 482.

101 *Id.* at 478.

102 *Id.* at 483.

103 *Id.* at 483-84.

104 *Id.* at 492.

105 *Id.*

106 *Id.* at 493.

107 *Id.* at 494-95. The Court noted that New Jersey's hate crime statute turned a second-degree offense into a first-degree offense under the state's criminal code, and therefore subjected defendants to significantly heightened penalties. *Id.* at 494. In Apprendi's case, the statute potentially doubled Apprendi's maximum sentence from 10 years to 20 years--a "differential ... unquestionably of constitutional significance." *Id.* at 495.

108 *Id.* at 495-96.

109 *Id.* at 496; *see also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that it was constitutional for Congress to define recidivism, particularly illegal re-entry into the United States after being deported following an aggravated felony conviction, as a sentencing factor, and not an element of the offense).

110 *Apprendi*, 530 U.S. at 496 ("There is a vast difference between accepting the validity of a prior judgment of conviction [provided beyond a reasonable doubt] and allowing the judge to find the required fact under a lesser standard of proof.").

111 *Id.* at 490.

112 542 U.S. 296 (2004).

113 *Id.* at 301 ("This case requires us to apply the rule we expressed in *Apprendi* ....").

114 *Id.* at 298-300; WASH. REV. CODE § 9A.40.030 (1975), *amended by* Leg. Serv. 57-6151, 2d Spec. Sess., at 356 (Wash. 2001).

115 The 49 to 53-month range consisted of, under Washington state law, a "standard range" of 13 to 17 months for second-degree kidnapping and a 36-month firearm enhancement. *Blakely*, 542 U.S. at 299.

116 Blakely had abducted his wife from their home, bound her with duct tape, forced her at knifepoint into a box in the bed of his pickup truck, and ordered their 13-year old son to follow the truck in another car under threat of shooting his wife with a shotgun. *Id.* at 298. The judge held a three-day bench hearing following Blakely's objection to the sentence to obtain further testimony about the circumstances of the kidnapping. *Id.* at 300. The judge affirmed his finding of deliberate cruelty and the 90-month sentence at then end of the hearing. *Id.* at 301.

117 *Id.* at 300.

118 *Id.* at 303.

119 *Id.* at 303-04 (citations omitted).

120 *Id.* at 304.

121 *Id.* at 304-05.

122 *Id.* at 306.

123 *Id.*

124 *Id.* at 306-07; *see id.* at 307 ("This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene.").

125 *Id.* (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

126 *Id.* at 307-08 ("With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.").

127 *Id.* at 308.

128 *Id.*

129 *Id.* at 308-09.

130 *Id.*

131 543 U.S. 220 (2005).

132 *Id.* at 227.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 245.

138 *Id.*

139 *Id.* at 244.

140 *Id.* at 32 (quoting *Blakely*, 542 U.S. at 301)

141 *Id.* at 245-58.

142 *Id.* at 258.

143 133 S. Ct. 2151 (2013).

144 536 U.S. 545, 568-69 (2002), *overruled by Alleyne*, 133 S. Ct. 2151. The Court blessed the trial court's finding by preponderance of the evidence that a firearm was brandished during criminal offense for purposes of imposing enhanced sentence under 18 § 924(c)(1)(A). *Id.* at 567-68. The Court held that judicial finding of facts increase a defendant's mandatory minimum sentence within the statutory range does not violate the Constitution. *Id.* at 568-69.

145 *Alleyne*, 133 S. Ct. at 2155.

146 *Id.* at 2155-56. The statute sets a base minimum sentence of 5 years imprisonment; a minimum of 7 years imprisonment if the firearm was "brandished"; and a minimum of 10 years imprisonment if the firearm was "discharged." 18 U.S.C.A. § 924(c)(1)(A) (West 2006).

147 *Alleyne*, 133 S. Ct. at 2156.

148 *Id.*

149 *Id.*

150 *Id.* at 2158 ("*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*.").

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 2160.

156 *Id.*

157 *Id.* at 2161; *see id.* at 2160 ("It is impossible to dissociate the floor of a sentencing range from the penalty affixed to a crime.").

158 *Id.* at 2160.

159 *Id.* at 2160-63.

160 *Id.* at 2162.

161 *Id.* The court noted that its decision did not mean that "any fact that influences judicial discretion must be found by a jury," nor did it upset the "the broad discretion of judges to select a sentence within the range authorized by law." *Id.* at 2163.

162 *See, e.g.*, United States v. Booker, 543 U.S. 220, 240 n.4 (2005) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause ....").

163 *See, e.g.*, United States v. Milton, 27 F.3d 203, 211 (6th Cir. 1994); United States v. Dorcely, 454 F.3d 366, 369 (D.C. Cir. 2006); United States v. Ashworth, 139 Fed. App'x. 525, 527 (4th Cir. 2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).

164 *See, e.g.*, United States v. Mercer, 242 Fed. App'x. 932 (4th Cir. 2007) (relying on *Watts* to reject the defendant-appellants' Fifth and Sixth Amendment challenge to trial court having used acquitted conduct to enhance his sentence); United States v. Mercado, 474 F.3d 654, 661 (9th Cir. 2007) (Fletcher, J. dissenting) ("The majority's reliance on *Watts* as dispositive of Sixth Amendment issues is misplaced. *Watts* neither considered nor decided the [Sixth Amendment] issue currently before us."); *see also* People v. Rose, 776 N.W.2d 888, 888 n.3 (Mich. 2010) ("Although other courts have recognized that *Watts* is not controlling on the Sixth Amendment question, they have nevertheless been influenced by the other courts that erroneously presumed the contrary.").

165 *See infra* note 161.

166 United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) ("The underlying premises of *Booker* and its predecessors--*Jones, Apprendi ... and Blakely*--detract from *Watts'* continued validity.").

167 *Id.* ("*Apprendi* and its progeny, including *Booker*, have elevated the role of the jury verdict by circumscribing a defendant's sentence to the relevant statutory maximum *authorized* by a jury; yet the jury's verdict is not heeded when it specifically withholds authorization.").

168 Leonard & Dieter, *supra* note 26 at 280-281 ("[J]udges can find facts that contextualize an offense and enhance punishment but *the jury must first convict the defendant*.") (emphasis added).

169 United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008).

170 408 F.3d 672 (10th Cir. 2005).

171 *Id.* at 676.

172 *Id.* at 682-83. The court's finding bumped the defendant's offense level from 26 or 30, to level 32. *Id.* at 682. This resulted in a sentencing range of 121-151 months, as opposed to 63-78 months under the offense level that corresponded with the jury's verdict. The court imposed a 121-month sentence. *Id.*

173 *Id.* at 685

174 *Id.* at 683.

175 *Id.* at 684.

176 *Id.* at 685.

177 *Booker*, 543 U.S. at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *see also* United States v. White, 551 F.3d 381, 384-85 (6th Cir. 2008) (explaining that Post-*Booker* there is no Sixth Amendment violation when a judge looks at other facts, including acquitted conduct, to select a sentence within the statutory range).

178 Ring v. Arizona, 536 U.S. 584, 602 (2002) ("The dispositive question, we said [in *Apprendi*] 'is one not of form, but of effect.' If a State makes an increase in an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.") (quoting *Apprendi*, 530 U.S. at 494.

179 United States v. Pimental, 367 F. Supp. 2d 143, 153 (D. Mass. 2005).

180 *Id.*

181 *Id.* at 150-51 ("In a nutshell, this position, that one can consider acquitted conduct because the Guidelines are now advisory, seems to hark back to the period pre-mandatory Guidelines when there was a clear line between the trial sphere and the sentencing sphere").

182 *Id.* at 153 ("The *Booker* remedy decision made the Guidelines advisory .... But the principal decision in that case and those that had foreshadowed it reflected the Court's new concern with the formal procedures for determining facts essential to sentencing.").

183 *Booker*, 543 U.S. at 244.

184 *Mercado*, 474 F.3d at 663.

185 *Pimental*, 367 F. Supp. 2d at 152-53 (footnote omitted).

186 Peugh v. United States, 133 S. Ct. 2072, 2084-85 (2013).

187 *Id.* at 2085.

188 Gall v. United States, 552 U.S. 38, 49 (2007); *See also* Rita v. United States, 551 U.S. 338, 347-49 (2007).

189 *Peugh*, 133 S. Ct. at 2080.

190 *Rita*, 551 U.S. at 347, 356-59.

191 United States v. Ibanga, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006), *vacated and remanded*, 271 Fed. App'x. 298 (4th Cir. 2008); *See also* United States v. Canania, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("[F]ederal district court judges are often acting as automatons-mechanically enhancing sentences with 'acquitted conduct' pursuant to the now 'advisory' Sentencing Guidelines.").

192 *Canania*, 532 F.3d at 777 (Bright, J., concurring); *Rita*, 551 U.S. at 366 (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*.")

193 *Peugh*, 133 S. Ct. at 2083.

194 Alleyne v. United States, 133 S. Ct. 2151, 2156-58 (2013). The protection of a defendant's jury right must "not [be] motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." United States v. Booker, 543 U.S. 220, 237 (2005).

195 Amended Sentencing Memo at 22, United States v. Pimental, 236 F. Supp. 2d 99 (E.D. Va. 2002) (No. 99-10310-NG), *aff'd in part and rev'd in part*, 380 F.3d 575 (1st Cir. 2004).

196 *Mercado*, 474 F.3d at 664. *See also Id.* ("In the case of acquitted conduct, the jury has been given the opportunity to authorize punishment and specifically withheld it.").

197 *See id.* at 663 (Fletcher, J., dissenting) ("It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.") (quoting United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass. 2005).

198 *Cf.* Oregon v. Ice, 555 U.S. 160, 173 (2009) (Scalia, J., dissenting) (arguing that when a judge's fact-finding is essential to the imposed punishment, "[t]hat 'should be the end of the matter."') (quoting Blakely v. Washington, 542 U.S. 296, 313 (2004).

199 No one would ever dispute that a judge's power to punish a defendant facing a one count indictment rests on the jury returning a guilty verdict. If the jury returns a not guilty verdict, the trial judge would have no authority to punish the defendant using judge-found facts under a preponderance of evidence standard. It simply defies logic to believe this power vacuum is filed just because a defendant faces multiple counts.

200 *Booker*, 543 U.S. at 231. *See also* Ring v. Arizona, 536 U.S. 584, 605 (2002) ("[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").

201 *See Alleyne*, 133 S. Ct. at 2158.

202 *Jones*, 135 S. Ct. at 8-9 (2014) (Scalia, J., dissenting) (citations omitted).

203 *See* 519 U.S. 148, 158 (1997).

204 555 U.S. 160 163-64 (2009).

205 *Id.* at 173 (Scalia, J., dissenting) (quoting *Booker*, 543 U.S. at 223).

206 *Id.* ("I cannot understand why we would make such a strange exception to the treasured right of trial by jury.").

207 *Id.*

208 *Id.*

209 *See Jones*, 135 S. Ct. at 8; *Ice*, 555 U.S. at 173.

210 United States v. White, 551 F.3d 381, 393-94 (6th Cir. 2008) (Merritt, J., dissenting) (quoting *Jones*, 526 U.S. at 248 (1999)).

211 United States v. Baylor, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring).

212 Brief of Law Professor as Amicus Curiae in Support of Petitioners at 15, *Jones*, 135 S. Ct. 8 (No. 13-10026) (quoting United States v. Booker, 543 U.S. 220, 237 (2005)).

5 UDENCLR 173

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Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Rosalis Pimentel, Centro Oasis De Vida

Topics:

Rule for Calculating Loss

Youthful Individuals

Circuit Conflicts

Technical

Comments:

Please let individuals to go back in their feet after making a mistake . Families need their support

Submitted on: February 21, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Michael Plummer, InnerCity CCDC

Topics:

Rule for Calculating Loss

Youthful Individuals

Simplification of Three-Step Process

Comments:

There needs to be more mitigating factors when considering to have a youthful offender certified as a adult.

Submitted on: December 23, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Michael Plummer, InnerCity-FreeMinds

Topics:

Acquitted Conduct

Circuit Conflicts

Comments:

The sentencing structure should be fair and balanced leading to rehabilitation and re-entry.

Submitted on: January 26, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Frank Salvato, Law Firm

Topics:

Acquitted Conduct

Comments:

Any use of acquitted conduct should be prohibited under the Guidelines. Using acquitted conduct just rewards spurious charges brought by a one sided grand jury process. Juries are intelligent and reflect the considered judgment of our community. To rise above jury determinations and ignore their reasoned decision making is something only lawyers could imagine. Juries would be shocked to learn their not guilty verdicts are still being used to enhance sentences often in a draconian manner. This just perpetuates the feeling of the community that lawyers cannot be trusted. Using the grand jury process to return questionable charges within an indictment then using acquitted conduct from such charges essentially ignores the jury's reasoned determination. The advocates of use of acquitted conduct often point to "judicial discretion" in imposing sentences. This is a silly argument. Those same advocates most often remove any such discretion by charging people with mandatory minimum offenses.
This is an easy one--no relevance for acquitted conduct.
Thank you for considering.

Submitted on: February 4, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Michael Sorensen, Nonprofit Leader

Topics:

Youthful Individuals

Comments:

Brain science and understanding of brain development has expanded and so too should our sentencing practices. We know that individuals under the age of 18 are more likely to be impulsive and not fully understand the consequences of their actions. Moreover, juvenile adjudications are subject to different procedures across the country, and it is unjust to confirm such inconsistencies into a federal standard.

The Commission should not consider any sentence imposed for an individual under eighteen in the instant criminal history score. I support Option 3 which entirely excludes these convictions from the criminal history score.

Submitted on: February 8, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

William Stanton, Lawyer

Topics:

Acquitted Conduct

Comments:

I believe that acquitted conduct (both state and federal) should be precluded from being used to enhance a sentence or in aggravation at sentencing. I believe the earlier version of the amendment that was considered last year contained the appropriate language and provided better protection for defendants who had previously been acquitted.

Submitted on: February 22, 2024

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December 28, 2023

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

In re: Public Comment for Consideration
2023-2024 Proposed Amendments to the United States Sentencing Guidelines
Case Study – *United States v. Omari Patton*

Ladies and Gentlemen of the Sentencing Commission:

I write to you to offer public comment regarding the Commission's upcoming deliberations on the 2023-2024 proposed amendments to the federal Sentencing Guidelines. I have been a private criminal defense attorney since 2008, with a practice heavily-weighted in federal court. Prior to entering private practice, I served on active duty with the United States Air Force Judge Advocate General's Corps, where I also worked as a defense lawyer for two years of my four-year commitment. I received an honorable discharge from the Air Force in 2008.

I am writing to specifically address the Commission's consideration of the amendment to the Guidelines dealing with use of acquitted conduct for sentencing purposes.

In late October 2022, I was contacted by a federal inmate, Omari Patton. Mr. Patton has been in federal custody for over 21 years. This correspondence relates to my representation of Mr. Patton and, while my communication herein will rely upon publicly available information related to Mr. Patton, he has likewise given me permission to share his story with the Commission.

Mr. Patton was arrested as part of a drug distribution conspiracy in April 2002. He was tried, convicted and sentenced for his role in that drug conspiracy. Mr. Patton had a modest prior criminal record when he was indicted in 2002 and it was his first federal case, as well as his first drug conspiracy case. The federal judge who sentenced Mr. Patton imposed a period of thirty years in prison. While incarcerated, and as a result of the Commission's amendment to the drug sentencing guidelines, Mr. Patton's sentence was eventually reduced by approximately five years. He has nevertheless served an exorbitant amount of time in federal prison.

In 2017 and 2018, the government was conducting a multi-defendant drug investigation and Mr. Patton found his way onto their radar. While the investigation was primarily of individuals

"on the street," Mr. Patton was investigated for having acquired synthetic cannabinoids (hereinafter "K2") while in federal prison. At that time, what was known about K2 was in its infancy and criminal prosecutions of these offenses were infrequent. Mr. Patton was indicted in January of 2019 for his alleged involvement in acquiring K2 in the prison. Over the course of the pretrial phase, which was protracted due to the substantial number of co-defendants on the indictment, Mr. Patton discovered inaccurate or false information about himself contained in certain applications for wiretap authorizations. Specifically, it was alleged in several Title III applications and affidavits that Mr. Patton would be intercepted on audio and video surveillance inside a vehicle belonging to one of his eventual co-defendants. This information was obviously inaccurate (at best) or false because Mr. Patton had not been out of prison in over 15 years. Mr. Patton brought this inaccurate and/or false information to the attention of the Court, leadership at the United States Attorney's Office and DOJ ethics' officials on numerous occasions. The information he revealed did not reflect particularly well on the prosecutor of his case since the inaccurate or untrue details were contained not only in the affiant's statement of probable cause, but also in four separate applications for the Title III authorization signed by the prosecutor.

Eventually, Mr. Patton went to trial on the drug conspiracy related to the K2. The case was assigned to Judge Nicholas Ranjan in the Western District of Pennsylvania (hereinafter "WDPA"). A jury acquitted Mr. Patton in March 2022. ***In particular***, the jury seemed unconvinced that the government had proven Mr. Patton knew the K2 was a controlled substance, which was evident in the questions they asked the Court during the deliberations. Thereafter, Mr. Patton was returned to federal prison ostensibly to complete his federal sentence for the 2002 drug case. Mr. Patton was returned to FCI Fort Dix and was approved by the warden at Fort Dix for release to a Residential Re-entry Center (hereinafter "RRC"). His anticipated release from federal prison to the RRC was June of 2022.

The lawyer who prosecuted the K2 case, however, pursued reindictment of Mr. Patton, this time for having attempted to possess and provide contraband in a federal prison. The facts relating to the reindictment were identical to those underlying the drug conspiracy charge of which Mr. Patton was acquitted. In May 2022, a grand jury reindicted Mr. Patton at case 2:22-cr-121 in the WDPA (hereinafter "the contraband case"). For reasons that remain unclear, the contraband case was not assigned to the judge who had presided over the K2 distribution case, but, instead, was assigned to Judge William Stickman, IV.

Over the course of the 2019 K2 case and the 2022 contraband case, Mr. Patton suffered some very serious and life-threatening health problems related to clotting disorders and atrial septal defect (*i.e.* a hole in his heart). Upon receiving notification of the 2022 reindictment, Mr. Patton lost consciousness while in solitary confinement awaiting transfer back to western Pennsylvania and was rushed to the hospital in New Jersey. There, he underwent emergency open heart surgery. He was returned to Fort Dix to "recover" from open heart surgery, but was forced to remain in solitary confinement during his convalescence since the charges in Western Pennsylvania were pending. The recovery in solitary was excruciating and incredibly cruel.

Once Mr. Patton was returned to WDPA, and while awaiting trial for the contraband case, Mr. Patton applied for compassionate release from his sentence on the original 2002 case. Ironically, Judge Ranjan, who had presided over the K2 trial and acquittal in March 2022, was the

judge reassigned to Mr. Patton's 2002 case due to the retirement of the original judge. On January 10, 2023, Judge Ranjan – ***having intimate familiarity with the facts of the 2019 K2 case*** – nevertheless granted Mr. Patton's motion for compassionate release.

As would be expected, Mr. Patton's attorney for the 2022 contraband case filed a Motion to Dismiss the reindictment on the basis of Double Jeopardy. The government defended against the Motion to Dismiss on the basis of the fact that they would not be required to prove Mr. Patton knew the K2 was a controlled substance, thus it was not Double Jeopardy to re-prosecute him for the contraband violations. While facially the Double Jeopardy issue seemed very unfair, the government's position regarding Mr. Patton's knowledge was correct – indeed they did not need to prove Mr. Patton's knowledge that the K2 was a controlled substance in order to convict him of the contraband violations. And it was evident to the lawyers for both sides who had tried the 2019 K2 case, and were the same lawyers preparing to retry Mr. Patton for the contraband case, that the jury declined to convict Mr. Patton of the K2 conspiracy ***because the government had not proven Mr. Patton knew K2 was a controlled substance***.

In February 2023, Mr. Patton was tried and convicted on the contraband charges and thereafter awaited sentencing. I agreed to represent Mr. Patton at sentencing *pro bono* and entered my appearance at the end of February 2023. As such, I am intimately familiar with how Mr. Patton was sentenced for a crime of which he was acquitted.

When it came time for sentencing, the government sought application of a cross-reference under the contraband Guidelines where the contraband conviction stemmed from ***distribution of a controlled substance***. Specifically, the government advised the Probation Office that the Cross-Reference at U.S.S.G. § 2P1.2(c)(1) should apply and Mr. Patton's Guidelines should be calculated on the basis of U.S.S.G. §2D1.2 (the drug Guidelines), rather than under §2P1.2 (the contraband Guidelines).

Judge Stickman, who had not presided over the drug distribution case, agreed to apply the Cross-Reference and Mr. Patton was sentenced ***PURELY*** on the basis of conduct for which he had been acquitted.

The practice of permitting federal judges to consider acquitted conduct at sentencing has near-universal rejection – everything about it feels unfair and un-American. But Mr. Patton's case illustrates just how egregious and despicable the practice can be.

1. The practice of allowing acquitted conduct to be considered at sentencing gave a bitter-yet-powerful prosecutor a second bite at the apple after he had been fairly and squarely defeated in a previous trial.

2. The government was able to seek and obtain a sentence for an individual without having to meet the constitutionally-required evidentiary standard of proof beyond a reasonable doubt. The government was able to have someone sentenced for a crime of which they were acquitted and only had to do so by a preponderance of available evidence as is required by the Sentencing Guidelines.

3. The federal prosecutor, fully aware that the previous jury did not find that Mr. Patton knew K2 was a controlled substance – even having defended a pretrial motion on this ground by representing to the judge he (the prosecutor) need not prove Mr. Patton's knowledge – turned around at sentencing and asked the judge to find Mr. Patton did, in fact, know K2 was a controlled substance, albeit by a preponderance of the evidence[1].

4. The acquitted conduct upon which the Court relied in calculating Mr. Patton's Guidelines and imposing the sentence was presented in an ***entirely different case***. Whereas most acquitted conduct sentencings involve *enhancements* to Guidelines' calculations as a result of split-verdicts, Mr. Patton's *entire sentence* in the 2022 contraband case resulted from conduct of which he was acquitted in a separate federal trial, before another judge, heard by different jury.

5. In addition to applying a section of the guidelines related to a crime of which Mr. Patton was acquitted, the unfair practice of considering acquitted conduct enabled the government to pile on enhancements specific to the crime of drug distribution, a crime of which Mr. Patton was found not guilty.

In my opinion, Mr. Patton is the poster child for why this exercise of considering acquitted conduct at sentencing must be extinguished. In the course of preparing for Mr. Patton's sentencing, and briefing the many issues related thereto, as well as becoming familiar with the debate in federal criminal law circles regarding use of acquitted conduct at sentencing, I am aware of the fact that many prior "test cases" for eliminating this procedure often involved defendants with serious criminal histories and cases involving dangerous weapons and violence. While professionally I am a criminal lawyer, I am mostly just a regular American citizen like everyone else, and I understand the need for punishment in order to keep societal order and safe communities. To that end, I do understand the perspective of those who oppose this amendment. That said, I want to reiterate what I told Judge Stickman at Mr. Patton's sentencing hearing – the usefulness and functionality of the criminal justice system is only as good as its perceived fairness. If people think the system is rigged, it will not have the necessary deterrent effect to achieve its stated goals. The practice of sentencing people for conduct of which they have been acquitted renders a perception that the system is unjust. And perception is reality.

In an eloquent concurring opinion, Judge Millet of the D.C. Circuit wrote in 2015:

> The foundational role of the jury is to stand as a neutral arbiter between the defendant and a government bent on depriving him of his liberty. But when central justification the government offers for such an extraordinary increase in the length of imprisonment is the very conduct for which the jury acquitted the defendant, that liberty-

[1] It is noted that no actual evidence was presented at the contraband trial or attendant sentencing to prove Mr. Patton had knowledge that K2 was a controlled substance so, even by a lower evidentiary standard, the judge had no evidence upon which to base his conclusion that the cross-reference should apply. While this is a matter for direct appeal, the practice of considering acquitted conduct at sentencing is exacerbated by the commonly accepted exercise of "Presentence Report by Proffer," where the government simply tells the Probation Office what the "facts" are.

> protecting bulwark becomes little more than a speed bump at sentencing.

United States v. Bell, 808 F.3d 926, 929 (D.C. Cir. 2015).

Mr. Patton's case illustrates the runaway train that results when the "liberty-protecting bulwark" of a jury verdict is diminished to nothing more than a speed bump. The Guidelines calculation under §2P1.2(a)(3) would have resulted in an advisory Guideline range of 10-16 months' imprisonment. Instead, the cross-referenced drug Guidelines' advised a range of 63-78 months in jail. Mr. Patton was sentenced to 63 months in federal prison after having served over two decades there since 2002.

As a lawyer, criminal practitioner, American citizen – and, *especially* as a military veteran – it is my deeply-held belief that the integrity of the system must be paramount to all other considerations when it comes to this unjust practice of using acquitted conduct to determine someone's federal sentence. It is upon this conviction that I pray the Commission will, once and for all, put an end to the very iniquitous practice of imposing a sentence on someone for something of which they were acquitted by a jury of their peers.

If I can be of further assistance, or provide additional information regarding my work on Mr. Patton's case, I welcome the opportunity to be of service.

Sincerely,

Meagan F. Temple
Attorney-at-Law

cc: Omari Patton, Reg. No. 07410-068

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Mike Wilson, Kentucky, Western

Topics:

Youthful Individuals

Acquitted Conduct

Comments:

Youthful Individuals: The first presentence report I wrote was truly a trial by fire. That defendant had been 18 years old for three weeks at the time of his offenses of conviction (841s and a 924 (c)) and had amassed 12 criminal history points solely from juvenile adjudications alone. He was a legitimate Criminal History Category V at 18 years old. The Government moved under 3553(e) and the Court sentenced him well below the advisory guideline range. When he was released, he immediately began selling drugs and resumed out of custody gang involvement with new street credibility (fed convictions). He even got a few new neck tattoos. He died from injuries sustained in a car wreck after a high-speed chase with law enforcement within 3 months of release. He was 19 years old at his time of death.

Youthful offenders are dangerous and unpredictable. Options 1, 2, and 3 are flawed. They seek to remedy problems but create more. Option 1 has the potential to cause serious underrepresentation of criminal history (which in the case of juvenile histories, are often already underrepresented). Options 2 and 3 are worse and apt to actually create real issues in sentencing disparities, particularly as it relates to potential juvenile ACCA predicate offenses or adult convictions prior to age 18 for serious drug crimes or crimes of violence. Given workload constraints and ever dwindling resources, there will be little, if any, incentive to compile juvenile histories if either Options 2 or 3 are actually considered or adopted. Courts already take "age" and issues with criminal history into consideration when fashioning appropriate sentences when balancing the 3553(a) factors as a whole. Pretending what an individual defendant did or did not do prior to turning age 18 did not exist or is irrelevant to a calculation is playing "hear no evil, see no evil, speak no evil" and turning a blind eye to a very unpredictable and dangerous type of federal offender.

Acquitted Conduct: The first and only time I have utilized acquitted conduct involved a drug dealer who was charged in a two-count Indictment for selling drugs to two different people on

two different dates. One of the buyers (government's witness) did not comply with a trial subpoena after the defendant's girlfriend attempted to contact the buyer and pay the buyer not to show at the request of the defendant. The buyer did not show after a note was left in a mailbox. The defendant was "acquitted" of the count the Government couldn't prove but the Government later proved the defendant contacted the girlfriend to interfere with the witness prior to trial at sentencing. Options 1 and 2 would reward this type of conduct.

I believe that the use of the clear and convincing evidence threshold is sound (Option 3). The only issue I see with it is that U.S. Probation Officers, most of whom lack legal training or even know what the standard is, will be the gatekeepers who determine whether acquitted conduct meets the threshold. Additionally, juries don't always hear or see everything in discoverable materials (motions in limine, suppressed statements, etc.). The Rules of Evidence, which provide for what is admissible for trial, don't restrain sentencing hearings. I guess what I am getting at is that even with bumping up the burden of proof from a preponderance standard to a clear and convincing standard won't do much of anything because the lack of the use of the Federal Rules of Evidence at sentencing would likely negate any real-world impact via amendment. However, I think Option 3 is better than what exists now and facially provides more procedural due process to persons at the time of sentencing.

Submitted on: December 26, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Christine Aceron

Topics:

Rule for Calculating Loss

Simplification of Three-Step Process

Comments:

Dear Honorable Members of the Sentencing Commission,

This letter respectfully seeks your consideration in restructuring the Economic Theft loss table as defined under U.S.S.G. 2B1.1(b)(1). We have serious concerns about the current approach, most notably the sentencing disparities created by the current loss table and the subjective nature in which the loss table is applied. The current table has historically fostered sentencing disparities that fundamentally challenge the notions of justice in our country.

These concerns were compounded by the revisions to the Guidelines in 2005, which transformed the loss table into an even more punitive tool by amplifying the maximum level enhancement from 20 points to a staggering 30 points. This shift appears to contradict the fundamental purpose of the Sentencing Guidelines, raising the question of whether it accurately reflects the severity of economic theft offenses.

In its current form, the Guidelines result in significant disparities in sentencing outcomes between Theft, as specified under U.S.S.G. 2B1(b)(1), Burglary under U.S.S.G. 2B2.1(b)(2) and Robbery under U.S.S.G. 2B3.1(b)(7). At first glance, it would be expected that the loss tables for these crimes would be extremely closely correlated, but the current Guidelines exhibit a substantial deviation. These discrepancies are particularly inequitable considering the subjective nature of the calculation of loss for Theft under U.S.S.G. 2B1.1(b)(1). Notably, U.S. vs. Borrasi, 639 F. 3d 774 (7th Circuit (2011)), highlights that the Sentencing Guidelines aim to eradicate sentencing disparities and foster uniformity. This mission appears to be undermined by the current Economic Theft loss table, which engenders significant sentencing discrepancies.

Under the present Guidelines, a defendant charged with Burglary and Robbery under U.S.S.G. 2B2.1(b)(2) and Robbery under U.S.S.G. 2B3.1(b)(7), face a maximum of 8 level enhancement

for losses exceeding $9.5 million. Conversely, the Economic Theft loss table encapsulated in U.S.S.G. 2B1.1(b)(1), posits a significantly more punitive response to economic crime with a maximum enhancement of 28 levels. When aggregated with the base level offense of 6 or 7 levels and any supplementary enhancements, this provision could compel a defendant to confront sentencing ranging from 30 years to life in prison, largely dictated by the loss table.

To emphasize the unreasonable consequences of the current system, consider the following scenario. An individual contemplating the commission of securities fraud analyzes the Economic offense loss tables, and instead decides to physically steal from a company resulting in a $70 million loss. Under the Burglary Guidelines, this individual would accumulate a total of 20 points, which would result in a sentence of approximately 3 years. However, if the same person were to commit securities fraud for the equivalent dollar amount, their total points would sky rocket to 31 points which would result in a sentence of approximately 10 years. The same exact crime with the same dollar amount creating substantially different outcomes. Such disparities not only contradict the fundamental purpose of the Sentencing Guidelines, but also lead to incongruous outcomes that undermine the integrity of the judicial system.

This punitive disparity defies the spirit of the Supreme Court's ruling in U.S. vs. Gall, 552 U.S. 38 (2007), which advocated for a sentencing approach that is "sufficient, but not greater than necessary." This disparity seems to deviate from the Sentencing Guidelines' purpose of harmonizing sentencing outcomes as highlighted in U.S. vs. Booker, 543 U.S. 220 (2005).

Furthermore, the calculation of the loss under U.S.S.G. 2B1.1(b)(1) is often subjective and frequently leads to unjust outcomes, which is incompatible with our criminal justice system. The Sentencing Guidelines define loss as "the reasonably foreseeable pecuniary harm" that is "readily measurable in money." These losses should be a reasonable estimate of the monetary value which includes: "the fair market value of the property taken, or the cost of the property." These definitions directly contradict the subjective manner in which federal courts are interpreting loss and imposing sentences utilizing the Theft loss table. A clear instance of this subjectivity was shown in the securities valuation case U.S. vs. Velissaris (2nd Circuit (2022)), where the court stated that it was "largely immaterial" whether the defendant's calculations were "objectively correct or not," and that the prosecution "will not even attempt to provide a fair market value."

This approach directly contradicts the Supreme Court's assertion in U.S. vs. Williams (2017), where the court emphasized the need for clear and objective Guidelines to avoid arbitrary sentencing outcomes.

Therefore, we call upon the Sentencing Commission to implement a more objective and more just Economic Theft loss table with a more reasonable maximum sentence enhancement to accurately reflect the severity of Economic Theft offenses.

Submitted on: January 20, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Alfred Adkins, father of inmate

Topics:

Rule for Calculating Loss

Comments:

I, Alfred Adkins, a citizen of the United States of America, living in the state of Kentucky, am against the United States Sentencing Commission changing 2B1.1(b)(1) by having the sentencing guidelines be based on actual loss rather than intended loss. In addition, I petition the U.S. Sentencing Commission to remove from the commentary that intended loss should be considered at all in sentencing for crimes. All sentencing for such crimes should, in the future, and retroactively, be based on actual loss. Thank You

Submitted on: January 4, 2024

Feb 22, 2024

Written Statement of Angel Alejandro

Greetings, ladies, and gentlemen of the commission. My name is Angel Aljenadro, and I would like to thank you for the opportunity to share my story with you today as it pertains to youth, especially those who have come in contact with the justice system. As a youth justice advocate and a person whom the criminal justice system has directly impacted, I believe that I can offer a unique perspective to this panel, and I am grateful to provide my voice to contribute to the conversation that children are different and deserve to be treated as such.

I am the *Senior Development Manager, Grants* at the Campaign for the Fair Sentencing of Youth (CFSY), a national non-profit organization whose mission is *to catalyze the just and equitable treatment of children in the United States, we demand a ban on life without parole and other extreme sentences for children who cause harm; advance alternative responses that focus on their unique characteristics as children, including their capacity for change; and create opportunities for formerly incarcerated youth to thrive as adults and lead in their communities.*

The goal of the CFSY is to abolish the practice of sentencing children to juvenile life without parole (JLWOP) and other extreme sentences, which do not take into account a child's potential for change. Our strategic priorities are to change state laws through public education and litigation; to partner with litigators to ensure positive results before parole boards and resentencing judges; to educate judges, parole board members, and prosecutors about the need for age-appropriate consequences for children who commit serious crimes; to partner with private sector entities to change systems and secure resources to support formerly incarcerated youth to thrive outside of prison; to use the media to amplify compelling narratives and persuasive arguments from strategic spokespeople to influence key decision makers and to employ communications strategies to educate the public and decisionmakers; to track and disseminate resentencing outcomes, including racial disparities; and to increase awareness about the direct connection between slavery and mass incarceration.

My connection to the CFSY and the work to ensure that children are seen as more than the worst thing that they have ever done is highly personal to me as a formerly incarcerated child. As a member of the Incarcerated Children's Advocacy Network (ICAN), a national network of formerly incarcerated adults who were sentenced to extreme or life sentences

as children. It is imperative to use my lived experience as a person who grew up in federal prison to speak up for justice-involved youth and stand as an example of children's unique capacity for change, even those who may have caused harm. I cannot compensate for my wasted time or completely repair the harm I caused. Still, I would like to utilize my experience as more than simply a cautionary tale to children facing the same circumstances and choices that I met when I was a child; I hope that it can be used to inform the Committee about how children are different and should be treated as such, especially when it comes to accountability and sentencing so that they may have an opportunity to have a life outside of prison.

The ICAN network comprises almost 300 individuals across the country who all are examples of resilience and what can be achieved when provided with the opportunity for a second chance. These individuals are leaders and change agents in their communities, from operating food pantries, youth mentoring programs, credible messengers, violence interrupters, and advocates to leading restorative justice and diversion programs for justice-involved youth. Many in this network have gotten involved in this work immediately after coming home from prison, and some even created programs and curriculum while they were still inside. I joined ICAN upon my release from prison in 2019 and joined the CFSY as a grant writer five months after my release. Neither I nor those in the ICAN network are exceptions to the rule. We are unique in that we never gave up hope despite being told that we would die in prison; we are unique in our ability to thrive and be resilient in the face of overwhelming odds, but more importantly, we all stand as examples of children's unique capacity for change. Each of our stories is a testament to the adolescent development research that has found that children's brains and characters are still forming and that they do not have adult levels of judgment or the ability to assess risks as well as the capability of rehabilitation.

On February 9th, 1998, at 18, my life came to a screeching halt. On a Monday afternoon, on my way home from school, just steps away from my home, two FBI agents arrested me. As my father and stepmother came to the door, I was told that I was being charged with three counts of racketeering for a gang-related murder that had occurred when I was 15 years old. Six months earlier, three other individuals were charged with the same offenses. I was overcome with emotion and could not believe what I was being told. I was brought to the court building, and shortly after meeting my attorney, I was brought to a conference room with my lawyer and parents, where the FBI and Assistant United States Attorney tried to persuade me to become a cooperating witness. Through tears, I listened to them say that they didn't really want me because I hadn't been the actual shooter, that no one knew I had

been arrested, and I could go right back out into the street. My attorney would lean over and tell me that if I were her kid, she would make me take the deal they offered. I was to be arranged at 4 p.m., and I would have to decide by then. I was still crying when I told my attorney and the government representatives that I didn't need to wait until 4, and I had already decided. I rejected the offer. I could not jeopardize my family for the lifestyle that I had chosen. I believed I would be putting a target on my family and myself if I became a cooperating witness. I was told that I was a fool for rejecting their offer and that if the same offer were made to my co-defendants, they would jump on it; in fact, I was sitting in that seat because someone had already taken a similar deal. I was arranged, remanded, and sent to the county jail to await trial.

I spent almost three years in pre-trial detention, and I would have to go through a transfer hearing to determine whether I would be adjudicated as an adult or juvenile while my co-defendants were going through proceedings to determine whether they would be eligible for the death penalty. Due to my age, I was placed in one of the minor blocks at the county jail and essentially kept away from all of my co-defendants, who were in their 20s and 30s, with the exception of the law library and religious services. I had a few arrests before but had never been in prison or jail. I had little to no clue on how to fight a federal RICO case; I did not trust my attorney and had a blind allegiance to my co-defendants, who I thought were trying to protect me from what was to come. One such instance was while I was preparing for my transfer hearing, my attorney would continue to try to convince me to cooperate. When I confided in my co-defendants about my feelings, they suggested I should fire her. I didn't even know I could do that, but during one of my court appearances, when the judge asked me if I had anything to say, I stated that I did not believe my attorney had my best interest at heart. I thought she was secretly working with the government to get me to cooperate against my co-defendants, and I would like her to be dismissed.

In preparation for the transfer hearing two sets of psychologists interviewed me for the defense and government. The psychologists for the government diagnosed me with an antisocial personality disorder. I had no idea what this was but came to understand that it was a part of the pervasive and since disproven superpredator theory, which mislabeled myself and others as "fatherless, Godless monsters" who were incorrigible. Ultimately, I was adjudicated as an adult and was added to a superseding indictment with my co-defendants. My being separated in the minor block and going to court by myself for the transfer hearing garnered me a diminished level of trust from my co-defendants. My new attorney would keep me up to date on any developments and would provide me with discover materials as they became available, but as a person with a tenth-grade education,

it was difficult to understand a great deal of the materials and any case law that was pertinent to my defense.

After my adjudication to adult status, my lawyer brought me a plea offerof fifteen years. I understood the offer to be ten years for the conspiracy and a consecutive five years for possessing a firearm. I was told the offer was very generous, but I rejected it. I was only eighteen years old, and when I thought back, I could not even remember fifteen years of my life and thought that everyone I had ever known, including my siblings, wouldn't remember me when I got out. More compelling to me then was the fact that I would be pleading for things that I did not do. Not understanding federal jurisprudence and choosing to listen to my peers instead of my attorney made me believe that there was no way I would be found guilty at trial of murdering someone if I was not even in the physical location of the crime and never been in physical possession of the firearm, constructive possession was unfathomable at the time. Also, the consensus among my peers was that we would go to trial, and if anyone pleaded guilty, it would negatively impact the others. Later, my co-defendant, who was accused of being the shooter, pleaded guilty after being told he was eligible for the death penalty and had his case severed from all of us. His plea allocution was used against use at trial.

After I was found guilty and sentenced to life, I was sent to USP Allenwood in Pennsylvania with two of my co-defendants, where I spent approximately five and a half years before being transferred for fighting with another inmate. I was angry and depressed and would lash out if I perceived that people might be trying to take advantage of my age and size. There were times when I contemplated committing suicide. My time at USP Allenwood is where I would have to learn who I was and what I wanted to do with my life. With my two co-defendants as the only people I knew, I was still very much a part of the group that contributed to my incarceration. I would spend some time in the special housing unit (SHU) on a few occasions for fighting, which would ultimately get me transferred to USP Pollock in Louisiana, where I would spend another five years. USP Pollock would be my first trip on a plane and the first institution where I would be on my own and not know a single person. Pollock was very different from Allenwood in the level of violence; at the time, it was referred to as the "Slaughterhouse of the South." Within my first year of being there, there would be multiple murders, sexual assaults, racial and geographic riots. I had taken keyboarding and computer classes at Allenwood. In Pollock, I would move away from the gang and take more programming, e.g., additional computer classes, financial literacy, and industrial sewing. This led me to enter the Unicor program as a material handler and machine operator. It was my first real job where I would see a paycheck, and I took pride in

my work and felt I was growing as an individual. In an effort to avoid a lot of prison politics, I also began spending non-working hours in the hobby craft area, where I took classes in leatherwork, Native American beadwork, and acrylic and oil painting. These classes would come in handy as a way to pass the time in my cell during the frequent lockdowns at the prison. I was transferred to USP Beaumont in Texas as a part of a population increase, where I spent three years. At Beaumont, I could continue my work in Unicor, and because of my experience at Pollock, I received a better-paying position. Due to my consistent work and increasing time without an incident report my pay grade would also be elevated. At Beaumont, I would program at night, again taking computer and CDL classes. Even though I did not have a release date, I would still take available courses to prepare myself for a future where I would be free. I say available as many courses were designed for individuals with a release date, and I would be excluded due to my life sentence. I refused to give up hope that I would one day be released. I spent time in the law library trying to figure out case law, which was difficult, and spent much of my earnings from my Unicor job on jailhouse lawyers. I knew that I contributed to the harm that was caused but could not believe that my life was over practically before it had even begun. Most of the inmate population knew about my circumstances as being only 15 years old when the crime occurred and not being the person who pulled the trigger, so when the Supreme Court decided *Miller v. Alabama*, an older inmate brought me a copy of the decision to my cell for me to read because he knew that it would affect me. The Second Circuit adopted the decision in *Miller* and decided that it should be applied retroactive, and I was afforded the opportunity to be re-sentenced, where I was re-sentenced to 25 years. After my re-sentencing, I returned to Beaumont, had my custody classification changed, and was eligible for a medium. I was sent to FCI Raybrook in New York, where I spent approximately five years before release. While at Raybrook, I continued my education and enrolled in the Second Chance Pell Program. I received two Associate Degrees in Business Entrepreneurship and Individual Studies and maintained a 3.9 GPA. During the same time, I was a student tutor and maintained jobs in the laundry and education departments.

My reentry journey began from the moment that I was resentenced in 2014. As indicated above, I was already attending Adult Education Classes (ACE) offered by the BOP when I had no hope of coming home from prison. I signed up for classes I had previously been unable to take because of my sentence, like Resume Writing, Alternatives to Violence, and the aforementioned college classes.

Upon returning to society, I knew it would be an uphill battle. I knew that I was at a severe disadvantage, having grown up inside of prison. I would be returning home a mere month

before my 40th birthday. I had no social capital, documented work history, or typical work skills. I had never had to do anything for myself; I had never gone grocery shopping, paid any bills, had no credit history, or did not know how to open a bank account. The only identification I had ever had was my prison ID. My relationship with my parents and siblings had grown since my incarceration. My parents had since overcome their addictions, and I knew that I would have help when I got home, but I would be starting from scratch, and I did not want to be a burden to anyone. I began to save the money I earned from my prison jobs to have something to come home with. I began to reach out to childhood friends and family to inquire about potential employment opportunities so that I could hit the ground running.

Upon my release, I was transferred to a halfway house in the Bronx, NY. I got all my essential documents at the halfway house. I took Occupational Safety & Health Administration (OSHA) training classes at the Osborne Association to secure my OSHA and flagging certifications. Once I was placed in home confinement, I could travel and conduct job searches, and I continued to take job preparation, financial literacy, and resume writing classes. While taking courses at Osborne, I met with the Executive Director of the CFSY; I had been in contact with the CFSY since its inception in 2009, and they would update me on the budding movement to end juvenile life without parole and other extreme sentences for children. I would be asked to share my story, what I was going through, and what gave me hope. The CFSY has also been instrumental in recruiting a pro bono attorney to write an amicus brief for my resentencing. When the Executive Director learned that I was released from the halfway house, she met me, explained to me the importance of networking, introduced me to ICAN, offered to assist me in building my social network, and introduced me to the General Counsel at the New York Public Library (NYPL). After meeting with the General Counsel and sharing my story, I was offered a job at the NYPL. Not long after obtaining the job at the NYPL, I met again with the Executive Director and the Director of Strategic Partnerships of the CFSY. I was told about a potential job opportunity at the CFSY for a grant writer. I submitted a writing sample and accepted the position.

Before my arrest, my life was chaotic. My living situation was unstable, with my mother, father, and my father's wife battling substance abuse issues. I would bounce around from their apartments and periodically live with my maternal grandmother. I am the oldest of eleven children. My parents had three children while they were married, and when my father remarried, he had seven additional children and raised his wife's son as his own. As the oldest, I had become aware of what was happening with my parents, and when necessities were dwindling, I understood why. Around twelve years old, things came to a

head with my mother when the clothing she had brought me for school mysteriously disappeared during the night. This was not the first time things had gone missing after my siblings and I had gone to sleep. I needed to escape the madness of watching my mother's drug habit. I eventually grabbed some clothes and went to live with my grandmother. My grandmother worked two jobs and trusted that I would go to school in the mornings, but I misused her trust and would skip school. During one of those times, I was arrested for robbery at an arcade. I was released to my mother, and my grandmother sent me back to live with my mother. This was short-lived as my mother's habit had gotten worse, and her living situation reflected that with random people staying at her apartment and little to no food for my siblings and me. I would eventually leave to stay with my father, but when I got there, I quickly realized that things were not much better. My father worked odd jobs and would bring money home, but between the drug abuse and many mouths to feed, it wouldn't go far. At the time, I felt I needed to become a provider and went out into the streets to earn money. I began by buying and selling marijuana, which eventually led to me being introduced to the leader of the Latin Kings. At the time, I didn't know who or what the Latin Kings were. I would see him driving multiple vehicles and wearing expensive clothing and jewelry. If I wanted to reach that level, I would have to become acquainted with him, and I was introduced to him through a mutual friend. The meeting led to him becoming sort of an older brother. He would buy me clothes, introduce me to women, drive me around town, and introduce me as his younger brother. Eventually, he would share that "this was bigger than him," indicating his standing, cars, clothes, and money. He told me that he was a part of the Almighty Latin King & Queen Nation and that he wanted me to become a member. I immediately said yes, and when he brought me to the street where they would hang out, I learned that many of them were from my neighborhood, which only solidified that I would join. From that day, I would pledge my allegiance to the gang and, as the youngest member, would be dubbed the "future of the nation" and be groomed to one day become a leader.

My incarceration has impacted every facet of my life. As I said earlier, I have had to grow up inside of prison and have had to learn how to become a man behind those walls. My family life was chaotic before prison, but as my parents overcame addiction, our bond became stronger. As I grew behind those walls, so did my family, and over time, my family was the beacon that helped me navigate the choppiest of seas. Despite having a life sentence, I was determined not to let that change who I was fundamentally. I did not want prison to dictate who I could become. I was steadfast in my belief that I would not spend the rest of my life in prison; I was not irredeemable. I have witnessed extreme violence and maliciousness and have seen people normalize that kind of behavior. It did take me some time before I

began to realize this, and I stumbled along the way to discovery. I had turned 21 when I entered my first United States Penitentiary, and I was full of anger and despair and was admittingly lost. I had studied for and obtained my G.E.D. while preparing for trial.

I am not the person I was when I was a teenager. I invested in programming and devoted myself to rehabilitation. I can proudly say that the man that I am today couldn't be more different from the child that I was when I pledged my blind allegiance to a street gang and committed harm that would land me in prison. I understand the hurt and pain that I caused to my community, to the victim and his family, to my own family, and myself. I had more than two decades to contemplate what I had done, who I was, and who I wanted to become. I was determined not to let prison make me into a menace or monster. I knew I had to prove to myself and others that I was more than the worst thing I had ever done. I knew that I was far from irredeemable. If given an opportunity, I could be an example of redemption and resilience to my siblings and community and pull back the curtain on the facade of gangs and street life.

When I was a child, I was impulsive and reckless, and I couldn't be bothered to see anything beyond the confines of my neighborhood. I did not know about empathy and had no consideration for the feelings of others. My home and family were broken in many ways; I was a hurt child, and as the adage goes, hurt people, hurt people. Without understanding this concept, I was on a path of destruction. Today, I am a family man who works with and for the youth of my community. I strive to inspire those I encounter to help repair harm instead of causing it and share my story to deter those who may be in danger of following the path that I traveled. My work at the CFSY has allowed me to become proximate to restorative justice training and practices to address the harm I have caused. I am continuously building my network, gaining social capital and transferable skills to serve me in an increasingly competitive job market. I have had the opportunity to share my story in traditional and digital media and in person with lawmakers, influencers, and business leaders to help educate the public about the need for age-appropriate, trauma-informed accountability for children who commit harm, as well as the inequity, and disparities in the sentencing of children. I hope my story can somehow inform the changes this Commission is contending with and show that children can change despite their circumstances and move away from outdated one-size-fits-all sentencing structures and mechanisms that send the unequivocal message to young people that they are beyond redemption.

Sincerely,

Angel Alejandro

To: U.S. Sentencing Commission

Greetings,
I'm writing you today on behalf of the public addressing the Proposed priorities for the Amendment Cycle.
Our Answer is the same, the Public petitions for the following Amendments:

1. Eliminate the use of Acquitted Conduct / Dismissed Conduct in Sentencing.

2. Disbandment of all Conspiracy Charges.

3. Home Confinement, Ankle Monitor, or Alternatives-to-Incarceration Programs for First-time offenders, Low Recidivism Level inmates, and Minimum Recidivism Level inmates.

4. End All Mandatory Minimum Sentences.

5. Violent offenders and Immigrants receive the Amendments Retroactivity.

6. Youthful offenders serve no more than 3 years. Capped at 3 year sentence of incarceration, also receive programs with therapy treatment, and help receive housing in society away from abuse.

7. All Amendments Retroactivity, Effective Immediately for Both inmates already incarcerated in the prison system and new inmates to be sentenced.

Reasons:
The Public sees an Extreme Need to reduce costs of incarceration and the Mass incarceration causing overcapacity of prisons. To heal the brokenness that has transpired in this Nation.

Eliminate the use of acquitted conduct/dismissed conduct in sentencing. I can't believe this is even something that has to be discussed. Acquitted conduct is where the person is NOT guilty of it! So why would you be sentenced on it!?
Yet again another proof that lives are stolen for the Greed of officials.

Conspiracy Charges are of the same nature as acquitted conduct. Conspiracy Charges are ridiculous and NO where else valid in the World. The reason is Conspiracy charges are false. The reason why USA has Conspiracy Charges is to drain the American population of Resources, money, tax payer dollars, lives, family values, and hope.
We petition the Disbanding of All Conspiracy charges for those charges are False.
We the People, will no longer let lives be stolen for the Greed of officials.

We petition for home confinement, ankle monitor, or alternatives-to-incarceration programs for First-time offenders, Low Recidivism level inmates, and Minimum Recidivism level inmates. This will drastically reduce costs of incarceration and overcapacity of prisons. Thus solving many National issues. As of May 27, 2023 B.O.P. has placed 13,204 people into Home Confinement under CARES ACT. As of May 1, 2023 out of 13,204 people only 22 re-offended. That's a very clear answer, it is an effective tool that has proven to have worked the past three years of the CARES ACT.

The average housing cost of a single inmate per year is $50,000. That is far too much, especially with the nations failing economy verses the average home confinement cost of a single inmate per year is only $5,000. Dramatic differences. Switching to home confinement will save the Nation Millions possible Billons of dollars. Too much money is poured into the prison system causing Mass incarceration because the officials see more prisoners as more money in their pockets (Greed). How do we fix it? By placing more inmates on Home Confinement, enabling them to make amends by paying taxes, community service, working a job, and receiving the much needed therapy/reform programs through re-entry services. They can be contributing to helping our Nation and being productive members of society.

We petition for All Mandatory Minimum Sentences to END for already convicted inmates and future inmates.
The President promised in his Presidential Campaign to Completely End All Mandatory Minimum Sentences. Its time to make good on the Promises of our leaders. For if leaders can't keep their promises, then they are no leader at all and we don't need

We the people, petition that violent offenders be included for the Amendments, retroactivity.
Often what is classified as Violent offenders are those who stood up to their abusers. Refusing to be stabbed and beaten to a bloody mess anymore. Since no one helped them, they helped themselves, and they are punished for it.
The ones who were Brave stood up, and they deserve a medal for that.

A quote from https://www.loc.gov : "The Newcomers (Immigrants) helped transform American society and culture, demonstrating that diversity, as well as unity, is a source of national strength."
Why did American become like the other nations who persecute people who just crossed a line in the dirt?
God says all people are equal and just because they're foreigners, don't turn them away. They deserve the same amendments, retroactivity.

We petition for Youthful offenders to be released on Home Confinement or Ankle Monitor, and their sentence reduced to no more than 3 years. According to the damaging effects imprisonment causes on the youth. The current treatment of Youthful offenders is despicable. We are utterly appalled how they are handled by the Government.

The Future of our Nation are locked away to be abused and sexually abused. When the youth needed help from the older Generation. To receive treatment of therapy, rehabilitation, and safety to grow into healthy functioning adults. Instead they are locked up, receiving No help to become well. Most of the youth wish they were dead. Why is that? Because they had no chance, no mercy, no compassion, and no help to live in peace (the pursuit of happiness). Instead just more abuse, removed from outside abusers to inside the walls of prison staff abusers.
What are we doing to the future of our Nation? There is no nation if there is no people.

The Covid-19 Pandemic has given society a taste of what its like to be locked up. It is fact that the Mental Health of people dramatically spiraled down, especially in the Youth of the Nation. Most likely will last a lifetime. The Scars that you get when locked down never go away. How many youthful offenders are being mentally damaged? The answer is All of Them, and that's our future we are currently building. It needs to change and there is no better a time as Now.

1/3 of the U.S. population has been or is incarcerated.
2/3 of the public is left trying to support everyone? A set up for failure.
The U.S.A. has the highest number of incarcerated people in the world and its not even the highest populated Nation.

The devastation on our youth is unbearable. What was this nation build upon? Land of the Free and Home of the Brave. But now the generational curse is to be locked up. Where the standard is "You will walk in a little block and No one will hear you."

In darkness I lay,
In darkness I see,
I was only comforted by the voice of the Living God.
I'm tired, I'm tired of watching cities fall, of the nation crumbling.
I felt a great earthquake and I saw stars falling from Heaven destroying their great monuments.
God says "I will Not be ignored. Let My People Go."

We the people, petition for hiring more probation officers and start sending people on home confinement. Programs can be done either online portal or in person depending on available and mental/medical state of inmate.

This is substantial public comment. The guideline-writing process is evolutionary. We are expecting change through modification and revisions to the guidelines through submission of Amendments to Congress. Combating crime though effective and fair sentencing. The ultimate aim is the control of crime by stopping the breeding grounds for crime (prisons and abuse) and reform the existing inmates to be productive members of society (programs/learning to live right in society).

We the People, petition for these remedies to be retroactivity for current inmates and future inmates.
These We find the best course of action for our Nation. Thank you.

Respectfully Submitted,

01-03-2024
Date

From: ~^! BAILEY, ~^!WESLEY JR
Subject: [External] ***Request to Staff*** BAILEY, WESLEY, [redacted]
Date: Friday, February 16, 2024 7:05:11 PM

To: u.s. sentencing commission
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

brain science has evolved and so too should our sentencing practices. we know that individuals under the age of 18 are more likely to be impulsive and not understand the consequences of their actions. moreover, juvenile adjudications are subject to different procedures across the country, and it is unjust to bake such inconsistencies into a federal standard. the commission should not consider any sentence imposed for an individual under eighteen in the instant criminal history score.i support option 3 which entirely excludes these convictions from the criminal history score.

From: ~^! BANKS, ~^!FREDERICK H
Subject: [External] ***Request to Staff*** BANKS, FREDERICK, [redacted]
Date: Wednesday, January 10, 2024 2:34:19 PM

To: USSG
Inmate Work Assignment: None

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I object to the proposed sentencing amendments to the US Sentencing Guidelines as to the "intended loss" in USSG 2B1.1. I think the 2B1.1 Definition of Loss does not include intended loss as the court found in USA v. Frederick Banks 55 F.4th 246 (3d Cir 2023). When a court strikes down a guideline I don't think the commission should do a quick fix.

From: ~^! BARNES, ~^!CALIEB
Subject: [External] ***Request to Staff*** BARNES, CALIEB, [redacted]
Date: Tuesday, January 9, 2024 6:34:15 PM

To: Sentencing Commission
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

State acquittals should not be used against defendants in Federal cases. Once an individual has defended themsleves in a trial, the out come of said trial must be respected.

From: ~^! BARTUNEK, ~^!GREGORY
Subject: [External] ***Request to Staff*** BARTUNEK, GREGORY, [redacted]
Date: Sunday, January 28, 2024 3:19:07 PM

To: Commissioner
Inmate Work Assignment: T-Ord

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: Proposed Amendment #3: Acquitted Conduct (Part 1)

The Commission should not only prohibit the use of acquitted conduct, but also uncharged conduct, and charged but dismissed conduct. There is no logical reason to differentiate between uncharged conduct or charged but dismissed conduct and acquitted conduct. Clearly, "an acquittal is not a finding of fact." United States v. Watts, 519 US 148, 155 (1997). And, "there is no relevant difference [] between acquitted conduct and uncharged conduct." McClinton v. United States, 143 S. Ct. 2400, 2401 (2003).

It follows that it should not matter whether the alleged unproven conduct was part of the charged crime, or underlying conduct of the charged crime, or was in come way related to the charged crime, or was distinct in either time, space, or nature of the charged crime. The fundamental reason for not considering such unproven conduct in sentencing is that the defendant was not found guilty of the alleged criminal conduct, beyond a reasonable doubt, by a jury trial.

Furthermore, if you only address acquitted conduct, prosecutors will simply change their charging practices so they can bypass the acquitted-conduct prohibition, using uncharged or charged but dismissed conduct, instead, to unfairly increase a defendant's sentence.

In addition to modifying 1B1.3, 1B1.4, and 6A1.3, you necessarily need to modify other applicable sections of the guidelines that rely on such unproven conduct to increase the offense level. This includes, but is not limited to 2G2.2(b)(5), "the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor," which must be eliminated completely.

Over time, many judges and justices have raised important constitutional questions regarding the fairness and perceived fairness of allowing judges to use unproven criminal conduct to punish defendants more severely than they would, absent consideration of this conduct. See, e.g., McClinton at S. Ct. 2401 (collecting cases where many state and federal judges and justices have questioned the practice of using such conduct in sentencing). According to these jurists, allowing a judge, acting alone, to charge, try, convict and punish a defendant for such conduct, violated Due Process, the Right to Notice, Presumption of Innocence, and the Right to a Jury Trial, which are guaranteed under the Fifth and Sixth Amendments of the U.S. Constitution. Furthermore, this sentencing practice also violates Article III, Section 2, Clause 3 of the Constitution, which states in part, "The Trial of all Crimes shall be by Jury." However, the Supreme Court, time after time, has refused to consider this matter.

Respectfully Submitted,

From: ~^! BARTUNEK, ~^!GREGORY
Subject: [External] ***Request to Staff*** BARTUNEK, GREGORY, [redacted]
Date: Sunday, January 28, 2024 4:34:15 PM

To: Commissioner
Inmate Work Assignment: T-Ord

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: PROPOSED AMENDMENT #3: ACQUITTED CONDUCT (Part 2)

In Part 1, I discussed why the Commission should prohibit the use of any unproven conduct, including uncharged conduct, charged but dismissed conduct, and acquitted conduct. In Part 2, I will discuss why you can do this, why you should do it now, and how it interacts with statutory law.

Most likely, it will take combined efforts of Congress, the Supreme Court, and the Sentencing Commission to fully preclude the use of this unproven criminal conduct in sentencing. But the change has to start somewhere. And, since the Sentencing Commission's Guidelines played a prominent role in the rise of the use of such conduct in sentencing, you are in the best position to start the ball rolling. See, e.g., C. Murray, Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing, 84 S5. john's L. Rev. 1415, 1444, 1427-1437, 1450-1455 (2020) (describing the role of federal statutes and especially the Guidelines in the rise of acquitted-conduct sentencing). Clearly, what the Commission has done, it can certainly undo.

Most recently, in June 2023, the Supreme Court was again asked to address this important issue. See McClinton. But once again, the Court refused to act. One reason given by the Court in this case for their inaction was that they were waiting for the Sentencing Commission's determination regarding this matter. So, the ball's in your court. Therefore, I urge you to act, and change the Guidelines so that judges are discouraged from using this unproven criminal conduct in their sentencing decisions.

You asked how this would interact with 18 U.S.C. 3361. Currently, federal district judges have the discretion to either rely on or disclaim the use of unproven criminal conduct in sentencing. And since the Guidelines are ONLY ADVISORY, judges will still be able to exercise their discretion to consider such conduct, or not, in sentencing. And therefore, the amended Guidelines can coexist with both 18 U.S.C. 3361 and 3553, as they do now.

However, by making these changes to the Guidelines, instead of supporting the use of unproven criminal conduct to increase the severity of a sentence, they will discourage the use of this unfair unconstitutional sentencing practice. And, this will also result in achieving the primary goal of the Sentencing Guidelines, to remove the gross disparities in sentencing caused by this unjust sentencing practice.

Respectfully Submitted,

Gregory P. Bartunek

From: ~^! BARTUNEK, ~^!GREGORY
Subject: [External] ***Request to Staff*** BARTUNEK, GREGORY, [redacted]
Date: Monday, January 29, 2024 5:48:48 PM

To: Commissioner
Inmate Work Assignment: T-Ord

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: PROPOSED AMENDMENT #3: RESOLUTION OF DISPUTED FACTS

Currently, the sentencing guidelines allow judge-found facts to increase offenders punishment (length of sentence) "on the strength of the same evidence that would suffice in a civil case." RE Winship, 397 US 358, 364 (1970). Many jurists have opined that this is unconstitutional. But as of yet, the Supreme Court has refused to address this issue. Instead, it is waiting for you, the Sentencing Commission, to change the Sentencing Guidelines regarding the standard of proof that can be used in sentencing decisions.

I recommend that the Guidelines prohibit the use of judge-found fact to increase punishment, period. I doubt that you will do that at this time, so I ask that you change the level of proof to beyond-a-reasonable-doubt for facts used to increase punishment, but leave the standard of proof for any mitigating factors as is, clear and convincing.

"[J]urors in our constitutional order exercise supervisory authority over judicial function by limiting the judges power to punish. A judges authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." And yet, the government has virtually destroyed these constitutional protections which limit a judge's power to punish, through unfair charging practices, plea bargains, various statutes, and the Sentencing Guidelines.

Under the Guidelines, a judge can find you guilty of a crime, and use this judge-found fact to increase your punishment, without a jury trial, and without using a beyond-a-reasonable-doubt standard of proof However, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 US 99, 103 (2013(. And since "[t]he Guidelines are the framework for sentencing and anchor the district court's discretion," Molina-Martinez v. United States, 578 US 189, 198-199 (201), it follows that any fact which increases the length of a sentence based on these Guidelines must also be found by a jury using beyond a reasonable doubt, too.

Ten years ago, Justice Scalia, joined by Thomas and Ginsburg, dissented from the denial of certiorari in a case which used acquitted conduct under the Guidelines to significantly increase the length of the defendants sentence. See Jones v. United States, 574 US 948 (2014). "This has gone on long enough." Id. Now is the time to act. The Supreme Court is waiting on you to make a decision on this matter. See McClinton v. United States, 143 S. Ct. 2400 (2023). So, I ask that you follow my recommendation, and make a decision now. And make sure it's a good decision which is fair and respects our rights guaranteed under the United States Constitution!

United States Sentencing Commission

My name is Demetri Beachem, I was indicted out of Fort Wayne Indiana Northern District and am I currently being affected by this acquitted conduct/ relevant conduct matter. I was charged and indicted for Vicar Racketeering. After nearly 5 years of fighting the case I was offered a plea agreement for assault with a dangerous weapon, attempt assault with a dangerous weapon and 924(c) and the remaining counts dismissed. With me being a first time offender with no criminal history my offense level for 2A2.2 Aggravated assault my instant offense of conviction was offense level 14. The guideline range was 15 to 21 months.

With the help of the prosecutor's office and probation department they recommended that I be sentence to the exact charge that was dismissed in the agreement 2A2.1 attempted murder, which was one of the main reasons my counsel advised me to plead out. The judge deem it was appropriate and granted the request and it raised my offense level from 14 to 33. I went from guideline range 15 to 21months to an increase of 135 to 168 months for the single count. I was sentence to 288 months with no serious or critical injuries.

The awareness is that this "conduct" by the court should not be acceptable and permitted. The courts are using this as a manipulation tactic to induce defendants to plea out to a charge that may be a lesser offense because of the lack of evidence but still being able to sentence them for the dismissed conduct for an enhancement towards there sentence. The system is not upholding there end of the bargain and handed out an extreme amount of time for acquitted/relevant conduct that could not have been proven.

We all know that I am not the only one who has experience this problem but when is enough going to be enough and change going to come. I appreciate the opportunity to speak out and give my opinion and advice. I do ask is change going to come for this issue. Acquitted conduct shouldn't be permissible to use as an enhancement when conduct was not proven.

Thanks again for the opportunity.

Demetri BeachemSr

[redacted]

FCI Milan

P.O Box 1000

Milan, Michigan 48160

United States Sentencing Commission

1. The commission seeks comment on whether it should prohibit the consideration of acquitted conduct for purposes other than determining the guideline range. Should the commission prohibit a court from considering acquitted conduct in determining the sentence to impose within the guideline range or whether a departure from the guidelines is warrant?
    - Understanding that acquitted conduct is a charge that you was either found not guilty of at trial or was dismissed by rule 29 motion and since that charge has no merit to you any longer, choosing to use the same guideline range as to the dismissed charge to determine a sentence is a complete miscarriage of justice.
    - I believe that acquitted conduct should not be considered in determining a sentence. Allowing the courts to increase a guideline range for the same conduct or charge that was dismissed or acquitted of at a trial should be against the law. It's going up against charges that don't exist but you receive an increase amount of years for it.
2. Should the commission go further by prohibiting the consideration of acquitted conduct for ALL purposes when imposing a sentence?
    - Yes, I suggest that the United States Sentencing Commission prohibit the consideration and use of acquitted conduct for all purposes when imposing a sentence. Sentencing a defendant to a certain amount of time for a charge that was either dismissed or acquitted at trial should make the sentence imposed a violation of the constitution.
3. Option 1 of the proposed amendment brackets language that would exclude from the definition of "acquitted conduct", conduct establishing in whole or in part, the instant offense of conviction that was admitted by a defendant during a plea colloquy or found by a trier of facts beyond a reasonable doubt. This exclusion is meant to address cases in which conduct underlying an acquitted charge overlaps with conduct that establishes the instant offense of conviction. The commission seeks comment on whether such an exclusion is necessary to address overlapping conduct or should the commission provide additional or different guidance to address overlapping conduct.
    - An exclusion is necessary in address overlapping conduct because beyond the language judges need to understand that using acquitted conduct as relevant conduct, a tool to enhance a person sentence for a charge that was dismissed by the prosecutor's office and court would result in a fraudulent plea and or sentence.
    - For example With an instant offense of conviction having a guideline range from 30 to 36 months but using acquitted conduct a charge that may overlaps with another charge and that charge sentencing range is 135 to 168 months, why would it be appropriate for the court to

sentence anyone to a higher guideline range when the offense of conviction was for 30 to 36 months. Addressing the cross reference of statutes as well should not be warranted when the evidence of a charge does not exist.

- Overlapping conduct from an acquitted charge is a big issue that's occurring throughout this federal system. Courts should not be warranted the ability to enhance anyone sentence due to a charge that he or she was found not guilty of or dismissed by motion of rule 29 due to plea agreement.

I want to thank the United States Sentencing commission for asking for comments regarding this matter. These have been a manipulation and inducement tools for the prosecutor's office for a long time now and with the courts not understanding or seeing what they are doing, it causes an overall discretion and an illegal sentence.

From: ~^! BELL, ~^!TRAYONE LEFFERIO
Subject: [External] ***Request to Staff*** BELL, TRAYONE, [redacted]
Date: Tuesday, January 9, 2024 1:49:16 PM

To: whom it may concern
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

GOOD AFTERNOON SENTENCE COMMISSION:..I HAVE FRAUD CHARGES IN WHICH I WAS INDICTED ON IN 2017...MY INDICTMENT SAYS I DEFRAUDED THE GOVERNMENT OUT OF 423,000.00...WHEN I WENT TO TRIAL ,THE COUTS CHANGED MY AMOUNT TO TO 823,000.00 AND WHEN I WENT TO SENTENCING THE GOVERNMENT SAID MY INTENDED LOSS WAS 1.6 MILLION DOLLARS..AND SO BECAUSE OF THAT I RECEIVED A 14 LEVEL ENHANCEMENT...BECAUSE OF THE INTENDED LOSS ,THEY CHANGED MY AMOUNT TWICE WHICH ALLOWED ME TO BE SENTENCED TO 14 1/2 YRS IN PRISON...SO REALLY I WAS SENTENCED TO GHOST MONEY ,MONEY THAT I NEVER STOLE OR TOOK FROM ANYONE...I PRAY THAT YOU GUYS WOULD NOT GO FURTHER WITH TAKING THE INTENDED LOSS FROM THE COMMENTARY AND PLACING IT IN THE GUIDELINES,BECAUSE THAT ONLY GIVES THE GOVERNMENT POWER TO INCREASE PEOPLE'S SENTENCED BY A TREMENDOUS AMOUNT OF TIME FOR SOMETHING THEY NEVER DID OR FOR MONEY THEY NEVER RETRIEVED...IF I WOULD HAVE NOT RECEIVED THIS 14 LEVEL ENHANCEMENT ,I WOULD BE HOME WITH MY FAMILY TODAY ,BUT INSTEAD I'VE BEEN DOWN 7 YEARS AND STILL HAVE 5 MORE TO COMLETE...I PRAY TO GOD THAT YOU GUYS WOULD NOT AMEND THAT INTENDED LOSS TO THE GUIDELINES...THANKS AND GOD BLESS!!!

From: ~^! BETSINGER, ~^!DALTON
Subject: [External] ***Request to Staff*** BETSINGER, DALTON, [redacted]
Date: Thursday, January 4, 2024 9:33:58 AM

To:
Inmate Work Assignment: Commissary

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I see that the Sentencing Commission has proposed a new ammendment regarding youthful convictions, the post that was made to us here didnt detail anything about the ammendment it only said we are able to send our thoughts or comments regarding it.
Well this is my story, from the time i was 18 to 24 i was just young dumb and stupid. I started experimenting with alcohol when i was in highschool partying with friends my dad was in the army and he was gone all the time most of my teenage life he was away from home at work or overseas and it led to have no real athortative figure in my life.. So i fell into the wrong path. I started smoking marijuanna after i started drinking i left home i was doing good had a girl friend and tried to start real life had a child but things fell apart she left me took my son and the next thing i know i started living on the streets basically with no life experience i fell into a terrible crowd. Next thing i know im doing Meth and thats when my life ended as i new it, and i was a full blown drug addict then i begain selling small ammounts of meth and marijuanna mainly to support my drug habbit and the habbits of my friends. I never was making thousdand or millions of dollars i wasnt living the lavish lifestyle of a drug dealer i was riding around my little town in northeast iowa on a biycicle and bouncing around living on friends couches and in hotels.. I caught my first charge in my entire life in 2015 for a small amount of meth that was in seperate baggies and was charged with pos with intent to deleiver meth. I was 21 years old my frist felony even though it was a felony i was released back to the streets put on probation with no where to go and no structure in my life nothing changed i was thrown back into the durg life i had no one and nothing i was still addicted to Meth so i had no chance to change i got arrested again a year later with 3 grams of marijuanna again in seperate baggies and i was not smart enough to know better and it was my 2nd time in my life in jail i was offerd a plea deal for a 5 year felony suspened sentence and was relased to the halfways house the next day. So i took the plea because i wanted out of jail. I felt like i got another slap on the wrist and nothing was going to happen to me again still never had a chance to get rid of my drug habbit. I floated through the halfway house and then the next year i was really hooked on meth hard thats all i wanted to do everyday was get meth and in order to get meth i had to sell more so i started buying and selling a little bit larger amounts nothing major but i was caught with 80 grams and had a 28 gram controlled buy done on me.. Long story made shorter I was federally indicted and sentenced to the career offender enhancement and was given 262 months and 5 years probation ran consecutive to a 10 year state prison sentence for one of the charges they used to make me a career offender and was made to do a year in state prison before i even started my Federal sentence i caught my charge December 2017 my Federal time did not start counting until Febuary of 2020 i was never creditied my county jail time or nothing.... I was 24 years old when i caught this case, i was never put in prison in my entire life until this point. My frist charge was 2 years before my federal charge. I was given two felony suspended sentences for small amounts of drugs that in other states you would just be given a ticket for.. I was just a young dumb drug addict i was not a danger to society. I was just a lost kid hooked into a terrible lifestyle, i was never given the chance to try rehab or never given the chance to help me get off the drugs. I was placed in a halfway house full of people still wantin to be criminals. Now that ive been hammered with basically 30 years of prison time for having been caught with a total amount of drugs that in most states i wouldnt of never even went to state prison for, but because

im from Iowa i get 262 months in Federal prison an get labeled a career offender.. Ive changed my life around in prison.. Im no longer ever going to touch another drug again in my life.. I just feel like i deserve another chance at life. Im a prime cannidate for any sort of releif or a ammended sentence for a youthful conviction. I dont know what you consider a youthful conviction to be, but i was 24 years old when i caught my federal sentence. I was given a career offender enhancement and never served a day in prison until now.. I dont think its right that i was this harshly sentenced when people in other states dont get this kind of sentence. Thank you Dalton Betsinger

From: ~^! BLANKS, ~^!TYREE MAURICE
Subject: [External] ***Request to Staff*** BLANKS, TYREE, [redacted]
Date: Thursday, February 15, 2024 9:33:58 AM

To:
Inmate Work Assignment: Food Service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In 1999 when I was released from the South Carolina Department of Juvenile Justice I was notified that my Juvenile record would be sealed and couldn't be used against me in the future, but when the federal probation office did my PSR beside one(1) adult conviction all my criminal history points came from non-violent juvenile offenses. I feel that is unconstitutional and unfair. I've been incarcerated going on 22 years for an offense I committed when I was 18 years old and I'm tired and ready to start my life before I'm to old to have one . Please could someone help me! thank you

From: ~^! CASPER, ~^!BRIAN KEITH
Subject: [External] ***Request to Staff*** CASPER, BRIAN, [redacted]
Date: Thursday, January 4, 2024 9:05:31 AM

To: Judge Reeves, U.S.S.C. Chairman
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In 2006 I was sentenced to a 40 year sentence for a non violent drug possession charge. This sentence was due in part to a 2 point enhancement that was adopted by the Court for possession of a firearm during a drug crime. This is the same gun that I was found not guilty of by the jury after a one week trial including a 924(c) charge.
The people of the United States invest millions of dollars per year in taxes to allow our system of justice to work, meaning that we have the opportunity to take a criminal case to trial. Yet that trial and possible acquittal does nothing to prevent the Court from still imposing a sentence based on the conduct in which the defendant was found not guilty. So why do we even offer a defendant a trial ? Why not just charge the defendant and then sentence them ? This process goes against everything that the justice system is supposed to be based on, Due Process!
And these enhancements are usually of major impact. In my case, a 2 point enhancement raised my sentence 13 years and even today if I was to be resentenced without the 2 point enhancement I would receive a sentence 65 months lower than what I received in 2006, therefore not only should the Acquitted Conduct Amendment be adopted, it should be deemed retroactive because this process has never been Constitutional if it is deemed so now. Nothing in the Constitution has changed so only the perception of the public has.

From: ~^! CATALON, ~^!CALVIN JAMES JR
Subject: [External] ***Request to Staff*** CATALON, CALVIN, [redacted]
Date: Friday, February 16, 2024 9:49:17 AM

To: ussc
Inmate Work Assignment: rec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

juvenile criminal history
due to brain studies and supreme court ruling on how youthful individuals are sentence today. i am in support of option 3. also with the inconsistency of state to state courts in the handling of juvenile being tried as adults and inconsistency of juvenile adjudication keeping records of juveniles i am again in support of option 3. being that some states dosent allow juveniles to be tried as adults and others madate it for different reason such as age, crime, and prosecutors discretion i am again in support of option 3. for the standard of federal sentencing all the inconsistencies in juvenile courts treating of our kids,i am in support of option 3.

From: ~^! CHEEK, ~^!ERIC MICHAEL
Subject: [External] ***Request to Staff*** CHEEK, ERIC, [redacted]
Date: Monday, January 8, 2024 10:05:09 AM

To: commitee
Inmate Work Assignment: compound orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I see that you are addressing Acquitted Conduct which is a GREAT thing. But will it help people like myself whereas i was charged with U.S.C. 841 (b)(1)(A) (MORE THAN 280 GRAMS OF CRACK COCAINE). I was convicted by a jury by way of special verdict form of U.S.C. 841 (b)(1)(B) (AT LEAST 28 GRAMS BUT LESS THAN 280 GRAMS OF CRACK COCAINE). But at sentencing the judge said to hell with the jury's finding of less than 280 grams and held me accountable for 1.7 kilograms which is an enormaous amount from "AT LEAST 28 G BUT LESS THAN 280 G." Now i've wondered how the judge was able to ignore the verdict form and if he was able to not honor the jury's verdict what is the point in going to trial at all. Then what happened to trying to fix the "TRIAL PENALTY" that defendants get hit with just for using there right to trial? But if and when you do fix the Acquitted Conduct can you please think about the people like my self that got a lesser included offense that the judge just decide out of spite to ignore the verdict's drug amount rendered. Thank you for whatever you do because it still helps others even if not myself. Oh and a large number of judges are spiteful so can you all not make EVERYTHING to the judges discretion.

From: ~^! CHERRY, ~^!MARK
Subject: [External] ***Request to Staff*** CHERRY, MARK, [redacted]
Date: Thursday, January 4, 2024 9:05:33 AM

To:
Inmate Work Assignment: none

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The fact that they use juvenile cases to give you more criminal history points is truly unfair. I was told as a ward of the state that those cases would never be used against me because supposedly they had been sealed but that is not true. That is truly an issue that needs to be addressed. Also for people that have been convicted of federal crimes as juveniles, it should also be taken into account that their brains were not fully developed until the age of twenty five. So they should be shown leniency and compassion so that they can have a chance at rectifying their wrongdoing.

From: ~^! CHRISTIANSON, ~^!MICHAEL
Subject: [External] ***Request to Staff*** CHRISTIANSON, MICHAEL, [redacted]
Date: Tuesday, January 9, 2024 8:05:05 PM

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To: U.S. Sentencing Commission
Inmate Work Assignment: UNICOR 1

ATTENTION

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Inmate Message Below

FROM: Inmate Michael A. Christianson
[redacted]
P O BOX 5000
FCI Pekin
Pekin, IL 61555-5000

COMMENT IN SUPPORT OF OPTION 1 RELATING TO THE AMENDMENT OF USSG Section 1B1.3 RELATING TO ACQUITTED CONDUCT

I support OPTION 1 to amend USSG Section 1B1.3(c)(2) to preclude the use of acquitted conduct at sentencing. It is a terrible injustice to every American who confronts a judge--and extremely harsh penalties (at least for men)--at sentencing, who is *then* unfairly compelled to face an even harsher sentence later for allegations of criminal wrongdoing that where determined to be unsubstantiated by a public jury, after a criminal trial, using rules of evidence, on the merits, with a standard of proof of Beyond A Reasonable Doubt earlier. This has never made any sense. It is a rule of law that is vindictive and hateful. The United States already exacts 10 pounds of flesh for every crime it convicts upon.

Amending this Guideline pursuant to OPTION 1 is a start, although it could be much improved. Acquitted conduct should--for instance--include EVERY State and U.S. Territorial acquitted conduct as well. But this OPTION 1 merely allows for excluding acquittals involving the thirteen Federal Circuits. You're being stingy.

The USSG is already the harshest set of sentencing guidelines in the democratic world--a public travesty, and a personal humiliation--to each and every one of you and your children. Before, the victims supposedly had no voice. But now they have ALL the voice and make a mockery of justice. Shame on you! Let God Judge Your Hearts. Because our society is paying the price.

From: ~^! COBB, ~^!CHRISTOPHER DAVID
Subject: [External] ***Request to Staff*** COBB, CHRISTOPHER, [redacted]
Date: Wednesday, January 10, 2024 9:19:14 AM

To: Commentary, 4C1.1 Changes
Inmate Work Assignment: lbr pool

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing on concern over the expansion of the definition of sex offender contained in the proposed guidelines amendments currently open for pubic comment.
First, the definition of sex offender already used is overly broad, as non-contact offenses are the primary group that are excluded, despite the fact that non-contact "sex offenses" have a recidivism rate of only 4.5% (see Bureau of Justice Statistics, 2021 ed. & This Commission's Own 2021 Report on Non-Contact Sexual Offenses). As this percentage is comparable to the percentages of re-offenders that are present in non-excluded groups (as determined in this Commission's 2023 Amendment cycle "Statement of Reasons" - see Amendment 821 Part B (p.7); the categorical exclusion of a group that includes non-contact pornography offenders represents an irrebuttable presumption (something that I complained of in last year's public comment period).

The Supreme Court has repeatedly condemned the practice of setting up a set of categorical exclusions from accessing a benefit relating to both property and liberty interests.
The following cases all involve the failure of government officials to provide an opportunity to refute the appropriateness of the exclusion by category of persons from accessing a benefit where the exclusion is effectively mandated by rule or statute and the underlying presumption is demonstrably false (as here); see. e.g.: BOARD OF EDUCATION V LaFLEUR, 414 US 632 (1974); VLANDIS V KLINE, 412 US 441 (1973); STANLEY V ILLINOIS, 405 US 645 (1972) (all invalidating categorical exclusions from property interest benefits); and OLIM V WAKINEKONA, 461 US 238 (1983); KENTUCKY DEP'T OF CORR. V THOMPSON, 490 US 454 (1989); and SANDIN V CONNER, 515 US 472, 115 S.Ct. 2293, at 2298 (1995) (applying the same irrebuttable presumption principles to liberty interests involving prison conditions and length of confinement).

As such, the categorical exclusions from the benefit of a 2 point reduction listed in USSG : 4C1.1(a)(2)-(10) violate due process, and this Commission not only, therefore, does not have the authority of expanding the definition so as to add more people to it, but never had the authority to create these exclusions in the manner that was implemented to begin with.

Due to these issues, I am presenting to this Commission that it should not only NOT adopt the expanded definition of sex offender offered in this year's Amendment cycle, but that it should remove all of the exclusions in 4C1.1 for the fact that they violate the 5th Amendment on both Due Process and Equal Treatment principles.

Thank You,

Christopher D Cobb
(Please publish this message in its entirety for broad and unfettered public access)

From: ~^! COLBERT, ~^!CLABORN
Subject: [External] ***Request to Staff*** COLBERT, CLABORN, [redacted]
Date: Saturday, January 13, 2024 7:19:23 PM

To: U.S. Sentencing Commission (public comment)
Inmate Work Assignment: AM KITCHEN

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In the section proscribed for the amendments of computing criminal history for conduct committed prior to the age of eighteen. I would like to ask the sentencing commission to utilize "option 3". Every person circumstances are different and it creates an unfair application of sentencing factors that counts some juvenile adjudications while in certain instances doesn't count others. In an adult prosecution, juvenile adjudications should not subject the person to a more harsh penalty. This is a contradiction to use a corrective measure to subject the person to a more harsh penalty for juvenile conduct that was committed prior to the age of eighteen, but at the same time considering to amend part B the Sentencing of Youthful Offenders to provide for a provision that allow the Courts to consider a downward departure for the the age or youthfulness of the offender. Especially when these factors can be considered anyway in the instances were there is a under representation of criminal history. We would like for the U.S. Sentencing Commission to promulgate both aspects targetting juveniles. The Commission should do away with counting juvenile adjudications especially when the majority of the times that they are applied it is against the youth because juvenile adjudications are not normally counted against adults. To continue to count the ones that are in the five year window still targets the youth in ways that doesn't affect the adults with juvenile priors that are beyond the ten year window. Option 3 for computing criminal history and allowing for a downward departure for age or youth.

From: ~^! COX, ~^!DAVID LEE
Subject: [External] ***Request to Staff*** COX, DAVID [redacted]
Date: Sunday, January 28, 2024 5:48:31 PM

To: Sentence Commission
Inmate Work Assignment: Psycology/Suicide Watch

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The following correspondence is in regard to request for comment on up-coming proposed guideline amendment(s), specifically, "Acquitted Conduct". I received a federal sentence in 2010, whereby, I received 15 years more due to the use of Acquitted Conduct. Please use my case, U.S. vs. David Lee Cox criminal case no: 5:09-CR-37-1-1B0, to look at the effect of Acquitted Conduct.

SUMMARY OF CASE: On October 14, 2009, I was convicted by jury trial, using special jury verdict sheet, of Less than 500g of cocaine and NO AMOUNT of crack. Based on the jury verdict I would have been offense level 24, criminal history II, resulting in a guideline of 56-71 months, and I faced a statutory maximum of 240 months. (SEE &841(b)(1)(C)). However, the PSR found me to be offense level 38, Acquitted Conduct consisting of 45 kilograms of crack, resulting in a guideline of 324-405 months. Ultimately, the court adopted the PSR and imposed the statutory maximum of 240 months.

The use of Acquitted Conduct is unAmerican and completely undermines the fairness of the jury trial and the 6th Amendment and should not be used. This Commission should prohibit the use of Acquitted Conduct.

Respectfully,
David Lee Cox

From: ~^! COX, ~^!INGRAM
Subject: [External] ***Request to Staff*** COX, INGRAM, [redacted]
Date: Tuesday, February 13, 2024 9:19:08 AM

To: To Whom It May Concern
Inmate Work Assignment: labar pool

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am currently at a category V with 11 criminal history points. I was awarded a total of 6 criminal history points for two robbery convictions. Both cases I caught before my 18th birthday (one at age 16, one at age 17). In my state (New York) at the time 16 year old's were charged as adults (this law has since changed). I do not want to make excuses for my actions because I except responsibility for my actions, but we know that individuals under the age of 18 are more likely to be impulsive and not understand the consequences of their actions. If not for these youthful convictions, I would have a total of 5 criminal history points and be at a category III. It is unfortunate that these impulsive decisions we make as kids effect us substantially as adults. the commission should not consider any sentence imposed for an individual under 18 in the instant criminal history score. I support option 3 which entirely excludes these convictions from the criminal history score.

Sincerely,
Ingram Cox

Ronald Davidovic
[redacted]
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

January 11, 2024

U.S Sentencing Commission
1 Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002

RE: 2023-24 PROPOSED SENTENCING AMENDMENTS
"Loss Amount" Amendment
Letter in OPPOSITION to amendment

To Whom It May Concern:

I am presently incarcerated at the Federal Correctional Institution in Coleman, FL following a conviction for "Conspiracy to Commit Health Care Fraud and Wire Fraud" in the Southern District of Florida. I was sentenced to a term of seventy (70) months under the "intended loss" commentary contained in U.S.S.G. §2B1.1. I am writing to STRONGLY OPPOSE the proposed amendment to the guidelines.

I was a salesperson for a marketing company that sold leads to a Durable Medical Equipment (DME) company that billed medicare. Our client used our sales leads (expressions of interest from individuals experiencing back pain who wanted to qualify to receive a back brace) to commit fraud by referring the prospects to telemedicine doctors who "rubber stamped" prescriptions and then editing those prescriptions so that additional medical equipment would be ordered and billed to Medicare.

Although it was determined that I earned approximately $161,000 in commission from the sale of the leads (the actual benefit conferred on me), I was charged with a six million dollar ($6,000,000.00) "intended loss", because the client (my alleged "co-conspirator") used these leads to commit fraud. Even though I only made $161,000 over the course of five years, I am jointly and severally responsible to pay back millions in restitution.

The worst part is; the length of sentence in these fraud cases is primarily driven by "loss amount". I received a 70 month sentence under the "intended loss" calculus, as opposed to a 24 month sentence, had an "actual loss" amount been used.

The application of "intended loss" is absurd! It is tantamount to the government scoring every bowler a 300 because they "intended" to bowl a strike every time

Letter in OPPOSITION to "loss amount" amendment
Comment to 2023-24 Sentencing Amendments
January 11, 2024

According to your request for comments, Courts appear to agree that the use of "actual loss" is more appropriate in eighty percent (80%) of the cases that were sentenced under §2B1.1. Accordingly, it would seem as though the use of "intended loss" should be a rare exception and not the rule. Especially if the objective is to obtain sentencing consistency.

For the foregoing reasons I STRONGLY OPPOSE the propsed sentencing amendment to §2B1.1 and respectfully suggest the proposal be rejected and the guidelines be amended to use "actual loss" as the standard, with "intended loss" used only in warranted exceptions.

Respectfully Submitted,

Ronald Davidovic

From: ~^! DAVIS, ~^!DARYL
Subject: [External] ***Request to Staff*** DAVIS, DARYL, [redacted]
Date: Monday, January 22, 2024 12:05:18 PM

To: commission
Inmate Work Assignment: rehab

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was sentenced to the statutory maximum of 240 months for hobbs act robbery conspiracy level 43.I had no crimnal history points.I was given a murder enhancement and a gun enhancement for a crime i did not commit and that a jury of my peers did not convict me of murder or having any gun and that the goverment dismissed each substantive count that the jury did not convict me of including the homicide which has elements to it.They brought these same charges that i was acquitted of back at my sentencing my time went from 47 months to 20 years which i have done 13 years.Im still fighting for my freedom in a rigged justice system.My question is what can be done.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Harley Davis

Topics:

Youthful Individuals

Comments:

Hello I just wanted to give my opinion. I dont think any conviction prior to the age of 18 should be used at all. I think it's under option 3! Thank you I hope you all make the right decision and I'm very grateful for you all!

Submitted on: December 21, 2023

From: ~^! DECARO, ~^!RICHARD
Subject: [External] ***Request to Staff*** DECARO, RICHARD, [redacted]
Date: Friday, January 12, 2024 8:05:05 PM

To: Public Comment
Inmate Work Assignment: Commissary

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Thank you for allowing my comment. I wish to comment on the proposed amendment "Acquitted Conduct." This amendment effects a very small percentage of the incarcerated and it MUST include state acquittals!

I was acquitted by a death penalty qualified jury in the State of Missouri. The federal statute I was charged with actually uses the state statutes I was acquitted of as an element of the federal statute. The difference for me is I would have received 168-210 months instead of the life sentence I am currently suffering if not for the use of acquitted conduct.

S. 2788, 118th Cong. (1st Sess. 2023) is the best I believe, but as long as it includes at least state acquittals. This amendment, because in only will effect a few, MUST be made retroactive.

Please give this a serious consideration. I've served a 35 year prison term with all credits applied. I have 17 grandchildren and a great granddaughter! Thank you for your time.

Sincerely,
Richard DeCaro, [redacted]

From: ~^! DOOLIN, ~^!TONY
Subject: [External] ***Request to Staff*** DOOLIN, TONY, [redacted]
Date: Friday, February 16, 2024 8:34:21 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: Captians Office

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I have a comment and suggestion for part E of the proposed amendment regarding the application of the "death results" provision of 2D1.1 9a)(1)-(a)(4).
It should be clear " weather the enhanced offense levels apply only when the defendant is convicted under the statute because each statutory element was established". How could it be otherwise? USC 994 makes it clear that the guidelines are promulgated consistent with ALL pertinent provisions of any Federal statute. What else is the guideline derived from but the STATUTE? USC 994 makes clear what the USSC's duties are; and it is not to make changes to the guidelines to make them statutes or to circumvent Congress or the Supreme Court's authority to make and define the Law.

Amendment 123 from 1989 made it clear that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statures cited. So why change what you already specifies and you know is right?

Option 1 will help to put the determination of the application of the "death results" provision back in its proper place. Which is in line with a jury determination or admission by the defendant as Congress and the Supreme Court intended.

Option 2 should not be an option. It puts the determination of the "death results" provision at he whim of a possibly fallible or vindictive prosecutor or Judge, who does not have the power of a jury or congress. This is not the Commissions authority to do and doing so is a violation of due process and the separation of powers principles of the U.S. Constitution.

Choose option 1. It will help to make things right and help people who are innocent of the "death results" enhancement but fell victim to the prosecutors intent to weaponize the guidelines to circumvent the statute.

Thank you,
Tony E. Doolin

From: ~^! DOUGLAS, ~^!JOHN JOSEPH
Subject: [External] ***Request to Staff*** DOUGLAS, JOHN, [redacted]
Date: Monday, January 8, 2024 3:33:57 PM

To:
Inmate Work Assignment: unit orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In regards to the request for public input on sentencing for acquitted conduct, I would just like to point out a major flaw. In the United States of America persons are considered innocent until proven guilty. So yes, I agree that Judges should not sentence legally innocent persons to prison. The problem, however, is that prosecutors will just not charge people they think they have a weak case against, or they will dismiss the charge before the jury returns its verdict if the case looks weak knowing full well that "uncharged" conduct can still be used to enhance the sentence against persons who are "legally innocent". The only solution is to stop sentencing enhancements for acquitted AND uncharged conduct. Persons not convicted by a jury are factually innocent whether uncharged or acquitted.

From: ~^! DOUGLAS, ~^!TYRECK
Subject: [External] ***Request to Staff*** DOUGLAS, TYRECK, [redacted]
Date: Thursday, January 4, 2024 3:48:53 PM

To: Sentencing Commission
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Judges:

I am writing regarding my support for this commission to alter the statues that permit the Youthful Offender, hereinafter "YO", convictions to be included in criminal histories.

Historical Facts

I am 30 years of age and I have been in prison since I was 18 yrs of age. I was giving a YO in NYS wherein I served county time. Subsequently I was released and got another case which resulted in another state and federal conviction.

Support for YO statue to be removed

Growing up in my household all I need was the streets. I am a product of an environment wherein my parents where addicted to drugs, alcohol and violence. I have suffer from ADHD and lead poison since I was kid. I was raised by the streets, my family never was there for me and this caused me to engaged in criminal activity. The honest true was that we grew up admiring drug dealers, as we never had any other dreams. Everyone next to me or around me, from my immediate family to my close "friends" (who I taught were my friends) was engaged in drug addiction and criminal activity.
Although I had biological parents alive, the streets and negative factors were my counselors. In school I learnt nothing but negativity and when I got arrested at a very young age-- everyone taught it was cool, something I know now is not true.
The effects of poor choices at a very young age, lack of growth development, matureness, and impulses (driven by my condition of ADHD) led me to make irrational decisions that marked my whole life.
I feel like I am being double penalized for actions when I was a minor. I take accountability for my actions, as now I am much older and have a different outlook/perspective in my life. I do understand that society laws are in place to maintain peace, prosperity and order for everyone-- this is what makes society be stable now.
My thoughts when I was younger weren't the same, I was influenced by what I thought was best for me. I think my poor choice decisions when I was younger shouldn't be counted towards raising a person's criminal history. This guideline changed caused me to get a drastically and more severe punishment, as I was categorized in a different category-- causing me to be away from my family for a longer period of time. By no mean take my words, as means I am not trying to accept responsibility. My point is that convictions at such young age should not be considered I knew no better. I had no parents, my parents were hooked in drugs and they had no idea how to raise me.

Thank you for allowing me to express my situation and opinion in support to this matter. Thank you and enjoy your holidays

From: ~^! DUNCAN, ~^!BRYAN
Subject: [External] ***Request to Staff*** DUNCAN, BRYAN, [redacted]
Date: Monday, February 19, 2024 12:33:50 PM

To: USSC
Inmate Work Assignment: Intended loss

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To whom this may concern,

I am sending this message regarding a change/amendment for the intended loss rules in the U.S. Sentencing Guidelines. The provision that allows for intended loss is unjust. It gives the federal government too much leeway to fashion grossly inflated loss amounts that balloons peoples sentences and perpetuates the growing issue of mass incarceration in America.

Take my case for example. I was sentenced based on an intended loss of 30 million when, I have no restitution. This intended loss calculation is based on a thing called extrapolation. the government and the district court used weird figure that do no exist in the trial record and only in the PSR to extrapolate to this number.

Too much leeway with loss calculations can lead to inmates sitting in prison much longer than they should. Please eliminate this intended loss method from the USSG.

THANK YOU

January 2, 2024

Re: Comment on Potential Guideline
Regarding Acquitted Conduct

Dear U.S. Sentencing Commission:

I submit this comment in hopes that serious thought and discussion is had regarding the current practice of punishing certain people based on acquitted conduct. Here, I want to provide a real life example of how arbitrary, egregious, and unfair the practice has become.

In 2002, I was charged in a 1 Count indictment alleging a conspiracy to distribute both cocaine powder and cocaine base (crack). (See Attached Indictment). At the conclusion of a 3-day trial the jury found me guilty as charged of the conspiracy offense. The jury further determined (via special verdict interrogatory), that my conspiracy involved cocaine powder only. (See Attached Jury Verdict). The jury heard the evidence and declined to find that my conspiracy involved crack cocaine.

In order to provide a better understanding, I want to first provide a few more facts. First and foremost,

at the time of my arrest, prosecution, and sentencing I knew very little about federal laws or the federal system in general. I had zero knowledge of the 100-to-1 sentencing disparity between cocaine powder versus crack, and I did not learn or understand the significance of the disparity until after I was sentenced. I was absolutely certain that I had not distributed, conspired to distribute, or entered into any agreement to distribute any quantity of crack. Although I knew that I was in fact guilty of conspiring to distribute cocaine powder, I exercised my right to a trial by jury, because I was not involved with the distribution of crack.

Prior to my sentencing, a Presentence Report ("PSR") was created by the U.S. Probation Officer. The PSR recommended that: (1) I be held accountable for 30 kilograms of cocaine powder; (2) 5/8 of the 30 kilograms be converted to 12.24 kilograms of crack; and (3) I be held accountable for 244,800 kilograms of marijuana, which is what 12.24 kilos of crack converts to. (See Attached Drug Weight info.). The conversion of cocaine powder to crack was made possible with the smoke and mirrors of "relevant conduct." (See U.S.S.G. § 1B1.3). But for the drug conversion (via relevant conduct), I would not have received a 6-level increase of my base offense level, and would not have faced a Guidelines range mandating the imposition of a life sentence.

The notion that any American citizen can exercise their Constitutional 6th Amendment Right to a jury trial, only to have the results of the Right trivialized upon acquittal, is un-american and offends the most basic principal of fundamental fairness. Here, I exercised my right to a jury trial because I was not guilty of a crack cocaine offense, and the jury verdict evidences that fact. To be punished for over 12 kilograms of crack in spite of the jury verdict, to a large degree renders a jury trial meaningless. I would have faired better by simply pleading guilty to an offense I was not guilty of, and receiving the benefit of accepting responsibility. Myself, like millions of other Americans, would not have known that one could be punished for an offense, or alleged conduct, after being acquitted for such.

Last, in my 2 decades of incarceration, the practice of punishing for acquitted conduct appears to be overwhelmingly reserved for cases involving defendants of color. The Sentencing Commission should explore whether there is in fact a racial component associated with those most punished for acquitted conduct. In my opinion, Option 1 brought forward by the Sentencing Commission is the only option that does not offend a defendant's Constitutional Rights. Acquitted conduct can not reasonably be relevant conduct for purposes of determining the Guidelines range,

particularly when the trier of fact finds that the alleged relevant conduct was not involved in a specific defendant's offense. The other two available options proposed by the Sentencing Commission, will only lead to further unfair, arbitrary, and capricious use of acquitted conduct.

Thank you for your attention and consideration of my comments regarding acquitted conduct.

Sincerely,

MARCO DUNCAN
[redacted]
U.S. Penitentiary Max
P.O. Box 8500
Florence, CO. 81226

Absurdly, I am ineligible for a reduction in sentence under Section 404 of the First Step Act, ONLY because I was not convicted for the 12.24 kilograms of crack cocaine for which I was sentenced. My punishment rests in an unreachable twilight zone, based entirely on the use of acquitted conduct. How can alleged conduct be relevant, where there has been a finding that a defendant's offense did not involve that conduct?

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v. Docket No: 3:02CR20-002 RV

MARCO D. DUNCAN

VERDICT

WE, THE JURY, IN THE ABOVE ENTITLED AND NUMBERED CASE FIND THE DEFENDANT MARCO D. DUNCAN:

Guilty of the offense as charged in Count One of the Indictment.

(NOTE: Please answer the following only if you found the defendant guilty as charged.)

We unanimously find that the conspiracy involved:

✓ (a) 5 kilograms or more of cocaine powder; or

_____ (b) 50 grams or more of crack cocaine; or

_____ (c) both 5 kilograms or more of cocaine powder and 50 or more grams of crack cocaine.

FILED IN OPEN COURT This
7/23/03
CLERK, U.S. DISTRICT
COURT, NORTH. DIST. FLA.

191

NOTE: If you have found the defendant guilty of the offense as charged, do not answer any other questions. Please sign and date the verdict form. If you found the defendant not guilty of the offense as charged, you must then consider the lesser included offense of conspiracy to distribute lesser quantities of the controlled substances.

_____ of the lesser included offense of conspiracy to distribute either cocaine powder or crack cocaine, or both.

(NOTE: Please answer the following only if you found the defendant guilty of the lesser included offense.)

We unanimously find that the conspiracy involved:

_____(a) cocaine powder; or

_____(b) crack cocaine; or

_____(c) both cocaine powder and crack cocaine.

We unanimously find by proof beyond a reasonable doubt the following quantities involved: (Check all appropriate)

Cocaine powder:

_____(a) an amount between 500 grams and 5 kilograms of cocaine

_____(b) an amount less than 500 grams of cocaine

Crack cocaine:

_____(a) an amount between 5 grams and 50 grams of crack cocaine

_____(b) an amount less than 5 grams of crack cocaine.

SO SAY WE ALL.

James B. [illegible] 7-23-03

FOREMAN'S SIGNATURE: DATE:

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

v.

INDICTMENT

3:02cr 20/RV

SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS

THE GRAND JURY CHARGES:

COUNT ONE

That on or about January 1, 2000, up until the date of the return of this indictment, in the Northern District of Florida and elsewhere, the defendants,

SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS,

did knowingly and willfully combine, conspire, confederate, agree and have a tacit understanding

FILED IN OPEN COURT THIS
2/20/02
CLERK U.S. DISTRICT COURT
NORTH. DIST. FLA.

with each other and with other persons to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine and fifty (50) grams or more of a mixture or substance containing cocaine base, commonly known as "crack cocaine," controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii) and (iii).

All in violation of Title 21, United States Code, Section 846.

(CRIMINAL FORFEITURE)

The allegations contained in Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 21, United States Code, Section 853.

From their engagement in the violations alleged in Count One of this Indictment, punishable by imprisonment for more than one year, which count is re-alleged and incorporated as if more fully set forth herein, the defendants,

SHAUN P. THOMAS,
MARCO D. DUNCAN,
WILLIE J. BERRY,
WILLIAM S. MULLIN,
SAMENIA PALMER,
TERRENCE B. ROBERTS,
CARLOS S. DAILEY
and
ROBERT W. MIMS,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a)(1) and (2), all of their interests in:

A. Property constituting or derived from any proceeds the defendants obtained directly or indirectly as the result of such violations;

B. Property used in any manner or part to commit or to facilitate the commission of such violations;

If any of the property subject to forfeiture as a result of any act or omission of the defendants:

A. cannot be located upon the exercise of due diligence;

B. has been transferred or sold to or deposited with a third person;

C. has been placed beyond the jurisdiction of this Court;

D. has been substantially diminished in value; or

E. has been co-mingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

All in violation of Title 21, United States Code, Section 853.

A TRUE BILL:

FOREPERSON

2-19-2002

DATE

Thomas F. Kirwin

THOMAS F. KIRWIN
United States Attorney

STEPHEN P. PREISSER
Assistant United States Attorney

DRUG WEIGHT

38. Based upon the above information and to avoid double counting of drug weights, the defendant is being held accountable for 30 kilograms of cocaine. As reflected in the Offense Conduct section, cocaine was being converted into cocaine base during this conspiracy with the defendant's knowledge. Although the jury verdict did not include the distribution of cocaine base, this information may be considered under relevant conduct based upon a preponderance of the evidence instead of a beyond a reasonable doubt standard. This fact is evidenced by the testimony given at trial of codefendants' Rodney Lee, William Mullin, Terrence Roberts, and Laveil Thrower. Using 51% to reflect "most of the cocaine" or the majority, 15.3 kilograms will be converted into cocaine base. Using an 80% multipler for the conversion ratio, Duncan is held accountable for 12.24 kilograms (15.3 x 80%) of cocaine base and 14.7 kilograms of cocaine.

39. The Drug Equivalency Table in §2D1.1 provides a means for combining differing controlled substances to obtain a single offense level. The drugs are converted to their marijuana equivalent and added together. The table sets 1 gram of cocaine as the equivalent of 200 grams of marijuana and 1 gram of cocaine base as the equivalent of 20 kilograms of marijuana. Therefore, the 12.24 kilograms of cocaine base converts to 244,800 kilograms of marijuana and 14.7 kilograms of cocaine converts to 2,940 kilograms of marijuana. This results in a total drug weight of 247,740 kilograms of marijuana.

45. **Base Offense Level:** The guideline for violation of 21 U.S.C. § 841 and 846 is found in §2D1.1. The base offense is taken from the Drug Quantity Table at §2D1.1(c) based upon the quantity of the controlled substance. As noted in the Offense Conduct section, Mr. Duncan is held accountable for 247,740 kilograms of marijuana. The Drug Quantity Table sets 30,000 kilograms or more of marijuana at a base offense level of 38. 38

✓ The Court adopts the factual findings and guideline application in the Presentence Report.

The Court made the following findings and/or determination on these issues, which were raised for the first time at the sentencing hearing:

Paragraph 87 is modified to reflect the name of Melvarian McCowan instead of William McCowan.

Guideline Range Determined by the Court:

Total Offense Level:	46 (Table Capped at 43)
Criminal History Category:	IV
Imprisonment Range:	Life
Supervised Release Range:	10 years
Fine Range:	$25,000 to $8,000,000 (Fine waived or below the guideline range because of inability to pay.)

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Julie Edwards

Topics:

Youthful Individuals

Acquitted Conduct

Simplification of Three-Step Process

Comments:

I support proposed Options 1 & 3 of the sentencing commission. I also support simplified of the three step process.

Submitted on: February 8, 2024

From: ~^! ETIENNE, ~^!TRAVIS
Subject: [External] ***Request to Staff*** ETIENNE, TRAVIS, [redacted]
Date: Thursday, February 8, 2024 6:04:55 PM

To: Sentencing Commission
Inmate Work Assignment: Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Juvenile Criminal History;
Brain science has evolved and so too should our sentencing practices. We know that individuals under the age of 18 are more likely to be impulsive and not understand the consequences of their actions. Moreover, Juvenile adjudication are subject to different procedures across the country, and it is unjust to bake such inconsistencies into a federal standard. The Commission should not consider any sentence imposed for an individual under eighteen in the instant criminal history score. I SUPPORT OPTION 3 which entirely excludes these convictions from the criminal history score.

My name: Etienne, Travis case # 11-20795
I was sentence as a ACCA and the court sentence me to 262 months in prison. They used my juvenile priors to enhance my sentence. This is the first time I ever been to prison, Also the most amount of time I served on my state priors was 364 days in the county jail for all 3 priors on a 1 single sentence..

From: ~^! FEDERMANN, ~^!RICHARD
Subject: [External] ***Request to Staff*** FEDERMANN, RICHARD, [redacted]
Date: Monday, January 8, 2024 5:33:44 PM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I would like to comment on Proposed Amendment, Part B of the Youthful Individuals section. I would suggest that the statement regarding the consideration for a downward departure based on the offender being a youthful individual explicitly set the age threshold to be 25 years and younger. Some courts are still treating individuals under the age of 25 the same as adults above the age of 25, with conscious disregard of the recent research into brain development and the developing Supreme Court case law (Roper v. Simmons, Graham v. Florida, and Miller v. Alabama, etc.) and the impact of those cases on proceedings for sentence reductions, such as with compassionate release. Many district courts are ruling that a reduced sentence is appropriate for offenders under the age of 25 based on the changing understanding of neuroscience, research into brain development , and the Supreme Court rulings, but other courts are still choosing to set the threshold for maturity at 18 years, even when presented with the new research and Supreme Court rulings.

If the science is demonstrating that brain development is not complete (on average) until age 25 and that this can diminish culpability as well as make it impossible to determine how an young person will behave once their brain finishes developing, then the federal judicial system as a whole should recognize such rather than allowing individual judges to decide for themselves whether the research and Supreme Court opinions are relevant and persuasive or not. It just creates room for great disparities when judges are allowed to decide whether to blatantly ignore the science of brain development and the developments in common law by allowing judges to arbitrarily set the threshold for consideration for a downward departure based on youthfulness themselves based on their own (sometimes uninformed and disinterested) beliefs about maturity and development.

From: ~^! FLEMING, ~^!LAMONT
Subject: [External] ***Request to Staff*** FLEMING, LAMONT, [redacted]
Date: Monday, February 19, 2024 8:19:11 PM

To: US Sentencing Commission/Juvenile Amendment
Inmate Work Assignment: PM ORD BA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Comment In Re: Proposed Amendment For Juvenile History

I am in support of Option 3 of the proposed amendment for the guidelines, which aims at eliminating the use of juvenile records in calculating a defendant's criminal history score.

Option 3 recognizes that research has scientifically proven that the brains of juveniles are immature, impulsive, and unable to appreciate the consequences of his or her criminal conduct.

This observation in Option 3 aligns with due process and that a defendant be sentenced on competent and accurate information and facts. As such, a defendant's juvenile record should no longer be used to calculate his or her criminal history score, and/or to expose him or her to a longer and unjust prison term.

Continuation of the use of a defendant's juvenile record in this regard would both be incongruent with due process and inconsistent with the findings of scientists with respect to the brains of juveniles.

Moreover, punishment under these circumstances does not reflect the defendant's true character or criminal history, as it rests in part on his juvenile record for which he could not appreciate at the time.

I respectfully urge the Sentencing Commission to adapt Option 3, in the interest of Justice.

[redacted] - FLEMING, RHONDA ANN - Unit: DUB-F-A

[redacted]

TO: U.S. Sentencing Commission
SUBJECT: ***Request to Staff*** FLEMING, RHONDA, [redacted]
DATE: 01/04/2024 06:10:09 AM

To: Commission
Inmate Work Assignment: yard

To Whom It May Concern:

On the issue of "intended loss" versus "actual loss" in the guidelines, the Commission should consider my case.

I am serving a 360 month prison sentence based on intended loss, for a white collar offense. Please review my case:

United States v. Rhonda Fleming, No. 4:07-cr-513-1, Southern District of Texas, Houston, Division.

The actual loss, which I objected to, was $6 million. The U.S. Attorney's Office stated I intended to take $36 million, thus the guideline sentence was 360 months.

No one would believe this sentence fits the offense. There are white collar offenders serving longer sentences than murderers and robbers, who injured people. Statistically, armed robbers and murderers receive sentences of 20 years or less.

I pray the Commission will consider United States v. Banks, 3rd Circuit, reasoning on this important issue.

Respectfully,

Rhonda Fleming

Commissioner / Judge Pryor—

please re-consider this intended loss issue. Prosecutors inflate intended loss. Or in the alternative, a jury should decide this issue — or enhancement.

Thank you
RAF

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KING ARTHUR; BOSE EBHAMEN; RHONDA FLEMING, Defendants-Appellants.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
432 Fed. Appx. 414; 2011 U.S. App. LEXIS 14625
No. 09-20877
July 15, 2011, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Subsequent appeal at, Remanded by United States v. Fleming, 518 Fed. Appx. 301, 2013 U.S. App. LEXIS 7418 (5th Cir. Tex., Apr. 12, 2013)Post-conviction relief denied at, Dismissed by, Motion denied by, As moot, Certificate of appealability denied United States v. Ebhamen, 2014 U.S. Dist. LEXIS 30938 (S.D. Tex., Mar. 11, 2014)Post-conviction relief denied at, Certificate of appealability denied United States v. Fleming, 2014 U.S. Dist. LEXIS 47551 (S.D. Tex., Apr. 7, 2014)Related proceeding at Fleming v. Medicare Freedom of Info. Group, 2015 U.S. Dist. LEXIS 59301 (D. Minn., Apr. 15, 2015)Post-conviction relief dismissed at, Certificate of appealability denied United States v. Ebhamen, 2016 U.S. Dist. LEXIS 73624 (S.D. Tex., June 7, 2016)Related proceeding at, Magistrate's recommendation at Fleming v. Riehm, 2016 U.S. Dist. LEXIS 171658 (D. Minn., Nov. 7, 2016)Writ of habeas corpus dismissed, Writ of mandamus denied, Sanctions allowed by, Request granted Fleming v. Mora, 2018 U.S. Dist. LEXIS 60705, 2018 WL 1726156 (S.D. Tex., Apr. 10, 2018)

Editorial Information: Prior History

{2011 U.S. App. LEXIS 1}
Appeals from the United States District Court for the Southern District of Texas. USDC No. 4:07-CR-513-6.United States v. Fleming, 2009 U.S. Dist. LEXIS 1536 (S.D. Tex., Jan. 12, 2009)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Suzanne Rene' Bradley, Esq., Special Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX; James Lee Turner, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For KING ARTHUR, Defendant - Appellant: Andrew J. Williams, Kingwood, TX.

For BOSE EBHAMEN, Defendant - Appellant: Mike DeGeurin, Esq., Foreman, DeGeurin & Nugent, Houston, TX.

For RHONDA FLEMING, Defendant - Appellant: Rhonda Fleming, FMC Carswell, Fort Worth, TX.

Judges: Before SMITH, DeMOSS, and OWEN, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: A United States District Court for the Southern District of Texas jury convicted three defendants of health care fraud (18 U.S.C.S. § 1347) and wire fraud (18 U.S.C.S. § 1343), and conspiracy to commit those crimes (18 U.S.C.S. § 371). Two defendants were also convicted of money laundering (18 U.S.C.S. §§ 1956, 1957). All three defendants appealed their convictions. Two

also challenged their sentences.Sufficient evidence supporting defendants' health care and wire fraud convictions, 18 U.S.C.S. §§ 1347 and 1343, included defendants' failure to notify Medicare of sale of their supplier numbers, the financial rewards from participating in the scheme, and testimony and exhibits casting doubt on their claims they were duped by the other defendant.

OVERVIEW: Defendants participated in a scheme to submit false claims for durable medical equipment (DME) to Medicare and Medicaid (together, Medicare). Companies controlled by the defendants purchased and delivered very little DME, yet billed for more than $34 million. Medicare reimbursed over $5.8 million into accounts controlled by defendants. Inter alia, the appellate court held that the Government set out evidence sufficient to support the health care and wire fraud counts, including two defendants' failure to notify Medicare of the sale of their supplier numbers, the financial rewards they reaped from participating in the scheme, testimony and exhibits casting doubt on their assertions that they were duped by the other defendant into participating in an illegitimate business, and evidence showing that Medicare continued to send remittance notices and overpayment letters, discovered in their company's files, to their business address which detailed the high volume of claims paid and denied on their supplier number. The other defendant's sufficiency challenges were also meritless in light of evidence that overwhelmingly showed that she orchestrated the conspiracy.

The district court applied a twenty-two-level increase to Fleming's base offense level because it determined the **intended loss** amount from Fleming's fraud was $34 million. 82 In supplemental briefing to this court, **Fleming** contends our recent decision in *United States v. Isiwele* 83 demonstrates that the district court erred in applying the twenty-two-level increase. We held in *Isiwele* that, while the amount fraudulently billed to Medicare is "prima facie evidence of the amount of loss the defendant intended to cause," the "amount billed does not constitute conclusive evidence of **intended loss**." 84 Rather, the "parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the billing party's intent." 85 We note initially that **Fleming** waived any argument contesting the district court's method of calculating **intended loss** because she did not contest that method below. 86 Alternatively, to the extent this argument was not waived by virtue of Fleming's failure to advance it below, her defective supplemental brief containing no citation to record evidence demonstrating that the amount billed **{2011 U.S. App. LEXIS 40}**exaggerates the **intended loss** also constitutes waiver. 87

In a related issue, **Fleming** argues the district court violated her rights by failing to provide her with a trial transcript, which she requested prior to sentencing in order to contest the **intended loss** amount. **Fleming** cites no authority for the proposition that the district court was required to provide her with a transcript prior to sentencing. Even assuming such a requirement exists, any error was harmless. **Fleming** had a copy of the transcript for this appeal and, as noted above, she has not cited any record evidence demonstrating that the amount billed exaggerates the **intended loss**.

We **{2011 U.S. App. LEXIS 41}**do not have jurisdiction to review the district court's denial of Fleming's request **{432 Fed. Appx. 431}** for a downward departure for diminished capacity under U.S.S.G. § 5K2.13 unless the "district court held a mistaken belief that the Guidelines do not give it the authority to depart." 88 **Fleming** points to no evidence the district court was unaware of its authority.

From: ~^! FRAZIER, ~^!CHARLES LEE
Subject: [External] ***Request to Staff*** FRAZIER, CHARLES, [redacted]
Date: Wednesday, February 14, 2024 8:19:47 AM

To: U.S. Sentencing Commission
Inmate Work Assignment: Juneau Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I write to suggest the following: (1) that juvenile offenses that occurred more than 7 years prior to the instant offense should not be credited nor considered a prior criminal history point for sentencing for the instant offense; (2) that juvenile offenses that occurred less than 7 years prior to the instant offense should not be credited nor considered a prior criminal history point for sentencing for the instant offense unless there was serious bodily injury or death; and (3) that juvenile offenses generally should be considered mitigating factors at sentencing in accordance with 18 u.s.c. 3553(a) because of all the relevant studies done that children do not fully develop their brain and mental capacity until around age 25. There are numerous cases that hold that juveniles are less culpable than their adult counterparts, and have a diminished capacity for responsibility for their actions. This should be taken into consideration when addressing the impact a prior record has on a defendant, when that defendant's previous record was while he or she was a child. Thank you for your time and consideration in this matter, respectfully.

Alfredo Gallego
[redacted]
Federal Correctional Institution Schuylkill
P.O. Box 759
Minersville, PA., 17954

January 22, 2024

United States Sentencing Commission
1 Columbus Circle, North East, Suite 2-500
Washington, D.C. 2002-8002

Subj: Public Comments for Youthfull Offenders Under 25 Years Old.

Dear Panel:

This public comment regards the confilct amidst the United States District Courts on the matter of "Youth Matters" at resentencings for offenses committed 25 or under. In spite the much develooped psychology, neurology, and social research/ studies/reports on 'brain development' going on well into one's mid 20's - as referenced by Supreme Court Justices, used in many district court decisions and caused legislative and sentencing guidline amendments ei. 5H1.1, there still are district court judges and United States Attorney's who outright reject any notion of it while presumming thier own cut off age at 18 years old - as my judge and prosecutor did in my 2021 3582 motion.

My instant offense consists of trhe brutal killing of a New York Postal Truck Driver. At 23 years old, I was recruited by my older brother to help him in a desperate hiest that he believed would relieve him ofhis family financial crisis. I was responsible for the death of the late Mr. Guerrermo Gonzalez. On January 21, 1993, I solely was arrested at the scene of the crime and eventually charged, tried, and sentenced to Life Without Parole. I've now been incarcerated for 31 years. I presently have a pending motion under 3582 requesting the Court for a reduction in sentence to 40 years (480 months).

At the time of the offense/conspiracy, I had just tur4ned 23 years old and wore all the unmistakable hallmarks of a post-adolescent/emerging adult, ei., economically dfependant/living with mother; no personal livingarrangments; underdeveloped sense of responsibility; heart broken from first love relationship; lacked emotional maturity; poor decision maker; truancy/plummenting in school grades; substance abuse/marijuan and cocaine laced cigerattes; no sense of identity in school, community, or religion; never given thought to career path; highly impressionable and easily influenced; etc and etc. At the time I was recruited by my older brother, I was a newly enrolled fall freshman at Long Island University, Brooklyn Campus.

Since the chargings in this case, George Gallego, older brother/mastermind had to serve only 8 years through cooperation while other con-conspirators recieved lesser time through the same manner. White A., another conconspirator and George's "inside guy"/postal worker was recently "immediatly release" under 3582 after serving only 26 years.

At 55 years old, and having served 31 years in prison, I have been fortunate to have recieved above and beyond what this imprisonment intended to give in way of correction and instruction in rehabilitation, deterrence, acceptance in responsibility, remorsefullness, selrf-development and transformation. Throughout my incar-

ceration I have acquired over 15,000 hours of programing, served prison administrations clerically and served the inmate population in mentorship, achieved 120 semester college credit hours, a paralegal certificate, several vocational trainings and apprenticeships, matured in the nine (9) PreRelease Preparation Program Categories, and obtained several glowing letters from an Associate Warden, Case Management, a Criminal Professor, a Dean of College, and others.

I pray this commission, while appreciating the need tro leave descretion in the District Courts, will enact something advisory for judges that would disallow them to ignore all together such science on brain development for 25 and under defendants to which they would apply it on a case by case bases.

In the meantime, I am holding on as best as I can learning how to live a defacto death sentence as I navigate how to exist as a redeemed and rehabilitated adult who came into ths system in his relative youth. Just the same, learning to navigate a prison clture that has become worse/harsher post covid in every facet ei., violence, illegal drug use, gang activity, inmate on staff indicents, shortage of staff and increased intermittent lockdowns. I am a new being with a discovered purpose in psychology/social work who y earns to fullfill the academic/career path in a second chance of experiencing life outside these bars as an adult and as a citizen of the world.

Thank you for your time,
Respectfully Submitted,

Alfredo Gallego

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Lona Garcia, Mother of inmate who was 5 days into 16yr old serving a 20-22 year sentence

Topics:

Youthful Individuals

Comments:

I am a mother of a child that made a horrible choice. One In which He must take accountability for. My child was 5 days into his 16yrs of life. I believed that there needs to be change to our justice system an sentencing guidelines due to the fact that science clearly states that brain development is not complete before the age of 18. Indeed it is not until mid 20s these parts of brain are developed. I believe for this reason that when sentencing youth this must be considered. Their iq matters, them fully understanding what is going on matters. Children do not an are not capable of FULL comprehension of their behavior. Youth are impulsive in behavior. This does not take away from our youth being held accountable however I support change in a manner that acknowledges brain development.

Submitted on: January 23, 2024

From: ~^! GARY, ~^!KEVIN
Subject: [External] ***Request to Staff*** GARY, KEVIN, [redacted]
Date: Thursday, January 4, 2024 2:49:15 PM

To: Sentencing Commission
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am an individual who has been effected by the acquitted conduct issue that's been debated over the past few years. I was acquitted of murder in 2006 by 12 jurors of my peers in the State of Maryland. I then was arrested by the US marshals in 2008 for violating the federal RICO law. In my plea agreement it was added that the murder was relevant conduct in the RICO and i was enhanced by 15 years because of it. Our country has a set of laws in stone that it goes by (The Constitution). Its laws are clear and there is no way around them. In my opinion it is unconstitutional to hold one accountable for something that the people, that the lawyer and prosecutor selected, agreed upon that that said person was not guilty of. How is a charge able to be brought back up at a later date and used against said person? That's saying that there is no need to go to trial and receive a not guilty verdict. Because if said person can get found not guilty and then still suffer the consequences behind the charges still, then there is no need to go to trial because you'd then still be held accountable. Thank you for your time and this opportunity.

From: ~^! GILES, ~^!JON
Subject: [External] ***Request to Staff*** GILES, JON, [redacted]
Date: Friday, January 5, 2024 12:34:03 PM

To: U.S.S.C
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Re: Youthful Offender Proposal

My name is Jon Giles. I am a 44 year old federal prisoner who has been incarcerated for 15 years. I was found guilty by a jury and determined to qualify for the Career Offender enhancement based on a conviction that I accumulated when I was 17 years old, a juvenile. This conviction was my first felony offense and occurred nearly 20 years prior to my current conviction. Absent the career offender designation, my sentencing guidelines was 7-20 years. Because of the career offender designation, my sentencing guidelines enhanced to 30 to life! Again, this is based on a conviction I accumulated when I was a Juvenile. The Supreme Court along with a spectrum of different sentencing reform experts have made a determination that it is grossly unfair and punitive to severely punish juvenile offenders based on decisions they made in their mental developing phase as the science has shown that the human brain is not fully developed and capable of making protracted, discerning decisions before the age of 21 or so. I am a 45 year old man who is essentially still serving a sentence based on actions that I committed when I was merely 17 years old. I feel that our society has accepted that there must be a limit as to how severely we punish our citizens for crimes committed during their youth. Yes, we must hold our society and its members accountable for their actions, but when we do not consider the evolving scientific evidence that balances our justice with mercy then we do a disservice to our society by not allowing redemption and second chances. I feel that the only way to address this issue, an issue which effects tens of thousands of federal prisoners is to enact RETROACTIVE amendments to the U.S.S.G which would eliminate or alleviate the ability for sentencing Judges to deem defendants a career offenders based on convictions they accumulated when they were juveniles. Men, such a myself must be allowed to move past those poor decisions and be given a chance as adults to be a benefit to society. I beg the U.S.S.C to propose guideline reforms reflecting this pattern of thought and, more importantly , to make these amendment retroactive so that it reaches back and effects those of us like myself who languish in prison based on crimes committed when we wee juveniles. Thank you in advance.

From: ~^! GONZALES-LONGORIA, ~^!JOSE LEON
Subject: [External] ***Request to Staff*** GONZALES-LONGORIA, JOSE, [redacted]
Date: Thursday, January 4, 2024 3:05:15 PM

To: Acquitted Conduct Support
Inmate Work Assignment: USP-Safety Dep. Clerk

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

RE: Proposed Amendment Acquitted Conduct Act.
Subject: Support and Retroactivity
Comment: I strongly support the proposed amendment to acquitted conduct and a victim of such enhancements. I proceeded with a bench trial on drugs and firearm possession charges. I was acquitted on ALL 924(c)(1)(A)(ii) weapon counts during closing of trial but the Government preserved the 924(c) acquitted counts for 2D1.1(b) enhancements. At lodestar guideline range of 2D1.1(c)(2)(1992) of 40 plus enhancements, the "gun bump" two level increase resulted in a greater sentence than the 924(c) consecutive 5-year sentence. At threshold of 43 a two level variance [upward] resulted in a greater total offense level. Despite Amendments 505 reducing lodestar to maximum 38 and minus two per amendment 782/788; the acquitted conduct maintains the total at 43 mandating life without possibility of release. Absent the acquitted conduct gun bump, upon 32-years of time served, i would be placed overdue immediate release.
Thus, I strongly support the acquitted conduct proposed amendment and its retroactivity.
Executed this 4th day of January 2024

From: ~^! HAINES, ~^!SHA-RON
Subject: [External] ***Request to Staff*** HAINES, SHA-RON, [redacted]
Date: Thursday, January 4, 2024 11:49:18 AM

To:
Inmate Work Assignment: Facilities Plumbing.

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I have been incarcerated since the age of 18, I am now 27, and I have a release date where I will not return home until the age of 34, I was sentenced to a total of 186 months which is a total of 16 years and due to my juvenile "criminal history" I received inhancements to my sentence because of minor convictions such as breaking and entering, trespassing, loitering and theft from grocery stores etc. down to the age of 13 simply because I had nowhere to go or a place to eat. The passing of these laws is very critical in the impact of my life and other inmates like me, I have now served 10 years of my sentence and I am expected to serve 6 to 7 more years for simple mistakes that I made as a youth because of my lack of knowledge and lack of proper judgement, I have experienced and witnessed alot of traumatic situations that have left me suffering mentally and emotionally as a child, and now as an adult in this federal system. I can not stress how important and critical it is that these laws are passed, especially being I have experienced the excessive punishment first hand. The passing of these laws will give me the opportunity to return to society as a productive member with the tools I took every necessary step to obtain while I have been incarcerated to ensure my success and try to find some type normal in my life since unfortunately all I have ever been shown is this system and mass punishment, so I ask that you please fully take it into consideration the lives like mine that are being impacted by the passing of these laws.

From: ~^! HANSMEIER, ~^!PAUL R
Subject: [External] ***Request to Staff*** HANSMEIER, PAUL, [redacted]
Date: Saturday, January 6, 2024 7:18:19 AM

To: -
Inmate Work Assignment: -

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I write in opposition to the Sentencing Commission's proposed amendment to change the definition of "loss" for purposes of property crimes to explicitly include intended loss, versus proveable actual loss. The proposed amendment contains no concrete methods for ascertaining intended loss and leaves the door open for the goverment to propose any number it wants at sentencing. This process will lead to sentences that are greatly exaggerated and untethered to the harm that was actually caused in a case. Why should someone who only caused $100 of loss (but was hoping to profit $1,000) be sentenced the same as someone who actually took $1,000?

From: ~^! HARDMAN, ~^!DAVID
Subject: [External] ***Request to Staff*** HARDMAN, DAVID, [redacted]
Date: Saturday, January 27, 2024 6:18:45 PM

To: Public Comment
Inmate Work Assignment: UNICOR-9

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission,

Thank you for continuing to reform the criminal justice system and stressing a mandate to reduce mass incarceration currently flooding the federal prisons.

1) Issue for public comment for Acquitted Conduct: I vote for adoption of OPTION ONE. Further, I recommend to the Commission to implement the concept of prohibiting acquitted conduct for ALL purposes when imposing a sentence.

2) It is vital new language has to be included to expand the very narrowly defined parameters in 1B1.3(c)(2)(A): Definitions of acquitted conduct MUST, MUST, MUST have a definition that acquitted conduct includes dismissed charges that have been used to "coerce" or "force" a plea agreement that subsequently, after a defendant has signed, these dismissed charges are then used as relevant conduct which enhances a sentence YEARS or DECADES longer than the defendant bargained for. This unfair and unjust tactic is used everyday by prosecutors bent on maximum sentences and the leading cause of the mass incarceration we see today.

3) The Commission itself recognizes the incredibly small percentage of acquitted conduct in trials. 97.5% of conviction were done by plea agreements. So if amendment of "acquitted conduct" for purposes of eliminating relevant conduct does not apply to guilty plea agreements, why bother at all? Facts would strongly suggest that a majority of the plea convictions are in FACT enhanced by the probation officers and prosecutors using relevant conduct from dismissed counts that over sentence inmates for decades. This MUST stop, and the Commission has the power to correct this mass injustice.

4) The Acquitted Conduct definition must have language that specifies dismissed or dropped charges for any purpose regardless of jury acquittal or plea agreements.
1b1.3(c)(2)(A) states acquitted conduct does not include conduct that "was admitted by the defendant during a plea colloquy"
97.5% of defendants forced to sign a plea agreement were never informed by their trial counsel of just how life changing this plea colloquy is. My attorney understated the hearing as "just a quick procedure" The courts and government depend on a defendant's legal ignorance to feed the mass incarceration's prison industrial complex. My point is that 97.5% of defendants have no idea what was said at the plea colloquy or what it REALLY meant to their sentencing guidelines. This practice must stop.

From: ~^! HARRIS, ~^!CHRISTOPHER
Subject: [External] ***Request to Staff*** HARRIS, CHRISTOPHER, [redacted]
Date: Saturday, January 20, 2024 12:18:39 PM

To: ussc
Inmate Work Assignment: laundry

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

dear, U.S.S.C.,

i am writing to comment on the 2024 amendments. first being the youthful offender amendment part (a) for calculating criminal history score. option 3 excluding all sentences prior to age 18 from being used for points.

by using points to enhance someone sentence when they are so young is cruel. i would like to bring up that no country that treats the most vulnerable of its young people in this way deserves to call itself civilized. treating juveniles as adults and using juvenile sentences we failed in the duty as lawmakers as parents as protectors of chiLden and as human beings. yes the united states sentencing commission should take into consideration that these children have been in trouble before but to count points from sentences prior to 18 is cruel. option 3 would be something that would fix the disparity between sentences because the difference of locations. in different states treat children differently. prosecutors in juvenile courts nation wide treat juveniles different when it comes to race. more black and brown offenders are being tried as adults. i want to point out what's the difference from a white child being sentence in juvenile court for a robbery (because his family had enough money for a attorney) age 16, then a black child sentence in a adult court for robbery at age 16. NOTHING!! the development of both children as research show that both are not suited to understand consequences and have impulsive behavior. so why should one 16 year old who case stayed in juvenile courts benefit of being a child at the time and have his record seal or expunged? the other o16 year old who will carry this burden into adulthood and possibly be punished later in life for what he did as a child. by going with option 3 this will help to protect our children who might find themselves making a bad decision as a child from later being used against him in federal court enhancing his sentence to life. this is how the system setting out children up for failure. the pipeline from school to prison. this counting of criminal history points for sentences prior to 18 is a prime example of that. look no further than using sentences as children to enhance a adult sentence as pipeline from school to to prison mentally. the uses can start to create change now towards not failing the young and most vulnerable.

From: ~^! HARRIS, ~^!NATHANIEL
Subject: [External] ***Request to Staff*** HARRIS, NATHANIEL, [redacted]
Date: Thursday, January 4, 2024 11:05:08 AM

To: Commissioners
Inmate Work Assignment: N/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hi there im writing my opinion regarding major changes that need to be considered regarding youthful offenders in the federal system. First in foremost there should be a more broader avenue of relief for offender 21 years and younger. You have many kids that are getting very harsh sentences, in instances to a point that it killing there hopes of every returing to society as a new and change person. Kids make mistakes due to the very nature of there lack of mental development. Many are being sentence to life sentences and sentences that are a defacto life sentence. We all have been kids before in did many bad and stupid that=ings that as we older and look back on and can hardly believe that we were engage in such things. As the mind develops a person decision making becomes more rational and less impulsive. I'm a living testiment of it.

For an example i'm serving multiple life sentences in the federal system for joining a drug conspiracy as a 14 year old minor and being engage in Racketeering conspiracy as a 19 year teenager up until my arrest at 20 years old. There was a few bad things that I did as a kid at the influence of older co-conspirators that 13 years later into my incarceration that hurts me deep and I realize if I was older at the time I would'nt did because I would'nt have been that easily influence as the older more mature man that I have now evolved to be. There should be avenues for relief for youthful offender in the the federal system, something similar to the SECOND LOOK ACT in nature like the District of Columbia (Washington D.C) have for their youthful offenders. The sentencing commission should allocate a more and broader and lient authority in the sentencing guidlines regarding offenders 21 years and younger. As of now there are shallow and narrow opitions regarding how to sentence youthful offender.

Judges should be able to take in great consideration the defendant age, influence, and imaturity at the time he/she commited their offense. How could a person who was young when they committed there offense show society that they are a change person if there past crimes is held against them indefitely? A person who is bad today can be good tomorrow. There should be a unique for Judge to sentence younths.

Steven J. Hecke
[redacted]
Federal Correctional Institution
Box 4000
Manchester, KY 40962-4000

January 28, 2024

United States Sentencing Commission
Attention: Public Affairs - Public Comment
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C 20002-8002

RE: Comment To Acquitted Conduct

To whom it may concern

Please find enclosed my comment to acquitted conduct. Thank you very much. Best wishes!

Yours Truly
Steven Hecke

Comment To December 14, 2023
Guideline Proposal Limiting
Acquitted Conduct

I noted in my research that Congress, Steve Cohen (TN-9), is pushing for legislation called the Prohibited Punishment of Acquitted Conduct Act. The Bill defines "Acquitted Conduct" in Two (2) Sections of the Act. Section (1)(A)(ii) defines "Acquitted Conduct" as:

> any favorable disposition to the person in any prior charge was made, regardless of whether the disposition was pretrial, at trial, or post trial.

My comment is to relevant conduct provisions as it relates to acquitted conduct relative to option One (1) of the proposed Guideline. My concern is what will the definitions of acquitted conduct contain, what will be included, and how will acquitted

conduct be defined? Will the Sentencing Commission still allow Sentencing Courts to consider evidence that violates the Constitution, ie if Defendant has his charges dismissed based on a favorable outcome concerning a motion to suppress?

Another question I have is has the Sentencing Commission had do regard for Congress man steve Cohen's Bill as it relates to the definition of Acquitted Conduct? The chief phrase that piques my attention in the above-mentioned Bill is section (1)(A)(ii)'s "any favorable disposition? I believe that if a defendant has a favorable disposition regarding their motion to suppress that, that conduct should not be calculated in the Guideline. The current state of the law allows the Government to reap the

fruit of their ill-gotten gain at the expense of our Constitution. See U.S. v. Sanders, 743 F.3d 451 (7th Cir. 2014). Not allowing the Government to gain an advantage from this forbidden fruit would deter the malfeasance of agents. This tactical advantage actually encourages agents to violate the Constitution. I have read a variety of treatises that promulgates that civil damages have no effect in discouraging officers misconduct.

I find it puzzling that the exclusionary rule is applied in civil cases. See Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. U.S., 116 U.S. 616 (1886). Federal Criminal sentencing proceedings are consider civil as well. I believe it is un-American to allow this practice to continue. It is my hope that the U.S.

Sentencing Commission will consider eliminating this sentencing practice by not allowing Judges to consider evidence that a Defendant has dimissed through a victorious motion to suppress.

Respectively Submitted

Steven J. Hecke

Steven J. Hecke
[redacted]
Federal Correctional Institution
Box 4000
Manchester, KY 40962-4000

From: ~^! HENRY, ~^!DREW JOSEPH
Subject: [External] ***Request to Staff*** HENRY, DREW, [redacted]
Date: Friday, January 12, 2024 1:19:16 PM

To:
Inmate Work Assignment: Food Service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

1. The Commission should prohibit the use of acquitted conduct for determination of the guideline range; should either prohibit, or discourage while requiring a clear and convincing evidence standard, its use for departing upward from the guidelines; and should allow its use for determining a sentence within the range. By narrowing the scope but still allowing consideration there should be no conflict with 3661 (and complete abolishment would be more appropriately accomplished through statute or by a Supreme Court ruling). However, this scope should be as narrow as possible in order to discourage prosecutorial freerolling. The adversarial system of criminal justice only works when the defendant and plaintiff are on equal footing, and while defendants must carefully weigh the risks of trial versus plea prosecutors need not do so when even after an acquittal they are free to argue for the same sentence despite the conviction being for a lesser charge.

Departures are problematic because the Supreme Court has set no constitutional limits on statutory maximum and the extremely large statutory ranges for drug charges allow departures to be used to justify sentences an order of magnitude over the guidelines (compare the offense level for distribution resulting in death to that of simple distribution of <4g of fentanyl). Such sentences may be de jure departures for "relevant conduct" but when the relevant conduct is responsible for the bulk of the sentence it is de facto no longer merely relevant conduct but the offense for which the defendant is being punished (again, distribution charges which would not have been filed had death not resulted are relevant). Allowing maneuverability within the guideline range would still allow judges the freedom to consider conduct that is in fact relevant (despite the existence of some reasonable doubt) without risking leaving the door open to de fact overturning of the jury's verdict via departures.

2. Yes, non-federal acquittals should be included in the definition. Given the routine practice of jurisdictional venue shopping and recharging intrastate conduct federally, this expanded definition would further limit the ability of prosecutors to make multiple attempts at seeking their desired outcome and thus mitigate slightly the disadvantage faced by defendants.

4. There should be no restriction placed on reasons for acquittals. Just as defendants face risks and must make difficult decisions, so too should prosecutors. Defendants are expected to exercise diligence in the timely filing of appeals and the selective filing of 2255 motions, and so prosecutors should not be held to a lesser standard if they fail to exercise proper diligence with respect to jurisdiction and statutes of limitations. A prosecutor with doubts about jurisdiction or venue could choose to mitigate the associated risks by seeking a lesser conviction and should pursue the greater conviction at his own risk, just as a defendant must seek an acquittal through trial at his own risk.

I am one of the defendants for whom acquitted conduct is relevant. I was charged with distribution of fentanyl

resulting in death and there is significant doubt as to whether or not I caused death (and the nature of this charge is such that even I, the defendant, am not certain that I am guilty of the offense) but I chose to plead guilty partly because of the risk of being sentenced for causing death even if I was convicted only of distribution (see Carvajal v. United States who was sentenced to 120 months after a jury acquitted him for causing death, this despite USSG 5K2.1 suggesting a sentence drastically lower than that prescribed by the base level 38 for distribution resulting in death). A lessening of the scope of allowed usage for acquitted conduct at sentencing would partly help to mitigate this problem, but there are many other problems associated with the distribution resulting in death charge that need to be addressed by the Commission, if not by Congress and/or the Supreme Court, particularly the drastic disparity between the base level for simple distribution and that for distribution resulting in death (which, in most cases, is an unpredictable random event) and the conflict between the latter base level and USSG 5K2.1, 28 USC 994, and generally accepted notions of justice, fairness, and culpability.

From: ~^! HICKS, ~^!AARON
Subject: [External] ***Request to Staff*** HICKS, AARON, [redacted]
Date: Friday, January 5, 2024 1:34:12 PM

To: Sentencing Commision; Acquitted Conduct
Inmate Work Assignment: DB

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello, my name is Aaron Hicks. I was tried two in a jury trials in the Western District of New York. I was convicted of 846-conspiracy to distribute marijuana only (count 2); and racketeering conspiracy as to "marihuana only" as well. A jury acquitted me of conspiracy to distribute cocaine & cocaine base (count 2- 846); and I was also acquitted of possession of a firearm in furtherance of a crime of violence (924(c)), along with aiding and abetting a crime of violence (2). At sentencing I was enhanced for cocaine and cocaine base which increased my base level to 40. I was enhanced for aiding and abetting violence which enhanced my level to 43. These enhancements adjusted my offense levels to a combined 46 which was treated as a 43. I was given 8 criminal history points and was sentenced to 360 months and a $10.6 million forfeiture (based on cocaine conspiracy that I was acquitted of). My statues that I was found guilty of had no mandatory minimums, without these enhancements my guideline range was 27-33 months (please see indictment#15-cr-33a; document#292; PSIR on 12/7/2017). I have now served 9 years on a 360 month sentence, even though my criminal history category did not warrant such a sentence. Without theses enhancements that were imposed on me at sentencing I would of been home with my children and family 7 years ago.
If the sentencing Commission was to prohibit the use of enhancing a person on conduct in which he was acquitted of at trial, it would serve justice to all whom have exercised their constitutional right to go to trial and was acquitted by a jury of their peers but yet was still punished for the same crimes in which a jury found them not guilty for. Not only I would be released back home with my family, but this dynamic change would be in the best interest of Justice. Thank you.

From: ~^! HSU, ~^!LI LIN
Subject: [External] ***Request to Staff*** HSU, LI, [redacted]
Date: Sunday, January 7, 2024 11:33:49 AM

To:
Inmate Work Assignment: AD PM1 &VisitingRoom Ord

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sentencing Commission:

Thank you very much for providing opportunities for Prisoners to cast out our opinions and voices since recommissioned. We certainly appreciate your every effort to make Sentencing fair and just and providing equality to all who are justice involved. Personally I see the efforts and results you have been working on and delivered on the issue of offenders who have no criminal history and non- violent offense, issue on REAL LOSS amount vs. intended loss amount, broaden Compassionate Release 1B1.13 definitions and qualifications of Extraordinary and Compelling reasons especially on ABUSES inside BOP and sole caregiver for minors and elderly at home. Thank you very much for all your hardworks and every effort to make all of these possible.

Today, I have different note on juvenile offenses or aquitted offenses counted as criminal history. I, personally after observation from my peers in Prison after nearly 6 years since 2018, I am sorry to say with sorrow that juvenile records should be considered as behavior pattern. Many of my peers under custody has long history of crime since teenagers. Seeing them here and how they continue to conduct themselves inside Prison system, I must to say majority (99%) of them did not learn their lessons YET (Hope that maybe one day they will), thus I believe offenders with Juvenile offenses and records should be considered as their behavior pattern and weigh in as part of criminal history in FIRST Federal offense. When offenders can finally realize and learned from their mistake and turn around their lives, I believe we don't see them to come back for 2nd Federal Offense. When offenders believe they can get away easily then they will easily become career criminal offenders, because I have seen so many of my peers brag about their criminal history and they can do their FED TIME like piece of cake (people typically have 1-3 years of sentences (for DRUG Trafficking and White collar crime, Fraud and Identity thefts, medical insurance fraud).

I am out of time limit, I will send another email for aquitted convictions....

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Elias Jaramillo

Topics:

Acquitted Conduct

Comments:

Hello United Sentencing Commission, I hope this email finds you well. I am currently a senior in high school who previously wrote a paper as well as explored the use of acquitted conduct. After conducting research and personal experience with the use of acquitted conduct, I believe the use of acquitted conduct should be prohibited. The reason I believe acquitted conduct should be prohibited can all be explained by the following paper: The Innocent Judged Guilty

Imagine a person getting a job where if they are late two times their pay is docked $100. Now imagine the worker was accused of being late one time but was later found to have arrived on time. A few weeks later, the worker actually did arrive late for the first time but their pay was docked $100 because the boss has reasonable suspicion that they arrived late on both occasions. Does this seem unfair? Well this is the case with some defendants in the criminal justice system, except their punishment is far more extensive and the government calls it the use of acquitted conduct which is completely legal. Acquitted conduct is defined as conduct underlying a charged criminal offense of which the defendant was acquitted. Acquitted conduct is a subsection of relevant conduct which is acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. The way relevant conduct is used in federal courts is to give a full scope of the defendant's characteristics, the crime committed, which ultimately determine the base offense level and adjustments. In other words, relevant conduct assists in determining the sentencing guideline range that a defendant is facing. The use of acquitted conduct in federal sentencing should be prohibited because it undermines the right to a jury trial, it can dramatically increase the sentence a defendant is given, and can be very detrimental to an individual. From the inception of why the use of acquitted conduct should be prohibited, it can potentially violate a defendant's god given right.

The use of acquitted conduct at federal sentencing should be prohibited because it undermines the right to a jury trial. The constitution's sixth amendment says in all criminal prosecutions, the accused have the right to speedy and public trial. Along with that, the constitution's 5th amendment due process clause says all criminal cases must be proven beyond a reasonable doubt in order to convict the defendant. However, in the appeal of USA v. Thomas Luckzak, it states

"At the sentencing hearing on March 9, 2020, the government argued that the trial testimony, even if not enough to prove guilt beyond a reasonable doubt, showed by a preponderance that Luczak shot Serratos," (USA v. Thomas Luczak, 2022). As shown in Luczak's appeal, despite Luczak being acquitted of the alleged murder by a jury at trial, prosecution argued at sentencing that there was a preponderance of evidence. By the prosecution arguing there is a preponderance in order to raise Luczak's base offense level from 33 to a 43, they used his acquitted conduct to undermine his right to a public trial and due process. The reason criminal cases have to be proved beyond a reasonable doubt is because the consequences are severe. So for acquitted conduct to have a lesser standard of proving guilt, it raises concern of how ethical it is to use. The use of Luczak's acquitted conduct essentially gave the prosecution a second bite at the apple to assure Luczak would receive a hefty sentence. The Department of Justice's core values are honesty and integrity. However, there is no integrity, let alone honesty in violating a person's right in order to assure they receive a hefty sentence when prosecution fails to meet the burden of proving guilt in their own game.

Not only does the use of acquitted conduct undermine the right to a jury trial, it dramatically increases the sentence a defendant is given. Seventeen year old Dayonta McClinton is just one of the people who fell victim to the "Kafka-esque" policy, use of acquitted conduct at sentencing (CRIMINAL LAW — SENTENCING). Mclinton was accused of murder, armed robbery, and brandishing a firearm, but was acquitted of the murder. However, his sentencing did not reflect that. By using the murder Mclinton was acquitted of, McClinton's guideline sentence increased to 240 months (CRIMINAL LAW — SENTENCING). As shown, McClinton was given quite the sentencing guidelines. Mclinton's conviction of armed robbery and brandishing a firearm alone put his sentencing guideline anywhere from 57 to 71 months. Nevertheless, Mclinton's sentence of 19 years, or 228 months is a little over 3 times longer than what he faced with the crimes convicted of. Because of the government's use of acquitted conduct, Mclinton is currently serving the amount of time he had been on earth before the crime in a federal penitentiary. This leads to my next reason why acquitted conduct should be prohibited, it can have extreme detrimental effects on an individual.

After seeing the technicalities of why the use of acquitted conduct should be prohibited, from a social standpoint, it can be very harmful to continue the use of acquitted conduct. With the use of acquitted conduct causing dramatically increased sentences, this leads to individuals spending more time rotting their lives away in prison. At just 17 years old, Jose Jaramillo had put his trust in the system serving justice when he was accused of committing a murder in 1999. Even after proving his innocence and being found not guilty by a jury , this would not stop the federal government from using this acquittal 20 years later. In an interview with federal inmate Jose Jaramillo, a victim of the use of acquitted conduct states "My life has never been the same because my family was still in debt, I was never able to return to school, and 20 years later, I still fight for my life as the government attempts to use this acquittal to enhance my sentence significantly" (J. Jaramillo, personal communication, October 21, 2023). After hearing the testimony from Jaramillo, it can be inferred why the use of acquitted conduct is harmful to society. Jaramillo went through numerous adversities at 17 years old to prove his innocence just for the government to later use this against him. Jaramillo has spent nearly 6 years and counting of his life incarcerated for a crime he was acquitted of. Society not only wins when the guilty are

convicted, but when criminal trials are fair (J. Jaramillo, personal communication, October 21, 2023). However, society does not nearly achieve a win with the use of acquitted conduct if the defendant has already been proven not guilty. Even though the logic shows why the use of acquitted conduct should be prohibited, there are still others who disagree with prohibiting the use of acquitted conduct.

Other government officials such as U.S. Attorneys and Assistant U.S. Attorneys believe the use of acquitted conduct should be continued because it allows the courts to take in account the defendant's full range of conduct. U.S. Attorney for the eastern district of Virginia, Jessica D. Aber argues why the use of acquitted conduct should be continued by citing text from the case that deemed the use of acquitted conduct as permissible, United States v. Watts stating "An acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt" (Aber). However, Aber fails to recognize United States v. Watts states "however, that had the acquitted conduct dramatically increased[d] the sentence, the evidentiary standard may have needed to be higher than a preponderance of the evidence, such as a "clear and convincing" standard" (CRIMINAL LAW — SENTENCING). Even if acquitted conduct continues to be used, it should at least be held to the same standard as all criminal cases, reasonable beyond a doubt. Then again, the courts would risk violating double jeopardy. In another source, president of the National Association of Assistant U.S. Attorneys, Steven Wasserman states "there is a significant likelihood that the proposed amendment will generate massive amounts of litigation about whether something qualifies as acquitted conduct" (Wasserman). In the letter Wasserman wrote, he claims that alternating the use of acquitted conduct would cause havoc rather than justice. As the quote shows, the government worries more about the burden of alternating the use of acquitted conduct rather than resolving the injustice that is created from the use of acquitted conduct. Despite the possible litigation, it's the Department of Justice's job to enforce federal laws, seek just punishment for the guilty, and ensure the fair and impartial administration of justice. Society puts its trust in the justice system to serve justice, hence the name. Therefore, they should ensure fairness even if there will be repercussions for them.

Acquitted conduct should not be used in federal courts when it comes to sentencing as it has a negative impact on society. The use of acquitted conduct should be prohibited because it undermines the right to a jury trial, it can dramatically increase the sentence a defendant is given, and can be very detrimental to an individual. Although some people such as U.S. attorneys think it should be allowed because it allows the courts to take in account a defendant's full scope of conduct, they fail to realize the concerns of unethicality and cruel justice. There needs to be an amendment on the use of acquitted conduct as it continues to hurt society rather than benefit. If the example from the beginning is unfair because a mere $100 that can be replaced, was docked for allegedly being late twice, then, a fortiori, the greater punishment of time taken that is not replaceable from the use of acquitted conduct is unfair. The use of acquitted conduct needs to be prohibited.

Submitted on: December 21, 2023

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Jose Jaramillo

Topics:

Acquitted Conduct

Comments:

The sentencing commission should absolutely expand the proposed definition of "acquitted conduct" to also include acquittals from state, local, or tribal jurisdictions as the term "acquitted conduct" is defined and used in the "prohibiting punishment of acquitted conduct act of 2023",S. 2788.

like justice Neil Gorsuch stated in a recent supreme court hearing during oral arguments in case McElrath v. Georgia, "an acquittal is an acquittal is an acquittal since time immemorial."

the sentencing commission allows the government to use a prior conviction, no matter if it was a prior conviction from a state case or federal case or even a juvenile case, to enhance a defendants criminal history points and ultimately enhance a defendants sentence. The definition for a "prior conviction" is not confined to a prior conviction that took place only in a federal court, it is defined as to include all "prior convictions" no matter where or in what court jurisdiction they occurred. i believe that it's only fair to do the same with the proposed definition of "acquitted conduct". The acquitted conduct is acquitted conduct no matter in what court jurisdiction it occurred. just like the 7th circuit stated in case U.S.v. Krilich, 159 f.3d 1020, 1030 (7th cir. 1998) "the government cannot have it both ways--WHATS SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER"...

what is fair is fair, and if the sentencing commission is thinking about limiting the definition of "acquitted conduct" to just include conduct that was acquitted in federal court, then they should also start thinking about changing the way they use the definition in defining "prior convictions" to limit it's definition to just include convictions that were done in federal court jurisdiction.

Submitted on: January 10, 2024

From: ~^! JOHNSON, ~^!CALVIN
Subject: [External] ***Request to Staff*** JOHNSON, CALVIN, [redacted]
Date: Tuesday, January 9, 2024 8:05:20 AM

To:
Inmate Work Assignment: 2A Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

YOUR PROPOSED OPTION #3 FOR PART A TO EXCLUDE ALL SENTENCES FOR OFFENSES COMMITTED PRIOR TO AGE 18 WOULD BE THE MOST EFFECTIVE, AND LOGICAL FIX TO A PROBLEM THAT HAS CREATED UNWARRANTED SENTENCING DISPARITIES AMONGST SIMILARLY SITUATED DEFENDANT'S DUE TO THE VARIATIONS IN DIFFERENT STATE LAWS DETERMINING WHETHER A PERSON UNDER THE AGE OF 18 MAY BE TRIED AS AN ADULT. FOR INSTANCE A DEFENDANT FROM NEW YORK STATE CONVICTED IN FEDERAL COURT WITH PRIOR NEW YORK STATE CONVICTIONS COMMITTED AT THE AGE OF 16-17 YEARS OLD WILL LIKELY RECEIVE AN SECTION 851 ENHANCEMENT TO LIFE INCARCERATION, 25 YEARS MANDATORY MINIMUM AFTER THE FIRST STEP ACT, AND/OR A CAREER OFFENDER GUIDELINE DESIGNATION FOR 2 PRIOR CONVICTIONS COMMITTED AT 16-17 YEARS OLD. WHEREAS STATES OTHER THAN NEW YORK STATE, A DEFENDANT WITH PRIOR CONVICTIONS COMMITTED AT THE SAME AGE, SAME CRIMES OF CONVICTION WOULD RECEIVE NO CRIMINAL HISTORY POINTS AND NO JEOPARDY OF A 851 ENHANCEMENT OR CAREER OFFENDER GUIDELINE SENTENCE. PLEASE USE OPTION #3. THANK YOU.

From: ~^! JOHNSON, ~^!CAMERON
Subject: [External] ***Request to Staff*** JOHNSON, CAMERON, [redacted]
Date: Saturday, January 6, 2024 2:49:04 PM

To: Ussc
Inmate Work Assignment: recycling

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i am writing about the amendments proposed for the 2024 guidelines. one being the juvenile convictions being considered for criminal history scoring. convictions prior to 18 years old should be prohibited juvenile and adult convictions prior to 18. reason being, in a case in federal courts i have seen prosecutors use a juvenile conviction from a conviction sustained when the defendant was 11 years old. me understanding the developmental stage of juveniles this tactic has failed in the pursuit of fair an equal justice. a 12 13 or 14 year old actions, if followed with him for the rest of his life then we all have another thing coming. and i believe it shouldn't be considered when calculating criminal history scores. people have done things as kids due to the under developed mind they would never think about doing as a adult and this specific guideline needs to be address. i believe all convictions(adult and juvenile) before the age of 18 should be prohibited due to the science research and studies of the brain of a child. i also want to look into how juvenile courts and convictions are done in juvenile court. in south Carolina a juvenile could be charged as a adult at 16 other states 17years old. both situations are not 18 years old but these convictions can follow them into adulthood. but states like Ohio you can be charged only at 18 as a adult. unless you are bond over. what i am saying is a 16 year old a 17 year old mind frames are the same but its different state to state. are these kids mind development different from state to state.NO!!! so one state convictions can be use just because a defendant is 17. what i am saying is all convictions prior to the age of 18 should be prohibited for consideration in calculating criminal history scores... because the way any child thinks wouldn't be the same as they would think as an adult unless they are wouldn't would automatically excuse them of these procedures.

From: ~^! JOHNSON, ~^!FREDERICK
Subject: [External] ***Request to Staff*** JOHNSON, FREDERICK, [redacted]
Date: Friday, February 9, 2024 9:33:56 AM

To: U.S.S.C.
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My name is Frederick. At the time of my conviction in 2006 I was given an increased sentence due to the use of Juvenile points in calculating my Criminal History category.....The offenses that were used were for "petit theft", "disruption of a school function", and "giving a false name to law enforcement officials" In total, 5 charges of juvenile were utilized giving me 10 points and placing me in Category V. This increased my term of imprisonment by approx. 5 years. The vast majority if individuals sentenced in juvenile courts are for petty offenses. Also, considering the facts set out in "Roper v. Simmons", the juvenile mind has yet to fully develop. For that reason I believe that Juvenile Convictions should be eliminated in the calculation of Criminal History Guideline placement

From: ~^! JONES, ~^!KIA
Subject: [External] ***Request to Staff*** JONES, KIA, [redacted]
Date: Friday, January 19, 2024 12:19:12 PM

To: U.S.S.C.
Inmate Work Assignment: ORDERLY

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

DEAR USSC,

I AM WRITING IN REGAGRDS TO THE 2024 AMENDMENTS FOR YOUTHFUL OFFENDERS PART A. EXCLUDING THE USE OF SENENCES PRIOR TO AGE 18.(OPTION 3) IN THIS LETTER I WILL TRY TO ENCOURAGE YOU TO CHOOSE OPTION 3. IN 1999 PENNSYLVANIA WAS ONE OF 22 STATES AND THE DISTRICT OF COLUMBIA THAT ALLOWED CHILDREN AS YOUNG AS 7 TO BE TRIED AS ADULTS, AND ONE OF FORTY TWO THAT ALLOWED CHILDREN TO BE SENTENCE TO LIFE WITHOUT PAROLE FOR A FIRST TIME CRIMINAL CONDUCT. PENNSYLVANNIA ALONE ACCOUNT FOR MORE THAN 20 PERCENT OF THE CHILDREN IN THE UNITED STATES WHO FAC THE PROSPECT OF DYING BEHIND BARS IF CONVICTED. I HAVE WITNESS SENTENCING OF THIRTEEN AND FOURTEEN YEAR OLD CHILDREN AND YOUNGER TO DIE IN PRISON BOTH FOR HOMICIDDE AND NON HOMICIDE OFFENSES. THE STATE WAS GULITY OF CRUEL AND UNUSAL PUNISHMENT. AND THEREFORE IN VIOLATION OF THE 8TH AMENDMENT OF THE CONSTITUTION OF INTERNATIONAL LAW, AND THEORETICALLY OF THE CONVENTION ON THE RIGHTS OF CHILDREN. SUCH LAWS TOOK NO ACCOUNT OF THE VULNERABILITY OF CHILDREN OF THE DEVELOPMENTA AND LEGAL DISTINCTIONS BETWEEN CHILDREN AND ADULTS AND OF CHILDREN CAPACITY FOR GROWTH ,CHANGE, AND REDEMPTION. ALOT HAVE CHANGED SINCE THEN WITH SUPREME COURT RULINGS CONCERNING JUVENILES AND LIFE SENTENCING, WITH RESEARCH WITH DEVELOPMENT OF CHILDEREN BRAINS. AND I COMEND THE COURTS FOR THAT CHANGE. WHEN IT COMES TO THE FEDERAL SENTENCING LETS MAKE A CHANGE THERE BECAUSE FEDERAL SENTENCING CALCULATION OF CRIMINAL HISTORY SCORE IS STILL USING CONVICTIONS ALL THE WAY INTO ADULTHOOD. THEY ARE TAKING CHILDREN DECISION MAKING BRINGING IT OVER TO ADULTHOOD AND ENHANCING ADULTS SENTENING.ONCE AGAIN NOT TAKING ACCOUNT OF THE VULNERABLITY OF CHILDREN OF THE DEVELOPMENT AND LEGAL DISTINTIONS BETWEEN CHILDREN AND ADULTS. I HAVE WITNESS A PERSON 19 YEARS OLD COME INTO THE FEDERAL SYSTEM AND ARE CLASSIFIED A CAREER CRIMINAL, BECAUSE OF HIS OR HER DECISION MAKING AS A CHILD. THIS PERSON DIDNT EVEN HAVE A CHANCE TO LIVE , HOW CAN HE OR SHE BE A CAREER CRIMINAL. BY ALLOWING THE CALCULATION OF CRIMINAL HISTORY IT CAUSES A DISPERITY BETWEN LIKE OFFENDERS WITH THE SAME CONVICTIONS BY ALLOWING A CONVICTION BEFORE THE AGE OF 18 JUVENILE OR ADULT CONVICTION TO BE USED BECAUSE SOME STATES EXPUNGE CONVICTIONS OF JUVENILES BUT WITH A FOR JUVENILE CONVICTIONS BUT A ADULT CONVICTION FOR SOMEONE WHO IS UNDER 18 IT WILL BE USED AGAINST HIM FOR 15 YEARS. THE SYSTEM HAVE CONFUSED PUNISHMENT WITH RETRIBUTIONAND SCARIFICED JUSTICE FOR INJUSTICE BY STILL NOT PROTECTING OUR CHILDREN. I BELIEVE OPTION 3 TO EXCLUDE SENTENCES PRIOR TO 18 TO BE CALCULATED IN CRIMINAL HISTORY SCORE. AND STOP HURTING OUR CHILDREN BEFORE THEY EVEN GET A

CHANCE.. BECAUSE USING SENTECES BEFORE THEY ARE OLD NOUGH TO UNDRSTAND HURTS THEM IN THE LONG RUN

From: ~^! KELLER, ~^!ANTHONY EUGENE
Subject: [External] ***Request to Staff*** KELLER, ANTHONY, [redacted]
Date: Friday, February 9, 2024 5:18:38 PM

To:
Inmate Work Assignment: Education

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing this comment in regards to the way the sentencing guidelines address Youthful offenders. I am offering my humble opinion as someone who is effected by the way offenses committed prior to age eighteen are handled. I was sentenced 6-12 years in prison with a recommendation to boot camp when i was 17 years old for a robbery i committed when i was 16. I completed boot camp and my sentence was suspended and i was placed on probation. Because i spent 435 in custody (between presentence confinement at the Jeffery C Wardle Academy of 11 months and the actual boot camp of 4 months) my juvenile conviction counted under the current sentencing guidelines. I take full responsibility for my actions even then and I make no excuses now for what kind of teenager i was. I only wish to highlight a few facts. One if the court docket would have been slightly less crowded and i would have had less presentence confinement time, just the 4 months of boot camp would not have made mine a countable offense. Or if I as a teenager had the money to make bail i would have had zero presentence confinement time and only the 4 months i spent in boot camp would not be a qualifying offense. Neither of these issues are reasonably in any teenagers control. The sentencing court at that time did recognize that i was a "troubled kid" and therefore the recommendation was made that i go to boot camp but unfortunately that recommendation and total process took just long enough for that prior offense to be counted 14 years and 9 months later. That case was my only violent felony. I was young and trying to prove that i was tough so i did something incredibly foolish. I am not a violent person and although I have done more foolish things as an adult, i have grown out of the mindset that things like that are acceptable. Bu because i committed that offense when i was 16, I received a 6 point enhancement to my 922g(1). My sentence doubled for something I did when I was a kid and even though I never saw the inside of an adult facility the sentencing guidelines has no way of differentiating between adult incarceration and juvenile intervention. There is a Supreme Court case where a man received a sentence reduction similar to the way my state handles adult adjudication and boot camp, and his new sentence of probation,replaced his old sentence of incarceration and therefore made it an ineligible prior conviction. US v Kristl. Well not all states treat these situations the same and although I was a juvenile when my sentence was suspended and Kristl was an adult, because of my state nomenclature in sentencing, his suspended sentence shouldn't count but mine should. That seems like a unintended sentencing disparity.

From: ~^! KEMP, ~^!DAVON MERKIESE
Subject: [External] ***Request to Staff*** KEMP, DAVON, [redacted]
Date: Thursday, January 4, 2024 11:33:54 AM

To: United States Sentencing comission
Inmate Work Assignment: Recreation

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

My Name is Davon Kemp i am a 37 year old African American man serving a 180 month sentence at La Tuna Camp for attempted possession of 500 grams or more of cocaine. I was charged in Detroit in a 4 count indictment for Count 1 Conspiracy to distribute 25 kilograms of cocaine count 2 Attempted possession of cocaine aiding and abetting count 3 possession of a controlled substance and count 4 possession of a firearm in furtherance of a drug trafficking offense. I exercised my constitutional right to go to trial i was found Not guilty of the conspiracy,the 924 C and the possession of a controlled substance the jury returned a guilty verdict to count 2- attempted possession using a special verdict form. At sentencing the Now retired Judge Gerald E. Rosen expressed that he disagreed with the jury verdict and if he was sitting as a fact finder that he would of convicted me of all the counts except for the 924c he expressed that he knows a Leader of a Drug trafficking conspiracy when he see's one and he said i wasn't fooling no one and enhanced me for the drugs that was in the conspiracy taking me from a level 30 to a 32 and i was given a 4 point leadership enhancement taking me to a level 36. I hope and pray that Option 1 is adopted and Acquitted conduct is completely eliminated i feel like a Judge should not be allowed to overrule a jury's verdict what's the point of going through the jury selection process and having a jury trial if the judge can override the Jury? I ask that if Option 1 or any changes is adopted that the changes be Retroactive. I thank you for ending this Unjust practice that has been going on for far to long.

From: ~^! LEWIS, ~^!JERRY LEE
Subject: [External] ***Request to Staff*** LEWIS, JERRY, [redacted]
Date: Thursday, February 1, 2024 8:05:18 PM

To: Director/Who Ever Is In Charge
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Good evening. I'm sending this email to inquire about "acquitted conduct". I know there has been a lots of talk about acquitted conduct, however, I want to ask about "preponderance of the evidence" that the court used in my case and may still use it. First, I was charged with Second Degree Murder and during my trial, the jury was given "Second degree Murder Instructions" and returned a guilty verdict. My Offense level for "second degree murder was a 33 and my Criminal History Category was a III. That called for 210 months maximum (17 1/2 years). At sentencing the Judge found that I was responsible for "First Degree Murder" with an offense level 43 automactic life sentence. How can this be ? How can I be sentence for a crime not charged, not presented to the jury nor found beyond a reasonable doubt ? I pray you will address this issue. Please have a great evening. Thank You.

From: ~^! LOGAN, ~^!BENJAMIN MATTHEW
Subject: [External] ***Request to Staff*** LOGAN, BENJAMIN, [redacted]
Date: Thursday, January 4, 2024 9:34:15 PM

To: U.S. Serntencing Commission
Inmate Work Assignment: Medical

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I have been incarcerated for the last 27 years because my sentence was increased for conduct that I was acquitted for in the state court of Minnesota in 1996. Without the use of the acquitted conduct I would have received a sentence from 121 to 151 months. Instead I was given 450 months for a crime that I was found not guilty of by a jury of my peers.
I guess the question remains, if a jury finds you not guilty of a crime, how are you to defend yourself if you are continually prosecuted for other crimes and then the crimes you were acquitted of are used to increase your sentence even when the jury says your not guilty of it? Where does the law draw the line? At what point do we say enough is enough?
The late Supreme Court Justice Antoine Scalia argued in 1999 the the framers did not intend for people to have to defend themselves 2, 3, or even 4 times for crimes that juries found them not guilty of. A juries decision is suppose to be final. If not, then why do we go to trial at all? Why use them if the same charges can be used later under a lesser standard of proof? It doesn't make sense and I think all parties from the Supreme Court, to Congress, to The Sentencing Commission, know that this is not the way the law is suppose to operate.
I am asking that the Sentencing Commission use the format of the bill that is in the House of Representives at this time called Prohibiting Acquitted Conduct. It would stop the use of Acquitted conduct that derived from State, Federal, and Tribal courts. If the conduct was adjudicated by a jury and a final judgement of acquittal was made. That conduct can't be used under a lesser standard of proof to increase a persons sentence based on charges for a different crime.
There are not a lot of people that go to trial at the Federal level. so changing this would not create an over flow for the courts to deal with. It would be making something that has been wrong for years into something that should have been done years ago.

Thank you

From: ~^! MARTIN, ~^!GABRIEL ELIJAH
Subject: [External] ***Request to Staff*** MARTIN, GABRIEL, [redacted]
Date: Thursday, February 1, 2024 11:19:14 AM

To: Commissioners
Inmate Work Assignment: orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Proposed Amendments To The Sentencing Guidelines Dec 26,2023
Youthful Individuals:

Part A Option 3 should be chosen for [4A1.2(d)]
Issues for comment:
1)Many courts carry over crimes committed before 18 because of continuances of the court dates. This is due to many of the young offenders being in high school so they receive the adult conviction although they did the crime at 16 or 17.
2)The crime should be considered if it's the same type that the person is currently being charged with. I don't think it should be counted on Criminal History rather it should be considered during sentencing.
3)The departure should only be considered if it's the same type of crime being committed again.
4)No, it doesn't exceed the commissions authority.

PART B Sentencing of Youthful Individuals 5H1.1 Age
Issues for comment:
1)As far as the brain development goes, i personally made it a point to get a life routine established before i turned 25.I was arrested at 19 and it was common knowledge then that the routine and personality people have at 25 will likely be the same they have throughout their life. This should definitely be a factor the judge considers but i think it must be a departure that's earned. Since the Judge is the one sentencing the person, sometimes to 20 or 30 years, they should also play a role in evaluating the progress of that persons rehabilitation (THE GOAL OF PRISON). The compassionate release motion is a good vehicle for this. The assembly line approach is quick, but not effective.
2)There should be the possibility for a downward departure based on the offenders youth taken in conjunction with conduct while incarcerated. Many times people commit crimes because of a lack of emotional intelligence and drug abuse. If they avoid breaking the rules and take programming that helps with these issues then they should be given adjustments later on in the sentence. This helps maintain hope for the individual and if they're sincere in their change they can maintain it over the span of a few years. I was arrested in 2010 at age 19 and sentenced to 24 years so being around people in here I can see what works and what keeps people motivated to change for the better.

From: ~^! MARTINEZ, ~^!JOSE
Subject: [External] ***Request to Staff*** MARTINEZ, JOSE, [redacted]
Date: Thursday, January 4, 2024 7:34:36 PM

To: U.S> Sentencing Commision
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I, Jose Martinez [redacted] Went to trial for a murder offense and after not-guilty verdict by the jury, the judge at sentencing found that I, in fat committed the murder< relying the acquitted. I received a life sentence. I entered trial with a jury believing that sanctity of a jury finding from member of my peers was a god giving right that could not be altered.
I respect request that the " Acquitted Conduct Amendment be passed and made a retroactively applicable to convict person(s) as I.
Thank you in advance for your time, attention, consideration and service.

Respectfully, Jose Martinez
Cause # 1:10-cr-00233-W,S-HKS

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Daryl Mason

Topics:

Youthful Individuals

Comments:

I would like to comment on the sentencing of youthful individuals. It is my opinion that when youths(age 17 to 21) are sentenced to time in prison, they haven't learned to be responsible people of society. They get locked up to lay in there racks all day, if they so choose, and are fed 3 meals a day. They receive no counseling or afforded the opportunity of employment. What message does this send and how many reoffend to go back to an easy lifestyle. If some youths would be offered probation and a chance at true counseling, they would have a better chance at making something of themselves, besides a burden on society. I also believe it's a one time chance, offend again and serve time. I also think this effect is worse in the federal system where the same crimes draw harsher sentences, especially for native individuals who committed crimes on a reservation. Why the different guidelines, when it's a 50/50 chance on what jurisdiction you will fall on(whoever has the time to take the case). Thank you for allowing me the opportunity to voice my opinion.

Submitted on: January 22, 2024

From: ~^! MASON, ~^!DEREK MICHAEL
Subject: [External] ***Request to Staff*** MASON, DEREK, [redacted]
Date: Friday, January 5, 2024 3:04:56 PM

To: Sentencing Commission
Inmate Work Assignment: AM Rec

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is in regards to the proposed change to the youthful offender policy. I agree with the new change of the "different form of punishment" of young adults based on the scientific facts on brain development in young adults. This is were the phrase "young and dumb" comes to play. Young adults are more prone to make stupid decisions due to the fact that their brain is still developing on making smart decisions and thinking about actions before they act, I know from experience as I know everyone else has. Everyone made bad mistakes/decisions when they were younger to. I got my case at the age of 19. I didn't realize what I was doing or the consequences of those actions until I came back to bite me. At 23 now, done 2 years here in federal custody, I had a lot of time to think about what I've done and what I need to do to live a good life. I have plans on starting my own business now and spend time with family. Being in prison is holding me back from that and I would like to get my life started again as early as I can. This new guideline would help me and other youthful offenders get their life back on track. Being outside of prison on home confinement and going to treatment (other forms of punishment) would help me and others start their new and improved life. Being stuck in prison can lead to bad decisions again (brain development), can put you in harms way (prision violence), and others keeping you in prison longer when we can actually get our life together with a better support group like friends and family. Can let us get a job or start a business like I want to do and others I know here to. I agree with the age policy change and I KNOW it can help others here actually better themselves NOW while they are still young and able to. I can see how this will actually help with prison reform and is a strong way to actually encourage young adults to change from their bad decisions and actions and keep them out of prison.

Thank you,

Derek Mason

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Danny Mitchell, Family members

Topics:

Acquitted Conduct

Comments:

I have a family member who guidelines were 135 months to 168 months but was giving 372 months because of acquittal conduct I am sure if the acquittal conduct wasn't used he will be home allready he's been gone for 9 years and 5 months

Submitted on: December 23, 2023

From: ~^! MOIS, ~^!EMANUEL
Subject: [External] ***Request to Staff*** MOIS, EMANUEL, [redacted]
Date: Thursday, January 4, 2024 2:05:15 PM

To: New Amendments Proposal
Inmate Work Assignment: na

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in regards to the new Amendment proposals in reference to youthful offenders.

I was 24 when i was arrested and due in part to my young age i was add time to my sentence, and in my opinion that is not fair. I don't believe that because someone is under the age of 25 they should be added time to their sentence based on a generalization that men under the age of 25 are at a higher risk to re-offend or commit a new crime.

In my case, i faced a mandatory minimum of 15 years, and so i would have already been well over the age of re-offending, and adding time on top of my minimum seems unnessicary.

I would like to see that such addistions to sentencing be reconsidered and possible removed, since each persons life and cirsumstance and upbringing are different and should be taken into consideration when being sentenced and their risk of re-offending in the future.

Thank you for your time.
Sincerely,
Emanuel Mois

UNITED STATES SENTENCING COMMISSION
Attn: Public Affairs - Proposed Amendments Comment
One Columbus Circle NE, Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: AMENDMENT TO GUIDELINE § 4C1.1 - DEFINITION OF "SEX OFFENSE"

To Whom It May Concern:

For more than a decade, the United States Sentencing Commission ("Commission") has made it clear that evidence-based revisions are necessary with regards to the child-pornography related sex offender sentencing guidelines. Between 2009 and 2021, the Commission issued numerous reports to Congress addressing the empirical data, including the recidivism rates and the out-of-date guidelines that result in extraordinarily high sentences for even first-time offenders. Despite these ongoing reports, however, the Commission continues to ignore these unfair and unjust guidelines and therefore it appears that the Commission continues to fail in its mission to revise the guidelines based on empirical data.

For the first time in recent history, the Commission finally decided to consider sex-offense related revisions with regards to its zero-point criminal history offenders, but only because the Department of Justice raised a concern about certain hands-on offenders still being eligible for a potential 2-point reduction. It appears that the Commission listened to the Department of Justice and is seeking to revise the definition of "sex offense" in Guideline 4C1.1.

This calls into question, in my mind, whether the Commission is an independent agency tasked with evidence-based policy, or whether it is simply an extension of the Department of Justice. This is because despite all the evidence and reports about child pornography offenders receiving extremely harsh sentences with no criminal history, the Commission appears to have only considered this definition revision because of the Department of Justice's concern. What about the Commission's decade-worth of data?

While I support and agree that the proposed definition should include hands-on offenses like the Department of Justice suggests, whatever definition the Commission chooses to adopt should **exclude from its definition Receipt, Possession, and Distribution of Child Pornography Offenses**. Such adoption will consistent with the empirical evidence available to the Commission, will address the Department of Justice's concerns, and will allow first-time internet-only offenders from potentially being able to reduce their unduly long sentence that was based on Guidelines not empirically supported.

I have faith that the Commission will consider this comment and make the just and right decision with regards to the definition of "Sex Offense" in Guideline § 4C1.1 as mentioned. Thank you for your time and consideration.

Sincerely,

Linda Pearce

From: ~^! NABER, ~^!JOHN FRANK III
Subject: [External] ***Request to Staff*** NABER, JOHN, [redacted]
Date: Monday, January 8, 2024 9:19:49 PM

To: USSC
Inmate Work Assignment: Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

This is in regards to the proposed "youthful individual" changes that will be made in Part B of this subsection (5H1.1):

I agree with the proposed changes, but I believe that it is imperative that the USSC expand 5H1.1 even more broadly; qualifying "youthful adult offenders" for a reduction due to their close proximity to being underaged is a step in the right direction, but more can be done. The federal criminal justice system should mimic what state justice systems oftentimes do for first-time offenders and [especially] first-time youthful offenders, and that is to provide them with a second chance through the imposition of a form of "shock probation" or similar punishment. Sending adult teenagers to adult prisons during these formative years of their lives leads to their entry into prison gangs as well as their overall assimilation into the prison culture. I have witnessed this occur firsthand, and as a teenager myself coming into the prison system, I had resist the herd mentality of criminality and endless scheming and evading authorities. Most importantly, the costs to society will actually be significantly lowered, I conjecture, by offering these youthful adult offenders a second chance, for it can help put a dent in the process of essentially breeding criminals, which is the DOJ's current strategy for these young deviants, many of whom are first-time offenders and have had no exposure to the American penal system. It is now putative among those in the scientific community as well as the general public that the brain is not fully developed until the mid-twenties, and this is why impulsive decision making is so high at this age, especially among males, who have not yet developed their adult prefrontal cortexes. They are not yet adults, pyschosocially speaking, yet they are adults legally and are thus tried as adults; this needs to stop, and we must adjust our criminal justice systems to reflect those seen in most Western, industrialized nations, with an emphasis on Scandinavian nations, where recidivism rates are substantially lower.

- John F. Naber III

Respectfully Submitted on this 8th day of January, 2024

From: ~^! NEWELL, ~^!RUSSELL JAY
Subject: [External] ***Request to Staff*** NEWELL, RUSSELL, Reg# 18005021, COL-C-A
Date: Thursday, February 8, 2024 1:05:21 PM

To:
Inmate Work Assignment: None

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Juvenile Criminal History

We all understand that juvenile adjudications are subject to different procedures across the country, and it is unjust to put those same inconsistencies into a federal standard. It has been found that individuals under the age of 18 are more likely to be impulsive and not understand the consequences of their actions. From experience of my own I was sentenced before the age of 18 for multiple charges and agree that at that age in my life I wasn't thinking about any of my own actions at that point in time. Growing up in a rough childhood and the fresh loss of of my father made me where I was rebellious and carefree and not thinking tomorrow or what might come from my actions then. It took me more 20 years to finally open my eyes and realize the repercussions and harm that my actions and ways caused harm to me and others as well. My state system is different from others they sentence us at the age of 17 as adults and even then I was sentenced for something that i committed at the age of 16 after I turned the age of 17 and they never even adjudicated me as an adult for the charges. I know from personal experience that the brain science that we have found that we are not fully developed until the mid-20's to be true. Please don't take this as I'm making an excuse for my wrong doings, wrong is wrong, but that comes from growing up maturing to see that now..as a rebellious adolescence we don't worry nor think about this things at the moment we did what did. I believe the commission should not consider any sentenced imposed for an individual before the age of eighteen in the instant criminal history score. I support option 3 which entirely excludes these convictions from the criminal history score. Thank you for time and consideration on my thoughts of this matter

From: ~^! O"BANNON, ~^!MICHAEL
Subject: [External] ***Request to Staff*** O"BANNON, MICHAEL, [redacted]
Date: Saturday, January 6, 2024 9:33:57 AM

To:
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

United States Sentencing Commission

Acquitted Conduct Sentencing

My Name is Michael O'Bannon. I am a 40 Year old Father of Two From Central Indiana. I Have been sentenced to 37.5 years in federal prison for a crime that I was acquitted of. After being arrested in 2018, I went to Jury Trial for conspiracy to distribute over 50 grams of methamphetamines'. after a 3week trial, a jury of my peers returned a verdict of "NOT GUILTY."
However, Once at sentencing. the judge completely disregarded the Jury's verdict and sentenced me to 450 months in prison. Finding that I did Participate in the Charged conspiracy... I just could not understand how one man could over-rule a jury's verdict.

With the use of acquitted conduct sentencing, My sentence was multiplies from 7yeays to 37.5 years. So I am Asking The U.S. Sentencing commissions to Please COMPLETELY stop the unlawful punishments resulting from acquitted Conduct sentencing in federal courts. :If anyone is to respect and honor the judgements coming out of our criminal justice system, " Courts must Give an exonerative effect to a not Guilty verdict." (McNew v. State 271 Ind.)

In (United states v. Haymond 139 s, ct. 2019) The court emphasized that "One of the Constitutions most vital protections against arbitrary government" is that only a Jury, acting on Proof beyond a reasonable doubt, May take a persons liberty. " Before depriving a defendant of liberty, the Government must obtain permission from the defendants fellow citizens." (Bell 808 F.3d at 930) (Millet J. Concurring). When those citizens refuse to grant permission to punish a crime, a judge cannot the " Brush off the Jury's judgement" By Using " The very same facts the jury rejected at trial to multiply the duration of a defendants loss of liberty." That is a deep incursion into the jury's constitutional role. And what's crazy is... that is exactly what happened to me.

Even before the statements issued in McClinton, a host of judges had written separately to opine that acquitted conduct sentencing is, "A Dubious Infringement of the rights to due process and to a jury trial." (United States v. Bell, f.3d 926, 928) D.C. Cir 2015(Kavanaugh J. Concurring). It perverts our system of Government to allow a defendant to suffer punishment for a criminal charge for which He or she was acquitted. (Unird States v. Faust, 456 f.3d 1342)

Again I am asking The United states sentencing Commission to Completely stop the Unlawful use of acquitted conduct during sentencing. I am a 40 year od Man, That has been Given a 40 year sentence for a crime that I was acquitted of... A Crime That I did not commit... And a Jury of my peers agrees. Thank you Very Much.

Respectfully submitted
Michael Obannon.

From: ~^! O"BANNON, ~^!MICHAEL
Subject: [External] ***Request to Staff*** O"BANNON, MICHAEL, [redacted]
Date: Sunday, January 21, 2024 7:18:59 PM

To:
Inmate Work Assignment: unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

United States Sentencing Commission,
Acquitted Conduct

I am writing again to voice my thoughts on the use of acquitted conduct during federal sentencing. I think it it completely unfair, and violates the constitutional rights of American citizens. I think it is obvious... That a defendant should not be sentenced to prison time for a crime he or she was acquitted of. Its Kind of a "No Brainer".

I also have read the options that the U.S. Sentencing commission is considering. And to still allow the Use of acquitted Conduct AT ALL is just wrong. Option #3 does Nothing but change the Burden of proof from "Preponderance of evidence'" to Clear and Convincing Proof". But either way, It is wrong to allow one man to overrule a verdict that has been voted on by a Jury of my peers. We have changed nothing if you allow a judge to overrule a Jury's verdict in any way. That's not even democracy.

Finally. The Change has to be made retroactive. As I wrote in my last letter. I am a 40 year old Man, Who is Locked in prison with a 40 year sentence for a crime that i was acquitted of. I am rapidly running out of time to file my appeal, And The only way I would receive relief for My Unjust 40 year sentence, would be for the Guideline amendments regarding acquitted Conduct to be made retroactive.

Thank You, Respectfully. Michael O'Bannon

From: ~^! OHNMACHT, ~^!DAVID
Subject: [External] ***Request to Staff*** OHNMACHT, DAVID, [redacted]
Date: Thursday, January 4, 2024 12:19:00 PM

To:
Inmate Work Assignment: suicide cadre

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear Sirs:

I am writing about the proposed amendments concerning youthful convictions. I have not yet seen the proposed amendments or guidance, but wanted to comment on the topic as a whole. Once I do see them, I will have more specific comments.

I am in a unique position, being not only an inmate but a person holding a degree in psychology and sociology. I have read many studies on brain and cognitive development, and I have encountered many men who are currently locked up and have youthful convictions. There is no longer a doubt, the brain does not stop developing, and is not fully formed, until around the age 25. A person under this age has less appreciation for their actions, and less thought of consequences. They are also more prone to acting emotionally, rather than rationally. Add to that the way we, as a society, have raised children for the past few decades, and a person under the age of 25 cannot truly be said to be a fully functional, responsible adult. Now, add in a youthful conviction, for which a person was incarcerated. There is no doubt, based on studies and my own personal experiences, that being taken out of society at that young age greatly impacts a person's development. The term "arrested development" is particularly apt, as a person who gets arrested and incarcerated at such an age is impacted developmentally. Such a person will undoubtedly now face social and emotional problems, and be less capable of rational thought and behavior as they get older and reenter society. Such a person is at greater risk to reoffend, as they have never gotten to learn how to function in society as an adult. They regress to the age they felt comfortable and confident, often their teenage years, and act accordingly. And what do we, as a society, do? We punish them even more for their current behavior based on their old behavior, rather than properly looking at the person as a whole and recognizing society's part in this cycle.

We should not hold convictions of a person's youth, before age 25, against them to lengthen their sentences. Instead, we should look at the impact of such prior conviction and incarceration, and use it as a mitigating factor today. I am not saying let people get away with their adult crimes, but rather, shorten their sentence and add mandatory counseling, programing and training to help the person learn to function as a responsible adult, and allow them the chance they never had. This should be across the board, for violent and non-violent crimes, drugs, murder, sex offenses, everything. We must recognize the role incarceration before the age of 25, especially long term incarceration, has in raising recidivism and causing these "adults" to reoffend. Excluding any class of offenders is counter-productive, in that we are saying, "You are in the group of worst offenders, so we aren't giving you any chances, nor any incentives to change. Instead, we'll just let you sit and stew, then come home exactly as you went in, so you can go right back to your criminal behavior." It is time to recognize that all offenders can be rehabilitated, and all should be incentivized to do so. To be sure, the shorter sentencing should be, as I said, tied to mandatory counseling, programing and training. A person that completes such should be rewarded and released, on probation or post-release supervision, to have the chance to lead a productive life. A person who refuses such, and continues to

do so, should be treated just like a person on probation or post-release supervision, and have their sentence revoked for such refusal, but only when such refusal lasts throughout the term of incarceration.

Youthful offenses plague this country; there is no doubt in my mind about that. We treat people under a certain age as if they shouldn't bear responsibility, and so they act accordingly. We need a societal shift to fix this problem. In the mean time,we must recognize that those youthful convictions and incarceration have created a generation of adults, currently in custody, who never had a fair chance at a real life.

Thank you for your time and attention. I look forward to seeing your recommendations and final report.

Yours,

David Ohnmacht

From: ~^! OJEDOKUN, ~^!SEUN BANJO
Subject: [External] ***Request to Staff*** OJEDOKUN, SEUN, [redacted]
Date: Thursday, January 4, 2024 9:18:57 AM

To: Sentencing commission- Proposesd amendment 2
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

2. Proposed amendment to U. S.S.G. sec. 2B1.1, comm. 3(A)(ii)-- "Intended Loss".

The use of "intended loss" has had profound and adverse effects on defendants' sentences. Several defendants who were supposed to be sentenced base on the amount of money or property that was "actually loss" or "actually destroyed/damaged", have had their sentences enhanced and resulted in more years of imprisonment than they would have gotten had the sentencing courts considered their sentence enhancements under the 2B1.1 base on the "actual loss". An example is a case of United States v. Banks, 55 F.4th 246(3rd cir. 2022), where the district court enhanced the sentence by a 12-point after considering the "intended loss" as basis for the sentence. the third circuit sitting en banc has thus held that the use of the "intended loss" is unwarranted/inapproriate because the sentencing commission's explanation or definition of the "loss" which appears in the commentary of the guideline as "Actual loss" and "intended loss" is thus ambiguous. The court has held that it could not give deference to Auer v. Robbins, 519 U.S. 452, 117(1997) but must exhaust all 'traditional tools of construction,' and determine that the regulation is "genuinely ambiguous". See Kisor v. Wilkie, 139 S.Ct. 2400, 2415(2019). Because this commission's definition of "loss" in 2B1,1 is ambiguous, the Due process of law is violated. See Connally v. General Const. Co., 269 U.S. 385, 391 (1926); Collins v. Kentucky, 234 U.S. 634, 34(1914).

Moreso, since the explanation of a guideline cannot be authoritative if "it violates the constitution or a federal statute, or inconsistent with, or a plainly erroneously reading if, that guideline" See Stinson v. United States, 508 U.S. 36, 44-45(1993); U.S.S.G. sec. 1B1.7, commentary; this commission should therefore abbrogate/elimitae the use of "intended loss" under the 2B1.1, comm. 3(A)(ii), and the guideline should be amended to reflect only "Actual loss" and that "actual loss" is the appropriate factor for sentencing enhancement under the U.S.S.G. sec. 2B1.1 of the sentencing guideline.

From: ~^! PALMER, ~^!ENOCH AMIR
Subject: [External] ***Request to Staff*** PALMER, ENOCH, [redacted]
Date: Thursday, January 4, 2024 7:34:37 PM

To:
Inmate Work Assignment: NA

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was charged with attempted murder in the State of South Carolina. The attempted murder was dismissed, Yet the AUSA used my State charge against me to use as a cross reference. I do believe that was not supposed to go that way because the initial charge for my FED indictment was disnissed. That's Acquited conduct, is it not?

From: ~^! PARKER, ~^!HANDSOME PETER
Subject: [External] ***Request to Staff*** PARKER, HANDSOME, [redacted]
Date: Thursday, February 8, 2024 7:05:40 PM

To: ussc
Inmate Work Assignment: food service

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

hello,ussc
i am writing about the "youthful individuals" part a of the amendment juvenile criminal history scoring. i am in support of option 3. reason for my support because of the inconsistency of juvenile courts in the different jurisdictions of the united states of America. in some states children are allowed to be bond over to adult court others don't allow it. juvenile cases are handled defferently. these inconsistencies should not make it over to federal sentencing because two individuals with the same exact record will have two different sentences because of the inconsistency. which will have a disparity between the two individuals. for example a juvenile in a state where its not mandated to bond a juvenile over to adult court will not be punished more harshly later in federal court then a state that allows juvenile bond over. both having the same record i believe the difference in state laws concerning juveniles all juvenile sentences should not be used in calculating of criminals history. the new research in brain studies and juvenile behavior im in support of option 3. using these sentences to enhance a offender sentence for things he or she did as a child is not protecting our children in fact setting them up for failure. consequences is not even considered when a child makes a decision so please correct this wrong that the federal sentence guidelines did not take into account at the time it was wrote or changed. option 3 is the best options because it takes out the confusion that the different states cause because of the way different states handle their juveniles. option 3 would eliminate disparities between states to states in federal sentencing.

To, All,..

....U.S Sentencing Commission For,
On, Public Responces..

Option:(2). Would Amend the 1B1.3 Commentary that a down ward departure may be warrante if the use of Acquitted Conduct has a "dispropionate impact" on the guideline rang:

Committes:__There For, as applied Fruadently on Report, submitted by Probation Officer, as Find Not Presented to grand jury or pitty jury. Was clearly a due-process Violation under the "Apprendi Rule," For uncharg Elements, Predicates, and statute. That were Not enter in "Indictment," For which the defendant relvant Conduct, Should not be consider at Sentencing. Not Found On Spical Verdict Form....or on Plain, Verdict Form, At the end of trial. by jury, and During the sentencing, Only Facts arising out of a Finnal Conviction, And not Elements, of Acquitt, dismissed, or uncharg Crimes, may not be Consider at sentencing. For it is a Violation on 5th, 6th, As un Constitutionally Applied. Under, Jones v U.S. 135, S.ct. 8.9 (2014).

Notice:__Where the Suprem Court, recived (3), Petition, on the Acquitted Conduct, related issue, "As a Road Mape:"....As "Rectroactive":

Put, differantly, "If a defendant is presumed innocent, upon Acquittal, then it necessary Follow that he is innocent of Charg For which, he was N'ever, Convicted Regardless of Whether the "Non-Conviction" are a Resualt of a dismissal, or Failur to charg out right. And can'nt be Penaliz at sentencing. A motion For Acquittal are timely under Rule. 29. At trial...."And anvalid Conviction, is No Conviction at All"

Signatur: Victor Pena

[redacted]

Date: 1/4/2024..

Submitted, before 22nd day of Feburary 2024, deadline:

From: ~^! PRINCE, ~^!CLOVIS
Subject: [External] ***Request to Staff*** PRINCE, CLOVIS, [redacted]
Date: Friday, January 19, 2024 11:18:48 AM

To: Commissioner
Inmate Work Assignment: Unassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Mr. Commissioner:

The economic loss provision within the sentencing guidelines need a complete overhaul. It is more harsh than murder or drug trafficking. The loss schedule and the intended loss and actual loss schedule, with the various commentary could place a white-collar crime at a life sentence, and no violence or threat to the community is involved. For example, $7 million in loss should be the starting point for enhancements at e.g., 6 points; $10 million at 7 points, and $20 million at 8 points. This will meet societies goals. But to sentence someone to prison for life for an economic crime and give this restitution and fines is profoundly unnecessary. The changes must be retroactive, because thousands of offenders labor in prison with 30 year sentencing for bank fraud or fraud. Thank you for allowing me to comment.

In the proposed amendments to the Sentencing Guidelines, the determination of “Loss” should be left to the discretion of the sentencing judge, or in the case of a trial, to the jury. Using the greater of actual or intended loss as a blanket determination across every case results in an unfair, unjust, and radically skewed offense level, that is not a true reflection of the defendant’s offense. The majority of cases will have a greater intended loss than actual loss.

Furthermore, under the definition of “Intended Loss”, it is unjust, unfair, and radically biased against the defendant to include “pecuniary harm that would have been impossible or unlikely to occur”. The application of actual or intended loss should remain at the sole discretion of the sentencing judge, and should be a point to be argued in any case involving loss.

Every case and every defendant is different, and the current construction of the Guidelines loss table has been influenced by arbitrary and unfounded decisions pushed by Congress, to which there is no reasonable support for those increases in the loss table. It should be noted that several Circuits have now determined the Sentencing Guidelines to be wanting, in the fact that the loss table is skewed disproportionately against the offense being sentenced.

The Sentencing Guidelines are meant to be guidelines to help ensure the uniformity and fairness of sentences throughout the United States justice system. By implementing the proposed amendments, the opposite effect is achieved, and will result in more disparate and unjust sentences based on wildly and horribly skewed offense level loss enhancements. The Guidelines regarding loss should remain as they are, and the proposed amendments should be wholly rejected.

If it is the intent of the Sentencing Commission to subject defendants to cruel and unusual punishments with excessive prison sentences, the the proposed amendments will achieve that goal. If it is the intent of the Sentencing Commission to have defendants face prison time according to the severity of their offense, then the Guidelines should remain as is, and deference should be given to the sentencing judge, or to the appellate circuit.

These proposed amendments are the result of frantic scrambling to close a non-existent loophole. The wording of the Guidelines as they are has been chosen very carefully by the Commission, and the Commission should have faith in it’s own work. If changes are to be made, then there should be significant investigation and consideration into the matter before amendments are proposed. Rushing to provide a solution that appeases only the federal prosecutors is not a solution at all, but is in fact an attack on the very system the Commission is trying to help guide. It is not federal prosecutors that make policy. Their job is to enforce policy. It has been shown and seen time and time again that federal prosecutors have and are pushing for sentences that are well above and beyond the severity of the offense of the defendant. The proposed amendments seem to be nothing more than the Commission bowing to federal prosecutors.

The proposed amendments to the Guidelines for calculating loss should be wholly and completely rejected.

[redacted] REED, LARRY EUGENE - Unit: BTF-M-C

[redacted]

TO: U.S. Sentencing Commission
SUBJECT: ***Request to Staff*** REED, LARRY [redacted]
DATE: 01/05/2024 11:38:25 AM

To: Chairman Reeves
Inmate Work Assignment: unicor

Declaration for the Prohibition of the Use of Acquitted Conduct in Sentencing Guidelines

United States Sentencing Commission
Attention: The Honorable Members

I, Larry Eugene Reed, solemnly submit this declaration to the United States Sentencing Commission (USSC) drawing upon the principles of justice, fairness, and the Constitution of the United States, to beseech the Commission to adopt Option 1 of the proposed prohibition against the consideration of acquitted conduct in federal sentencing guidelines.

INTRODUCTION

My life's trajectory was altered irrevocably by the application of legal constructs that allowed judicial reliance on unsubstantiated allegations deemed non-credible by a jury of peers. In the year 1994, I stood before the embodiment of our judicial system- a jury- and was acquitted of a murder charge dating back to 1988. This exoneration should have signified the end of an ordeal, an unequivocal declaration of my innocence concerning that grave accusation.

Yet, in a twist of fate that defies the tenets of fairness encapsulated in the American justice system, I found myself arrested in 1996 on unrelated federal charges of drug trafficking and firearms possession. I was subsequently found guilty on eighteen counts relating to drugs and two counts concerning firearms. It was during the sentencing phase of this conviction that the specter of the past - a past for which I had been exonerated - was unjustly resurrected to augment my punishment.

APPLICATION OF ACQUITTED CONDUCT

Despite my acquittal, the court employed a lessor standard of proof - the preponderance of the evidence - to determine that I was responsible of not one, but two homicides, neither of which I was formally charged with nor found guilty of by my peers. The weight of accusations against me rested on the terms of hearsay, with scant substantiating evidence apart from the testimony of two or three individuals claiming that I had boasted of these deeds, and one witness whose account was discredited in court.

This determination was not just a mere factor in my sentencing; it was the fulcrum upon which my fate pivoted, dramatically extending my incarceration length. Consequently, I have been subjected to the highest severity level under the guidelines, with a 2A1.1 enhancement for first-degree murder, tethering me to a sentence far beyond the statutory maximum of 5 to 40 years for the crimes of which I was actually convicted.

THE PAIN AND INJUSTICE

The incarceration I continue to endure - now spanning over three decades - has been exacerbated by the constant shadow of an unjust sentence enhancement. Opportunities for sentencing relief or amendments have faced continual obstructions due to the use of this acquitted conduct. This inequity has been a source of profound anguish, precluding what should have been my justly deserved, lawful reintegration into society.

CALL TO ACTION

The consideration of acquitted conduct in sentencing runs counter to the fundamental ideals of our justice system. It negates the jury's role as the arbiter of truth, disregards the presumption of innocence, and flouts the requirement for proof beyond a reasonable doubt - the golden standard of American jurisprudence.

In aligning with Justice Clarence Thomas's perspective, it is evident that the USSC has the auspicious opportunity - indeed, the moral imperative - to rectify this miscarriage of justice. The Commission can send an unequivocal message through the full adoption of Option 1: that the era of employing acquitted conduct in federal sentencing calculation is over, thereby restoring the integrity and trust in our legal proceedings.

CONCLUSION

I plea for the Commission's decision to resonate with the principles of justice, to undergird the sanctity of our Constitution, and to honor the verdicts delivered by our peers in the jury box. Let this moment not pass without the restoration of balance and fairness it promises to countless Americans whose lives hinge on the equitable application of the law.

I humbly request that the commission's adopts option 1, unequivocally prohibiting the use of acquitted conduct in determining federal sentencing guidelines. In doing so, you affirm that our legal system values truth, respects the outcomes of our juries, and upholds the foundation of justice that is the cornerstone of this great nation.

Respectfully Submitted,

Larry E. Reed
[redacted]
FCI 2
PO Box 1500
Butner, NC 27509

From: ~^! REID, ~^!KENNETH ROSHAUN
Subject: [External] ***Request to Staff*** REID, KENNETH, [redacted]
Date: Sunday, January 7, 2024 2:33:55 PM

To:
Inmate Work Assignment: acquitted conduct comment

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I very much agree that the acquitted conduct bill prohibiting punishment of Acquitted conduct(HR5430) should be immediately signed into law it was already voted on 23 to 0 by the house It will free me from this unlawful sentence because i was acqutted of murder by my jury in count 3, but sentenced to life for the same muder in count 4 the sentence violated my sixth amendment right to a trial by jury, because the court basically ignord the jury verdict "not guilty" o f drug related capitol murder in count 3 and sentenced me to life for a murder that i did not committ. I've been in federal prison for 21 years for a sentence that is unlawful. I factually did not hurt or kill anyone and i need the commissions help, to fully expose my acquitted conduct sentence and conviction. I cannot afford an attorney and need legal assistance,attorney appointed to help. I also havea illegal drug conspiracy sentence that is based on a wrongful conviction on count 1, where the jury did not convict me of the threshold drug qauntity-elements that were charged in the count 1.I was acquitted of the Threshold drug qauntity-Elements that were charged in count 1 therefore i am actually innocent of the crime as charged in count one. the threshold drug-qauntity-elements are also Acquitted Conduct

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Justin Rizzo-Weaver

Topics:

Rule for Calculating Loss

Youthful Individuals

Acquitted Conduct

Circuit Conflicts

Miscellaneous

Technical

Simplification of Three-Step Process

Comments:

Dear U.S. Sentencing Commission,

I am writing to express my unequivocal support for the proposed amendments to the federal Sentencing Guidelines, specifically concerning the use of acquitted conduct and juvenile criminal history in determining sentencing. The details provided by the Commission and the insights from recent research and public discourse underscore the critical need for these reforms.

The Commission's consideration of acquitted conduct is a landmark opportunity to align sentencing practices with the foundational principles of justice and fairness. The existence of multiple options for amending the use of acquitted conduct highlights the importance of stakeholder input. I strongly support Option 1, which would define and prohibit the use of acquitted conduct at sentencing. This approach respects the integrity of the jury's verdict and addresses the profound injustice of sentencing individuals based on charges for which they were acquitted. Implementing this change is essential for restoring public trust in the fairness and accuracy of our judicial system.

Regarding the treatment of juvenile criminal history, the advancements in brain science provide compelling evidence that young people's actions should not be judged with the same severity as those of adults. The current practice of using sentences imposed before the age of 18 to calculate

an adult's criminal history score does not account for the significant potential for growth and rehabilitation. I advocate for the Commission to adopt a policy that fully excludes juvenile convictions from the criminal history score, aligning with Option 3. This change would reflect a more enlightened understanding of juvenile behavior and the justice system's role in encouraging positive development rather than perpetuating cycles of punishment.

Additionally, the proposal to simplify the guidelines by eliminating the second step of the sentencing process and focusing on offense-specific considerations and the individual characteristics of defendants is a commendable effort to streamline sentencing. This simplification would not only make the process more efficient but also allow for a more nuanced consideration of each case's unique circumstances, thereby promoting more equitable outcomes.

The proposed amendments represent a significant step forward in creating a more just and humane criminal justice system. By prohibiting the use of acquitted conduct and juvenile criminal history in sentencing decisions and simplifying the guidelines, the Commission has the opportunity to ensure that sentencing practices are fair, equitable, and grounded in the latest scientific understanding and principles of justice.

Thank you for the opportunity to contribute to this important discussion. I urge the Commission to adopt these changes, which will undoubtedly have a profound and positive impact on our justice system and society as a whole.

Sincerely, –Justin Rizzo-Weaver, Sonora, CA

Submitted on: February 8, 2024

From: ~^! RODRIGUEZ, ~^!OSIEL
Subject: [External] ***Request to Staff*** RODRIGUEZ, OSIEL, [redacted]
Date: Friday, January 12, 2024 2:19:13 PM

To: USSG Proposals / Comments
Inmate Work Assignment: Unnassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

PLEASE READ----PLEASE READ----PLEASE READ----PLEASE READ....COMMENTARY ON THE PROPOSED USSG AMENDMENTS.
My name is Osiel Rodriguez. This is MY FIRST TIME IN PRISON and this December (2024) I started on MY 28th YEAR OF INCARCERATION.
As a 21 year old first offender, I was sentenced to 60 years for a bank robbery I committed in 1996 (nobody was hurt or killed). Thirty-two/32 of those years are due to a 4/four level upward departure that the court enhanced me at sentencing. This enhancement was for conduct I was acquitted of. I went to trial and was found not guilty 924(c) Use of a firearm during a crime of violence, and the court enhanced me for discharge of that firearm... the gun the jury found I did not possess. The I am a Cuban Citizen and all I want to do is get the living hell out of the United States as soon as I get out of prison. It's the getting out of prison part I am having trouble with. If your committee passes the AQUITTED CONDUCT correction amendment to fix situations like mine, it will save my life... not to mention millions of tax-payer dollars. I am begging you to please pass something to remedy cases like mine. I was surprised to read that not many people are affected by this (read it in your proposal papers).
Here is my case number and where I was sentences. Tried/sentenced in: U.S. District Court for the Middle District of Florida (Tampa). Case number: 8:97-cr-00004-RAL-3
I pray that you please pass something to save my life. I will turn 49 years old this April... the sentence I have is a death sentence. Please help me.
Thank you for your time.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Donterris Rogers Rogers

Topics:

Youthful Individuals

Comments:

It is unfair to hold a grown man responsible for things they might've done before the age of 18. A person is not fully mature until they are about 21. How can the federal gov continue to over punish and over sentence someone for a childish mistake they made as a juvenile. And to count that as points toward there sentence as an adult. Prior offenses shouldn't be counted as criminal history if they were done as a juvenile.

Submitted on: January 4, 2024

From: ~^! SANDSTROM, ~^!STEVEN
Subject: [External] ***Request to Staff*** SANDSTROM, STEVEN, [redacted]
Date: Thursday, January 4, 2024 11:49:17 AM

To: sentencing commission
Inmate Work Assignment: 2A Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

i would like to commit on the youthful offender amendment, as a youthful offender myself, as am not the same person as i was 19 years ago. i was 19 years old at the time of my offense, i was convicted of murder, i was not the gun man, but of course i was convicted of aiding and abetting in the offense and sentenced to multiple lif sentences. i was a misguided youth who was raised in a family of criminals, sence my incarceration i have earned my GED, taken over 100 education courses and i am mentoring the younger generation that the life of crime and the streets are not the way to live and that the street life isnt the way real men conduct themselves. if evaulated today it would be clear that im not the same man today as i was at the time of arrest and that my chances of recidivism is low, i hope and pray that the commission does something that helps the youth get the rehabilitation they need and not just throw us away like the system has done over the years, my changes was by my own wants of something different, if you want something different you have to do something different, and i have decided to change my ways, and it has all been for the better, i hate who i used to be and would love a second chance at life, thank you and have a great day.
steven sandstrom, USP Atwater

From: ~^! SHAVERS, ~^!MARCELL
Subject: [External] ***Request to Staff*** SHAVERS, MARCELL, [redacted]
Date: Friday, January 5, 2024 1:05:07 PM

To: COMMISION
Inmate Work Assignment: ORDERLY

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

MY CHARGE CONSISTED OF AN 846: 841(B)1B CONSPIRACY TO POSSESS METHAMPHETAMINE WITH THE INTENT TO DISTRUBIUTE. THE SECOND OFFENSE WAS AN 924(J) FELONY IN POSSESSION OF A FIREARM DURING A DRUG TRAFFIC CRIME TO COMMIT MURDER IN THE MANNER OF 18 U.S.C. 1111 AT TRIAL I WAS FOUND NOT GUILT BY THE JURY FOR VERDICT FORM 1ST DEGREE AND 2ND DEGREE MURDER. ON THE 1ST COUNT WHICH WAS THE DRUG CHARGED CONSPIRACY I WAS FOUNG GUILTY AND AT SENTENCING THE COURT APPLIED A 2ND DEGREE MURDER ENHANCEMENT (2A1.2) IN WHICH THE JURY FOUND THE OFFENSE NOT GUILTY. THE ENHANCEMENT BOOSTED MY LEVEL FROM A 26 TO AN 38. THE 12 POINT CROSS REFERENCE TO ME FROM A GUIDE LINE RANGE OF 120-150MONTHS TO 360 TO LIFE. HOW IS IT IM AM DOING TIME FOR A OFFENSE I WAS FOUND NOT GUILTY OF.

From: ~^! SHEA, ~^!TREVOR J
Subject: [External] ***Request to Staff*** SHEA, TREVOR, [redacted]
Date: Friday, January 12, 2024 6:49:16 PM

To:
Inmate Work Assignment: Orderly 5811

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Would the sentencing commission please consider retroactive amendments that provide relief to youthful offenders who received extraordinary sentences due to extreme guidelines levels?

I was a 19-year-old immature college student when I received a 33-year sentence followed by lifetime supervised release for admittedly heinous behavior I committed on my computer. My guidelines offense level was 52, which is 9 levels above a recommended life sentence under the Guidelines. In other words, according to the Guidelines, my non-physical computer offense is 9 levels more culpable than premeditated murder.

I am remorseful for my crimes and ashamed. But I am not the same person I was when I was 19 years old living in my parents' basement. Due to immature behavior on the internet as a teenager, I have ruined my life and those around me. I will never have a family. I am shunned and harassed daily. I have embarrassed my family. I am worried I may never visit my parents again while they are alive. This sentence has crushed my family.

The federal government no longer has a parole system. Please consider future amendments that allow district courts to reconsider lengthy sentences imposed on youthful offenders after they have served a significant amount of time, similar to a parole system. I think many courts will find that, in line with the scientific studies, young people do stupid and impulsive things without considering the consequences. If they've matured since then, the district courts should be able to reconsider their extreme sentences.

Thank you,
Trevor Shea

United States Sentencing Commission
Attn: Public Affairs - Public Comments
One Columbus Circle NE, Suite 2-500
South Lobby
Washington, D.C. 20002-8002

RE: Amendment to Guideline 4C1.1

Dear Commission,

I write to you today to show my support behind adopting the definition of "sex offense" in Guideline 4C1.1 using either option set forth in the Proposed Amendments issued December 14, 2023. My support, however, is contingent on the Commission specifically **EXCLUDING** from either definition the Receipt, Possession and Distribution of Child Pornography offenders.

My support is based on all the data and evidence I saw in your reports over the years that internet-only offenders are mostly first-time offenders, recidivate at one of the lowest rates and receive the harshest sentences. Offenders of these types of no-contact crimes needs psychological and mental health assistance - not lengthy imprisonment. Adopting a definition of "sex offense" that excludes child pornography offenders will be consistent with the data and allow these offenders to get the help they need and become productive members of society again.

I support excluding Receipt, Distribution and Possession of Child Pornography from any definition of "sex offense" in this guideline like the Commission has done with other guidelines.

Thank you for your time and consideration, and I hope you make this fair, evidence-based, change to the guideline I mentioned.

Sincerely,

Patricia J. Simmons

PATRICIA J. SIMMONS

From: ~^! SIMONS, ~^!JASON ALAN
Subject: [External] ***Request to Staff*** SIMONS, JASON, [redacted]
Date: Saturday, February 3, 2024 2:49:04 PM

To:
Inmate Work Assignment: UNICOR

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear U.S. Sentencing Commission,

I support amending the definition of "sex offense" in Guideline 4C1.1 to include either option provided; however, such definition should EXCLUDE the offenses of receipt, possession, and distribution of child pornography, like the definition provided elsewhere in the Guidelines. These are first-time, no-contact, nonviolent, internet-only offenses by individuals with no criminal histories who face long, draconian prison sentences, despite the empirical data showing low recidivism rates and the Commission's repeated reports to Congress to address this problem. These individuals should not be wasting taxpayer dollars where bank robbers and drug dealers can take advantage of this amendment to reduce their sentences. Thank you for your time and consideration.

From: ~^! SIZER, ~^!CRAIG
Subject: [External] ***Request to Staff*** SIZER, CRAIG, [redacted]
Date: Friday, January 5, 2024 10:49:22 AM

To: Sentencing commission
Inmate Work Assignment: Impact

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I'd like to comment on any proposed changes to the commentary regarding "intended loss." I firmly believe any loss amount regarding, specifically financial crimes should be limited to actual loss amounts. To many defendants including myself are faced with awfully long sentences that are associated with "intended loss" amounts that have never materialized. How can a system give a person 15, 30, or 100 years in prison for losses that never took place but instead because you imagined it or because it could of happened you're life will officially end as you now it. That barely happens to defendants accused of attempted murder and manslaughter cases. Is the system seriously paring trying to kill a human with financial loss amounts? If so, it's sad and we're doomed as a society!!

From: ~^! STARK, ~^!BRADLEY C
Subject: [External] ***Request to Staff*** STARK, BRADLEY, [redacted]
Date: Friday, January 19, 2024 11:49:03 AM

To: Sentencing Commission - Public Comments
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Comments with regard to proposed Amendments to the U.S.S.G. 2B1.1 Guideline as to the placement of the words "intended loss" from the Guideline commentary into the actual Guideline subsection for loss amount calculation enhancements.

Dear Commissioners:

I respectfully submit that Sentencing Commission should not include the words "intended loss" into the U.S.S.G. 2B1.1 Guidelines regarding the calculation of loss amounts for sentencing offense level enhancement. Additionally, I would request that the Sentencing Commission adopt the United States Court of Appeals for the Third Circuit's well-reasoned opinion in United States v. Banks, and strike the "intended loss" language altogether, including from the Guidelines commentary section.

Reasons for Removal of "Intended Loss" Terms from Guideline and Commentary:

1. There have been no empirical studies conducted in development of the 2B1.1 loss table enhancement amounts in the Guideline itself, nor in the commentary section with regard to the valuation calculation by means of "intended loss".

2. Courts typically default to an "intended loss" amount presented by the Government to the Presentence Report ("PSR") writer, adopting said amounts as a matter of expediency and convenience, or under a false impression that the Presentence Investigator has conduced a thorough and well researched investigation/analysis. However, this is typically not the case, as the Presentence Investigator merely reports the intended loss value provided by government case agents, again, in the belief that a thorough investigation has been conducted. In most of the cases, the "intended loss" valuation provided by government case agents is arrived at via cooperating witnesses, informants, etc., or in some instances fashioned from whole cloth to drive a desired sentencing model to the courts that meets the government's expectations.

3. Additionally, the "intended loss" commentary is the fraud guidelines (Section 2B1.1) equivalent of "Ghost Dope" in the drug guidelines (Section 2D1.1). It is subjectively applied in most cases to effectively hand down unwarranted draconian sentences, especially to those defendants that refuse to cooperate, or exercise their right to trial, as a means of extraordinary punishment.

4. The use and application of the "intended loss" commentary (and, if adopted in the Guideline itself) creates inter- and intra-jurisdictional sentencing disparities, both within the application of the 2B1.1 loss amount enhancement, and in comparitive cross-offense sentencing analysis, i.e., a defendant convicted of fraud driven by a subjective

"intended loss" amount faces a far greater sentencing exposure than most violent and predatory criminal defendants (murder, rape, child molestation, child pornography, terrorism, etc.). Such a sentencing scheme is irrational, counter-intuitive, lacks the reasoning in sentencing goals logic required by the Commission, disproportionally infringes on defendants' liberty interests, and violates the statute 18 U.S.C. 3553(a)(6) factor, along with the Supreme Court's doctrine against broadening the scope of sentencing exposure without reasoned empirically tested assessment and evaluation.

5. Finally, "intended loss" is a mens rea driven calculation that would require "intent" to cause a loss to be established by means of objective evidence at sentencing rather than be automically presumed (and thus, shifting the burden of proof that no intent to cause a loss was present with the defendant).

Thank you for your time and consideration of my comments. I hope that the Commission decides to strike the "intended loss" language altogether.

Respectfully submitted,

Bradley C. Stark
[redacted]

From: ~^! STEIER, ~^!JOHN R
Subject: [External] ***Request to Staff*** STEIER, JOHN, [redacted]
Date: Saturday, January 20, 2024 10:33:39 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

1. First Time Offender status to ALL Crimes. If you have ZERO crimminal history at sentencing, you should receive credit for ZERO Criminal History NO MATTER CRIME.

2. If you are convicted of 2252 (Distribution): A. Have a Tiered Level for ACTUAL involvement of Distribution B. Some individuals convicted of 2252 Distribution used a program that AUTOMATICALLY made material available to others and did NOT ACTUALLY KNOW it was "distributing" or "making it available to others"

3. 2252 Distribution Tiered Level from Active Distribution. For example: (a) Sent to an individual for profit or trade (Very Direct Active Distribution (b) Most PASSIVIE DISTRIBUTION (Using a P2P system and did NOT know it was sending it out in background to others also known as PASSIVE DISTRIBUTION being Lowest Tier System

4. REMOVE Mandatory Minimum for Chapter 18. 2252 convictions for First Time Offender Status

5. Chapter 18. 2252 Convictions, make it available to have Prison Alternatives for First Time Offender Status similar to State Systems.

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Andrea Taylor

Topics:

Youthful Individuals

Comments:

To the Honorable Members of the United States Sentencing Commission,

I am writing to urge you to consider the retroactive application of reduced sentences for youthful offenders convicted of non-violent drug offenses, specifically those sentenced prior to their 27th birthday. My support for this policy stems from a deep concern for the fairness and efficacy of our justice system, particularly as it pertains to individuals whose brains and capacity for rehabilitation are still under development.

The case of UNITED STATES v. McMASTERS (1996) exemplifies the profound impact harsh sentences can have on young lives. Mr. McMasters, sentenced at the age of 19 to 30 years for a non-violent drug offense, has already served more than two decades behind bars.

This lengthy sentence stands in stark contrast to the fate of his co-defendants, who received longer sentences but have since been released. Such disparity underscores the inherent unfairness of applying rigid sentencing guidelines without considering the unique circumstances of youthful offenders.

Scientific research and legal precedent both recognize the distinct characteristics of individuals under the age of 27. The brain continues to develop well into young adulthood, impacting decision-making and impulse control. Additionally, individuals in this age group possess a greater capacity for rehabilitation and positive change compared to older offenders. Treating them with undue severity not only hinders their personal growth but also fails to serve the best interests of public safety.

Therefore, I urge you to seriously consider the following actions:

Implement a policy of retroactive sentence reduction for non-violent drug offenses committed by

individuals under the age of 27 at the time of sentencing. This policy should take into account the individual's age at sentencing, the length of their current sentence, and the absence of violent criminal history.

Prioritize the review Mr. McMasters case and others similar, where significant disparities exist between co-defendants and where lengthy sentences seem disproportionate to the offense committed.
Explore alternatives to lengthy incarceration for youthful offenders, such as community-based programs focused on rehabilitation, education, and reintegration into society.

By taking these steps, the Sentencing Commission can demonstrate its commitment to a fairer and more effective justice system. We must recognize the unique circumstances of young people and provide them with opportunities for rehabilitation and positive change. Allowing individuals like Mr. McMasters to access reduced sentences and reintegrate into society would not only be an act of justice but also serve the long-term goals of public safety and community restoration.

Thank you for your time and consideration.

Sincerely,
Andrea Taylor

Submitted on: January 15, 2024

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Daniel Tisone

Topics:

Rule for Calculating Loss

Comments:

Honorable Members of the Sentencing Commission,

I urge caution in considering the inclusion of "intended loss" in our sentencing guidelines. Drawing a parallel to a situation where someone is charged with reckless driving based on the speculation of their intention to go faster emphasizes the potential folly in such an approach.

Just as penalizing for speculated intentions in speeding lacks legal precision, adopting a sentencing guideline based on "intended loss" introduces subjectivity and the risk of unjust outcomes.

Let us prioritize fairness and objectivity by focusing on actual loss, akin to charging based on observed speed rather than speculative intentions about available horsepower. This ensures a more just and equitable foundation for our sentencing laws.

Submitted on: January 22, 2024

February 1, 2024

To: United States Sentencing Commission

RE: Intended Loss vs. Actual Loss Sentencing Calculations

Speculative Nature of Intended Loss:

Determining intended loss is inherently speculative and subjective. Unlike actual loss, which can be objectively quantified, intended loss relies on assumptions about the defendant's state of mind and future actions that may not materialize.

Burden of Proof and Fairness:

The burden of proof is on the prosecution to establish guilt beyond a reasonable doubt. Calculating intended loss may shift the burden to the defendant to disprove speculative projections, potentially compromising the fairness of a trial. Without going into details, my son pled guilty to PPP Fraud and signed a document which stated actual loss NOT intended but was sentenced to intended loss - because he signed a plea deal, he could not appeal the loss issue. Another factor is a bank representative filled in all the paper work and that bank representative - the professional - requested the 'intended' amount, not the actual amount. The representative had incentive to request a ridiculously higher amount as he would receive commission on the amount received. The bank representative should take responsibility for inserting an 'intended loss'. This phenomenon was a regular occurrence with banks filling out paperwork for PPP loans.

Complexity and Expert Testimony:

There is much complexity involved in accurately estimating intended loss, requiring extensive expert testimony. In my son's case, he pled guilty to the actual loss and was not afforded the opportunity to have expert testimony. This complexity introduces confusion and creates an opportunity for the prosecution to present subjective opinions as objective facts.

Punishing Unfulfilled Intentions:

Punishing individuals for intended loss penalizes them for crimes that were not completed. The legal system typically focuses on actions and their consequences, not on the speculation of what could have happened.

Overestimation of Harm:

Calculating intended loss often results in an overestimation of the harm caused by the defendant's actions. This overestimation leads to disproportionately severe sentences, violating principles of proportionality in criminal punishment.

Legal Precedent and Clarity:

Relying on intended loss may lack legal precedent and clarity. Courts may struggle to establish consistent standards for determining intended loss, leading to inconsistent and potentially unjust outcomes.

Encourages Overcharging by Prosecutors:

There is the concern that allowing intended loss calculations incentivize prosecutors to overcharge defendants by presenting inflated estimates of intended loss, potentially leading to coercive plea bargains. The current policy stacks the odds of a disproportionate punishment in favor of the prosecution.

Focus on Actual Harm:

The justice systems requires a legal system that prioritizes addressing the actual harm caused by the defendant's actions rather than speculative harm that may not have occurred.

On a personal note, when I learned of the existence of intended versus actual loss, I was incredulous. I am not writing to argue my son's case or go into details; however, this notion of penalizing someone for something they did not receive goes beyond the pale. It is akin to someone receiving a speeding ticket for a speed well over what they were actually guilty of just because they "could have been going faster" (but didn't). There is no logic nor common sense in the arbitrary notion.

Because of the intended loss argument, my son has an extended sentence in prison where he can't repay fines, cannot be productive in making restitution, earn a living and, most importantly, not play a part in his 2 year old son's life. The trickle down effect of the 'intended loss' argument is vast and damaging and will have life-long negative effects for a family unit creating a life-long sentence.

I respectfully ask for a reconsideration of this hot topic of intended loss versus actual loss in the interest of fairness and justice.

From: ~^! TOSTE-ALEJANDRO, ~^!CHRISTIAN XAVIER
Subject: [External] ***Request to Staff*** TOSTE-ALEJANDRO, CHRISTIAN, [redacted]
Date: Wednesday, January 10, 2024 7:49:00 AM

To:
Inmate Work Assignment: n/a

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was incarcerated for a crime of violence, but this was first offense as an adult. But after they did my PSI and carculated my criminal history they put me in category (III). I want to make a comment regarding the youthful convictions regarding the proposed amenment 4A1.2 and 4A1.1 in wich I conclude that they shouldn't count them since the latest brain develoment study revealed that the brain in the area of impulsiveness, decision making, etc. is not well developed until the age of 25. With that been said I think they should not count them at all, because on top of the mentioned above the juvenile offender already did the time or sentence of the past juvenile offense. I want to mention to that the judge did not wanted to consider my age (18 when I did the instant offense) as a 3553(a) factor for the sole reason that the past offenses I commited as a juvenile was crime's of violence and not drug related. She argued that in a drug related offense she understands that the minor is been manipulated whit money, cars luxurys and etc., but that on a crime of violence I could of been 14 or 15 years of age but when you hurt somebody or inflict pain on someone you know that's wrong even though you are been manipulated for the same material things. I found that argument unjust and unfair because you are still a minor that are being manipulated but on this case you are being used to crime's of violence (In my case was a robbery that invloved a carjacking).

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Cheri Towle Feb. 04, 2024

Topics:

Youthful Individuals

Comments:

I'm making comment on the subject of reducing sentencing of youthful individuals. I am in support or it. It is personal. My son was sentenced to 10.5 years only weeks after turning 19 years old. We are at least fortunate he is at a minimum-security place. While he did commit a crime, no one cares about his personal swirl of addiction and mental health at the time. He was a high school senior, 7-time varsity sport letter winner, friends, kind, social, well liked, held a job, excellent grades in school. The pandemic hit, schools were cancelled, then online from home, he didn't know if he would see friends again, graduate from High School, was the world ending, were his thoughts with all the coverage online in the news at the height of the pandemic at the beginning. As parents we talked to our kids, kept communication open of how they were feeling and the scariness of the pandemic, but teenagers only will tell their parents so much sometimes, and didn't realize he was falling into a real depression. He unfortunately looked at pornographic websites occasionally, and the toilet bowl swirled from there swallowing him up with the world of the internet and all the bright shiny buttons that say "click on me!" he took it on as a coping mechanism and said it got worse as the pandemic went on. Fast forward, he became addicted, it became too late and found himself down the rabbit hole, clicking on inappropriate things and accepting files he got into chat rooms with, not knowing what he was excepting. Anyways, did he deserve a punishment from the law? Yes! At his young age he needs to know there are consequences for your actions weather you realized it was wrong or not at the time. He was young , immature, and impulsive in his decision making, thinking of only here and now, not his future. I understand a few years of prison sentencing but 10 years is too long, for someone of that age. At that point it is a waste of time for a young person, when he could be moving to his future of a productive individual in society. He, at age 22 now, is very remorseful, understands what happened, is striving to be a better human being, is utilizing all education and services available to him to be the best active member of society upon his release. He has matured, with a better understanding of thought processes and decision making. Age 18 now seems like a lifetime ago for him, and shakes his head at his past 18 year old self. (then arrested at 19) He is not the same person and deserves a second chance. Earlier than later. He is very motivated right now to do

better, be better. As the years pass I would hate for him to give up, or become complacent and unproductive, or to believe that the current environment around him is all he is capable of. Sad.
Thank you for your time,
Sincerely, a concerned Mother.

Submitted on: February 4, 2024

From: ~^! VAZQUEZ, ~^!EDGAR
Subject: [External] ***Request to Staff*** VAZQUEZ, EDGAR, [redacted]
Date: Friday, January 5, 2024 9:05:15 AM

To:
Inmate Work Assignment: aquitted conduct

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Good day and to whom it may concern , I am inmate Edgar Vazquez [redacted] i am a federal inmate who proceeded to trial and was found guilty to the count of 500 grams or more trafficking cocaine (a minimum mandatory sentence of 5 years) but elected to defend myself and chose my constitutional rights to proceed to defend the 924(c) count and was found " NOT GUILTY " and acquitted of the charge , also to mention during the trial process during jury deliberations my attorney ask the court for a acquittal in which she stated (honorable Sherri Chappell) " i will not interfere with the jury's decisions " case number 2:19-cr-30 (united states vs Edgar Vazquez 11th circuit middle district of Florida) but then after getting found not guilty on the 924(c) count at sentencing , she stated she feels the gun still has a major part of my case and therefor granted the government a +2 level enhancement and was sentenced to 11years 4 months not to mention i am a first time offender with zero criminal history points and was given level 30 of the sentencing guidelines schedule 1 a max of 121 months but was given 136 months which is way above the guidelines altogether. I am a first time offender with "zero criminal history points" with no state time or any priors . but i certainty am a victim to these sentencing disparities and also this nightmare of how federal judges get a second bite at the apple and get punished anyhow for exercising our constitutional rights so what good does it do to "TRY AND DEFEND " ourselves and prove our innocents because if we are acquitted of a charge we are going to be found guilty anyway and continue to fall through these government loopholes of punishment anyway , this has to stop and it is a violation of our constitutional rights as this affects the few of us (0.04%) who elect to go to trial and get acquitted of a charge . is this what is expected to our constitution ? we beg for help as this malicious nightmare has to stop as the mental suffering of our families our children our lives take from when we are found not guilty of our innocents and get punished anyway . it is barbaric and cruel , i beg someone does something as i am a true victim to our governments hands.

From: ~^! VEGA-FIGUEROA, ~^!JOSE A
Subject: [External] ***Request to Staff*** VEGA-FIGUEROA, JOSE, [redacted]
Date: Thursday, January 4, 2024 9:19:10 PM

To: U.S.S.G COMMISSION
Inmate Work Assignment: Unicor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I support the new proposed amendments regarding Acquitted Conduct. Specifically OPTION 1 which include a portion that indicates that acquitted conduct for the purposes of determining the guideline range, give a definition of acquitted conduct as "a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.
I Jose A. Vega Figueroa [redacted] case Cr 97-72, support this OPTION 1 because I have a life sentence and 5 years supervise release for the same charges that I have demonstrated my innocence's in trial during the superior court of Carolina Puerto Rico by unanimous vote 12 to 0 on October 11, 1995. The witnesses William Acevedo Rodriguez and Ramon Casiano Santiago were the witnesses for both Superior Court on 1995 and in the Federal court 1998 case. Both witnesses change their testimony to contaminate the federal jury so that I could be found guilt; hence committing Perjury. For this acquitted conduct I have been incarcerated for 29 years. I ask that you please remove the statute. To increase my sentence for use of enhancement level points is a violation of my constitutional rights as a citizen of the United States and being subject to an unjust sentence. God Bless You!

Public Comment - Proposed 2023-2024 Amendments and Issues for Comment

Submitter:

Maria Claudia Veleizan

Topics:

Youthful Individuals

Comments:

I am writing to you today as Maria Claudia Veleizan, the grieving mother of Juan Tomas Torres Veleizan, known affectionately as Tommy, who tragically lost his life on January 3, 2023, at the hands of a man with a long history of criminal activity. As the Assistant General Counsel for the United States Sentencing Commission, I implore you to consider the significance of an offender's juvenile record in the context of their current adult criminal behavior.

On the night of January 3, 2023, my beloved son Tommy, a decorated veteran, was brutally murdered by an individual who not only violated the terms of his parole but also had a well-documented history of criminal behavior dating back to his youth. This individual's juvenile record, filled with a pattern of escalating offenses, paints a clear picture of someone whose actions have only grown more dangerous over time.

For the sake of public safety and justice, it is imperative that the juvenile record of such individuals be taken into account when assessing their adult criminal actions. Failure to do so not only overlooks the warning signs of a potentially violent offender but also disregards the lives that are irreparably affected by their actions.

My family and I have been left shattered by the loss of Tommy. His father, Carlos Torres, his younger brother Dante Torres Veleizan, and I are haunted by the void left in our lives and the senseless manner in which Tommy's life was taken. We are not alone in our grief; countless other families have suffered similar tragedies at the hands of repeat offenders whose juvenile histories were ignored or minimized.

There must be a voice for victims like Tommy and their families. No leniency should be shown to individuals who have demonstrated a consistent pattern of criminal behavior that escalates into violence. If anything, the exact opposite should be done – harsher penalties and stricter enforcement measures are necessary to protect innocent lives and prevent future tragedies.

I urge you to use your position and influence to advocate for policies that prioritize the consideration of an offender's juvenile record in sentencing decisions. By doing so, we can honor the memory of victims like Tommy and work towards a safer, more just society for all.

Thank you for your attention to this critical issue.

Sincerely,

Maria Claudia Veleizan

Submitted on: February 20, 2024

From: ~^! WALTHER, ~^!DAVID LLOYD
Subject: [External] ***Request to Staff*** WALTHER, DAVID, [redacted]
Date: Tuesday, February 20, 2024 12:34:15 PM

To: U.S. Sentencing Commission
Inmate Work Assignment: FS-AM

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Has the Commission considered separating Sex Offenders (S.O.) by Tiers for eligibility for the 2-Point Sentence Reduction (Consideration) for First Time Offenders, the First Step Act and other programs?

For example, a Tier 1 First Offender, with no previous criminal history, and charged with one count of possession of CP by computer with no direct contact with a victim is ineligible for the programs as with a Tier 1, 2 or 3 offender with previous criminal history and direct contact or inticement of a victim personally. An offender with an Inticement charge is eligible for First Step Act.

Thank you in advance for your consideration and any clarification offered.

From: ~^! WESLEY, ~^!JOHNNY LEE
Subject: [External] ***Request to Staff*** WESLEY, JOHNNY, [redacted]
Date: Thursday, January 4, 2024 10:33:50 AM

To: sentencing commission
Inmate Work Assignment: unit orderly

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Replies to this message will not be delivered.

Inmate Message Below

dear sentencing commission,

yes, i want to thank you all for all you have done already to help out the adults in custrody and for all of the work you are doing to help get the men and women home who have been langusihing in these prisons. i think you all should pass every single thing that should help the people get out of these prisons as soon as possible. i also think based on the new things you are going over, it should be expanded as much as possible, because it seems to not take into account the new science that shows a male's brain is usuall not fully developed until around the age of 25. somewhere and some how you should base the changes to the youth conduct factor to crimes that were committed before the age of 25, because the 18 thing is being held too lightly, like someone is really thinking in a rational state as a teenager, just as how i committed my crimes when i was 19 years old. it was like i was a different person and i cant believe i was living and acting like that as a youth. yet, the laws are set up to punish youthfulness and people who are being wrongly influenced by older people in their cases. it is like when people look at their children they fear or have concerns about their children being wrongly influenced as teenagers, or while in college, or things like that, but then some look begrudgingly upon those people who committed crimes when they were in a youthful state, as if they are unredeemable. there are dozens upon dozens of cases i have read about of people who committed murders and otherviolent crimes as a youth and once they got older and got released, they have started non profits, have become public speakers, and have made mighty and good changes in their lives and in their communities once they get out. i dont think anyone who committed a crime before the age of 25 should be given a life sentence. i had a cellmate once named paul parker back in 1999 when i was at fci beckley. he home and successful now, but he came in at the age of 18. he had gotten caught with ten $10 bags of crack. he got out on bail and got caught with a 38 handgun while on bail. he didnt use the gun, but got caught with it. he went to trial and got 30 years! he was only 18 and got caught with $100 worth of drugs and told me how he had never had $1,000 before. he did get relief back around 2012-2015 and got his sentence reduced to 20 years, but he still 17 years! it is like the black and brown youth lives are being looked at as worthless. he probably could have did at the most 1 months and went out a changed man, not warehoused into these money making systems. we are being taken advantage of because we are put into a system where a monopoly is going on and if you want certain things like to use the computer system, to get commissary and hygeine, etc. we have to pay outrageous prices. i recall one time when i was at fci beckley how they were selling some asics for $50, but the paper said the commissary was buying them for $38, but one of the commissary workers found the real paper behind that paper that said they were buying the shoes wholesale for $12.50. so we were buying shoes for 4 times what was being paid for them. there was another time at fci beckley where boxes of potatoes came in to serve us to eat. this was between 1998-2000, but the boxe was labeled as being potatoes that was from the gulf way in 1991! there have been guys finding boxes of chicken being served to us that says not fit for human consumption. there have been boxes of beef being served to us that says grade d meat, which means one of the lowest class. we get plenty of products that say not for resale or this product is recognized to cause cancer in california or is a cancer causing product from china. how could these things be allowed to be sold or given

to the youth of this country who come to prison for victimless crimes in some instances like my former cellmate. he is now home with a daughter, is a working man, and is highly successful. i know hundreds of stories like his. they put him in the cell with me because he came in at 18 and they knew i came in at 19. they eventually made me a mentor in the brace program when i was at fci beckley and i was able to help a lot of youth people out and heard plenty of stories like his. i have been helping the young guys out during my entire 27 years in prison and it has saddened me that so many of them seemed to be looked at as worthless, yet when i heard their stories i knew why they ended up in their situations and seen how easlit it could be rectified and they could be helped to not come to prison again, if just some time and attention was paid to them and they were taught the necessary skills to help achieve success once they got out. yet most prisons offer limited programs and help to really help people out. they are being old books, old technology, old understanding of things, etc. they would be better off beig put in programs out there that would really help them and at the same time are not using them as a cash cow or being confined to a money making system. my last point into why all the things you are looking into should be passed and then some, is the fact that years ago i read a story of how they were doing a conservation project in africa to save elephants. they went to one community of elephants and a bunch of elephants had holes in their body and many were turning up dead with holes in them. they kept trying to figure out what was happening, because they thought poachers were doing it, but their tusks and everything else was still in tack. they sat their studying it for awhile and set up a system to watch them, etc. and they ended up finding out over a period of time that the elephants were fighting each other and they were poking holes in one another and that resulted in the death of some of them. they then studied it some more and found out the ones who were doing this was the young male elephants, as they are the ones with those big tusks. they then did a study to find out what made those young elephants start doing this to one another, because it wasnt happening at first. after a period of time, they realized it was only young elephants doing this to one another. then they realized during their conservation project, they had shipped off the older male elephants to another part of africa and away from the young elephants. they decided to bring back the older male elephants to see if that would make a difference. as soon as they did that, the killings of the young elephants among one another stopped! they then studied the younger elephants and they discovered that they scrape marks over their backs. they then looked at how when the younger elephants were about to fight, the older elephants would come scrpae the younger elephants backs with their bigger tusks. the older elephants helped keep order in the communties. this is what has happened with blacks in the communities in the u.s. multiple problems have been created by the prison system. the youths are grouper together in prison or left in society alone, because the older men and the fathers are being locked away for plenty of years. now older men are being released, violent crime and murder are down in cities like philadelphia and detroit right now. there are guys going home now who had murder charges, but are now being released through things like the first step act, commpassionate release, etc. and they are helping the communities. please let the men out who have been in awhile such as myself, and please stop allowing these youth to get all this time. i will do my part when i get out and help the commission out when they need me when i get home. God bless you all.

From: ~^! WHYTE, ~^!STEVEN CRAIG
Subject: [External] ***Request to Staff*** WHYTE, STEVEN, [redacted]
Date: Friday, January 12, 2024 6:49:17 PM

To:
Inmate Work Assignment: N/A

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Inmate Message Below

when you are charged with 841(b)(1)(C) Conspiracy to distribute heroin with a death result enhancement that carries 20 yrs now for a prior drug offense your hit with a 851 enhancement that should be amended and taken away because with you are already facing 20 years then now just because you want to invoke your right to prove your innocence it leaves the prosecutor with the power to make sure you get life for a crime that only carries 20 years.. The 851 enhancement should'nt be used if your already facing a 20 year mandatory minimum sentence That's very unfair and should be looked at to be amended.
Respectfully submitted..

From: ~^! WILLET, ~^!JAMES MICHAEL SR
Subject: [External] ***Request to Staff*** WILLET, JAMES, [redacted]
Date: Thursday, February 8, 2024 2:34:00 PM

To: Sentencing Commissiion
Inmate Work Assignment: Suicide Companion

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Inmate Message Below

I would like to share with the Sentencing Commission, that when I went to Jail Nov 4th 2019 I ask to be housed in a Programs Unit. While in the Unit a inmate who worked as a trustee was cleaning the Programs staff trash and found curriculums on CBT, ARRESTED DEVELOPMENT he ask if I would like to read them I said yes. After teaching myself Arrested Development, I was able to go back to when I was a youth to identify where it was I was cognitively arrested from the trauma in my life. My mom being beat in front of me, drugs use at age 14. At that point in my life as a juvenile my thoughts became irrational with that came unhealthy choices that lead to crime. Today as a 51 year old man I see how as a child/teenager would not be developed cognitively unless they were taught arrested development to unarrest they thinking process. So in my opinion I don't believe a juvenilles criminal history should be used against them. If I was to of been taught Arrested Development with CBT at a youth, my life may turned out different in my decison making. Thank you for your time.

From: ~^! WILSON, ~^!LORENZO ANTHONY
Subject: [External] ***Request to Staff*** WILSON, LORENZO, [redacted]
Date: Thursday, January 4, 2024 2:05:11 PM

To: Sentencing Commission
Inmate Work Assignment: Rec

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Inmate Message Below

To whom this may concern,

My name is Lorenzo Anthony Wilson. In July of 2003, I was arrested and indicted for Kidnaping and murder charges. In 2005 a jury of my peers aquitted me of Kidnapping, Murder and multiple fire arms charges. In an article posted in the Baltimore Sun the foreman of the jury was quoted as saying that there was just no evidence against Lorenzo Wilson. After being aquiited of all of these charges I was left with one count of conspiracy to commit Kidnapping, which is not governed by a guide line in which the Judge counld have released me that day. But the PSR made a recommendation of cross referencing to the underling charge of Kidnapping to reach a sentencing guideline. Still there is a problem with doing that, and that is that, a jury had heard the facts and chose to aquit me of Kidnapping. Ultimately, I was sentenced to a sentence of Life with out the possiblity of parole because the sentencing Judge felt as though after hearing the case I should have been found guilty, but the jury did not feel the same. The Judge found that I was responsible for kidnapping, murder and numerous fire arm charges. The jury verdict was totally ignored and set to the side in favor of a verdict unlawfully found by the sentencing judge. My right to a jury trial as guaranteed by the U.S. Constitution was violated. I chose to have a jury trial and afterwards that right was taken away. I have been incarcerated for 21 years for a Kidnapping and murder that I was aquitted of by a jury of my peers. Since my incarceration I have completed multiple college courses through Adams State University and the University of Colorado. I have participated in hundreds of hours of FBOP programing. I have maintain close community and family ties all while trying my best to parent my daughter who sufferes from anxiety , depression and suicidal thoughts as these time away from her has destroyed herself confidence, conitive skills and her ability to maintain a job and deal with others. I am a verteran of the United States Army who took a chance on my country and now I am asking that my country TO TAKE A CHANCE ON ME. I have been an Imam in the federal system for 15 years, I have been a devoted and possitive member to all of whom I incounter. I would love to get infront of the commission and and speak because I don't know if what I can ever put on paper will ever do justice. I have a brief that I have been sending to members of Congress the last ten years over and over. I would love to get a copy to the sentencing commssion. My sister Dr. Shontay Kincaid has the ability to act on my behave and can get the brief to the sentencing commission. Her contact information is:

[redacted]

Thank you for your time and consideration it was very much appreciated and needed.
Lorenzo Wilson

To whom it may concern,

The proposed amendment to United States Sentencing Guidelines 5H1.1 falls far short of what is needed regarding youthful offenders. I personally know men who have been sentenced for over 30 years for which the government admits there was "no identifiable victim" His offense conduct occurred between the ages of 18-21. He is now 36 years old and has spent almost all of his adult life in prison with more than 12 years remaining on his sentence.

Youthful offenders are unique in their susceptibility to unhealthy ideas and unsavory influences. Prison does NOT make people better or rehabilitate them. The individuals who better themselves within these corrupt, drug-infested, gang-ridden, violent and crowded environments, do so by having worked against all odds and circumstances. Most youthful offenders that enter prison with longer sentences than they can comprehend will succumb to drugs, gangs, or violence or a combination of all three, exiting prison mentally disturbed with no marketable skills or meaningful work history.

The U.S Sentencing Commission needs to amend 5H1.1 to encourage judges to be more lenient on youthful offenders than their older counterparts. The guideline, 5H1.1, should have more powerful language to give judges the legal authority and encouragement to give youthful offenders a second chance after remaining in prison for 10 years or more/

From: ~^! ZAYAS, ~^!LOUIS ANTONIO
Subject: [External] ***Request to Staff*** ZAYAS, LOUIS, [redacted]
Date: Monday, January 29, 2024 12:04:55 PM

To:
Inmate Work Assignment: educ pm/s w comp

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Replies to this message will not be delivered.

Inmate Message Below

I wish to voice my support for option 1 in regards to "acquitted conduct". It is simpy the only option that makes sense and it appears to be in accordance with what our constitution promises us. Thank you.

UNITED STATES SENTENCING COMMISSION
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