Written Statement of Alan DuBois

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on the Felon in Possession Guideline

March 13, 2014

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My name is Alan DuBois and I am First Assistant Federal Public Defender with the Eastern District of North Carolina. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the Felon in Possession Guideline.

A defendant charged with being a felon in possession of a firearm is sentenced pursuant to USSG §2K2.1. This guideline currently provides for a 4-level enhancement if the defendant "used or possessed any firearm or ammunition in connection with another felony offense."[1] A cross-reference also directs that where the "defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense," the guideline for that other offense should be applied if the offense level is higher.[2]

Identifying the lack of a consistent application of these two provisions by the Circuit Courts of Appeals, the Commission proposes two options for amending the enhancement, the cross-reference, and related commentary. In its Issues for Comment, the Commission asks (a) whether the proposed amendments adequately clarify the operation of subsections (b)(6)(B) and (c)(1) in felon in possession cases where the defendant also engaged in other offense conduct with a firearm and, if not, how the proposed amendment could better clarify the operation of these subsections; (b) whether the Commission should consider narrowing or clarifying the scope of these provisions; (c) and whether the cross-reference in subsection (c)(1) should be deleted.

Defenders are pleased the Commission has decided to examine these important provisions that too often unfairly lengthen our clients' sentences on the basis of uncharged, dismissed, and acquitted offenses. Defenders have long opposed this use of "relevant conduct." And it likely comes as no surprise that we urge the Commission to delete the cross-reference in §2K2.1(c)(1), and encourage the Commission to consider that the best way to sufficiently narrow the scope of §2K2.1(b)(6)(B) is to eliminate it.

Short of that, Defenders support clear limits on the reach of these provisions. Specifically, Defenders support the Commission's proposed amendment to the guidelines in §2K2.1(b)(6)(B) and (c)(1) as set forth in Option One, limiting application to other offenses involving the same "firearm or ammunition identified in the offense of conviction." But we do

[1] §2K2.1(b)(6)(B).

[2] §2K2.1(c)(1).

not support the proposed commentary in Option One, and urge the Commission to revise it to make plain that the provisions do not apply to unrelated offenses just because they happen to involve the same firearm or ammunition. Proposed Application Note 14(E) fails to do this. The promise of limitation in the first sentence of the proposed commentary – directing that courts "must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles" – is made empty in the example that follows. The example provides that any other offense involving the same firearm as the charged offense is deemed to be relevant conduct by operation of §1B1.3(a)(4),[3] meaning the other offense need not satisfy §1B1.3(a)(1)-(a)(3), even though the usual practice is to apply the minimal restrictions set forth in these provisions to enhancements, cross-references and adjustments.[4] Instead of this approach, the Commission should clarify the scope of (b)(6)(B) and (c)(1) by revising existing Application Note 14(C) in one of two ways:

Option A

"Another felony offense", for purposes of (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained; and that satisfies the relevant conduct principles set forth in §1B1.3(a)(1)-(a)(3).

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained; and that satisfies the relevant conduct principles set forth in §1B1.3(a)(1)-(a)(3).

Option B

"Another felony offense", for purposes of (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking

[3] Section 1B1.3(a)(4) provides that base offense level, specific offense characteristics, cross-references and adjustments "shall be determined on the basis of … (4) any other information specified in the applicable guideline." As discussed below, this provision is used sparingly, and in limited circumstances that are markedly different in nature than the uncharged, dismissed and acquitted offenses at issue here.

[4] *See, e.g.*, *United States v. Horton*, 693 F.3d 463, 476 (4th Cir. 2012) (stating "the Relevant Conduct Guideline treats as relevant conduct, including for cross-referencing purposes, the following," then quoting §1B1.3(a)(1)-(a)(3), without mentioning (a)(4)); *United States v. Kulick*, 629 F.3d 165, 170 (3d Cir. 2010) (stating "Relevant conduct is defined in 1B1.3(a) as," then quoting §1B1.3(a)(1)-(a)(3), without mentioning (a)(4)); *United States v. Settle*, 414 F.3d 629, 632 & n.2 (6th Cir. 2005) (discussion of what is included as "relevant conduct" mentions only 1B1.3(a)(1), (a)(2) and (a)(3)).

offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained; and that is substantially and directly connected to the [instant offense] [offense of conviction].[5]

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained; and that is substantially and directly connected to the [instant offense] [offense of conviction].

A. The Cross-Reference and Enhancement Should Be Deleted from §2K2.1.

Allowing a judge to "sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it" is, according to the Supreme Court, an "absurd result."[6] Yet that is precisely what the cross-reference in §2K2.1(c)(1) advises judges to do. We urge the Commission to delete the cross-reference in §2K2.1(c)(1) so that the guidelines will no longer endorse this absurdity. This cross-reference in §2K2.1(c)(1) is a particularly egregious example of how the "relevant conduct" rules can dwarf the actual count of conviction by requiring courts to calculate the guideline range based on separate crimes with which the defendant was never charged, that were dismissed, or worst of all, of which the defendant was acquitted. Based on our longstanding position that our clients should be sentenced for the crimes for which they have been convicted, not on the basis of uncharged, dismissed and acquitted offenses, Defenders also urge the Commission to eliminate the enhancement in §2K2.1(b)(6)(B).[7]

Last year, the Defenders submitted a letter to the Commission which, among other things, discussed the myriad costs associated with the guidelines' continued reliance on relevant

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[5] The language, "that is substantially and directly connected to the charged offense", is used in Application Note 1 to §2A6.1 – Threatening or Harassing Communications – to explain the "Scope of Conduct to Be Considered." §2A6.1, comment. (n.1). *See also* §2A6.2, comment. (n.3) (requiring that "conduct that occurred prior to the offense must be substantially and directly connected to the offense").

[6] *Blakely v. Washington*, 542 U.S. 296, 306, (2004).

[7] Defenders are not alone in the belief that the current relevant conduct rules present a critical and long-standing problem. Judges have expressed concerns in response to the Commission's 2010 survey and in written opinions. *See* Letter from Marjorie Meyers, Chair Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-25 & nn. 100-102 (May 17, 2013) (*Meyer's May 2013 Letter to USSC*), appended hereto. Other federal sentencing experts, Commissioner Barkow, John Steer, former General Counsel and Vice-Chair of the Commission, and others have expressed concerns with aspects of the relevant conduct rules. *Id.* at 25 & nn. 103-104.

conduct, and the absence of any compelling reason to rely on relevant conduct.[8] Rather than repeat the entire content of that earlier discussion, we append it to this testimony. Here we summarize the key points, and make a few additional points as well.

The costs of sentencing on the basis of these two relevant conduct provisions are significant.

Unwarranted Disparity. The relevant conduct rules work against the Commission's goal of reducing unwarranted disparity in sentencing because the rules often rely on untrustworthy evidence and, even then, only when the prosecutor or probation officer chooses to bring that evidence to the attention of the court.[9]

Denial of Fair Process. The rules also "are repugnant to the basic principles of fair process and procedure traditionally thought to be indigenous to our federal criminal law."[10] Defendants often are not informed of the conduct that will be used to justify a lengthier term of imprisonment until after they have pled guilty to the charged offense. The presentence report that contains the notice of this other conduct need not be provided to defendants until 35 days before sentencing, and the defendant must submit any objections within 14 days of receiving the report.[11] And, in many instances, it is this uncharged conduct that is the subject of the "bulk" of the sentencing hearing.[12] Sentencing hearings become mini-trials on offenses that may never have been charged, were dismissed, or on which the defendant was acquitted. But at these mini-trials, defendants are not protected by the rules of evidence,[13] a jury,[14] or proof beyond a reasonable doubt.[15] And in some districts, defendants do not receive discovery essential to preparation of a defense.

The use of acquitted conduct is of particular concern. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543

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[8] *Meyer's May 2013 Letter to USSC*, at 24-31.

[9] *See Meyers May 2013 Letter to USSC,* at 26.

[10] *United States v. Galloway,* 976 F.2d 414, 445 (8th Cir. 1992) (Lay, J., dissenting).

[11] §6A1.2.

[12] *See, e.g.*, *Horton*, 693 F.3d at 472 ("the bulk of the sentencing proceeding was devoted to testimony regarding a second incident, which the PSR determined – and the district court agreed – was relevant conduct").

[13] §6A1.3(a).

[14] *United States v. Booker*, 543 U.S. 220 (2005).

[15] §6A1.3, comment.

U.S. 220 (2005), many judges and commentators believe it is inconsistent with the Sixth Amendment right to a jury trial,[16] or at least "stands in sharp tension with the jury's constitutional role."[17]

Prosecutors with "indecent power."[18] Although one of the reasons the Commission adopted the relevant conduct rules was to "curb the ability of prosecutors to manipulate sentences through their decisions on charging,"[19] in practice it has increased the power of prosecutors to control sentences.[20]

Disrespect for the Law. The rules lead to disrespect for the law because they are contrary to what ordinary citizens take for granted.[21]

Liberty and Tax Dollars. The relevant conduct rules contribute to undue severity, which unjustly deprives people of their liberty, and unnecessarily consumes limited resources and tax dollars. The Bureau of Prisons continues to be overcrowded,[22] and incarceration continues to be an expensive option. [23]

Comity and Federalism. Sections 2K2.1(b)(6)(B) and (c)(1) also raise serious concerns about comity and federalism. This cross-reference was designed to address cases where the "firearm statutes are … used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon

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[16] *See Meyers May 2013 Letter to USSC*, at 28-29 & nn. 114-116.

[17] Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (2012).

[18] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

[19] Barkow, *supra* note 17, at 1629.

[20] *See Meyers May 2013 Letter to USSC*, at 26-27 & nn. 109-113.

[21] *Id*. at 30 & nn. 123-24.

[22] "System-wide, the Bureau [of Prisons] is operating at 36 percent over rated capacity and crowding is of special concern at higher security facilities, with 51 percent crowding at high security facilities and 45 percent at medium security facilities." *Oversight of the Bureau of Prisons & Cost-Effective Strategies for Reducing Recidivism, Hearing Before the Senate Judiciary Committee*, 113th Cong. (Nov. 2013) (statement of Charles E. Samuels, Jr., Director of The Federal Bureau of Prisons), http://www.judiciary.senate.gov/pdf/11-6-13SamuelsTestimony.pdf.

[23] The average cost of incarceration for a Federal inmate is $28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station."[24] And to this day, §2K2.1(b)(6)(B) and (c)(1) often work to give the federal courts the final say in the sanction that is appropriate for both the federal offense (felon in possession) and the state offense (the other offense).[25] Moreover, the federal government ends up bearing the total financial cost of these prosecutions despite the substantial state interests involved.[26] While this may at times work well for states with limited funds, or in jurisdictions where state and federal authorities have an established and trusted working relationship, when the federal court occupies the whole field, it carries the potential to threaten principles of comity and federalism. For example, pending before the Florida Supreme Court right now in *Bragdon v. Florida,* is the question of whether a person is barred from claiming immunity under Florida's "Stand Your Ground" when he was engaged in unlawful activity, i.e., was a felon in possession.[27] If Mr. Bragdon were convicted in federal court for being a felon in possession, comity and federalism principles raise questions about whether the enhancement and cross-reference apply where Mr. Bragdon might be entitled to immunity for the "other offense" under state law. If, however, the enhancement and cross-reference were deleted from the guidelines, the federal courts would still determine the sentence for the federal felon in possession offense, and the states would then decide the appropriate response for the state offense.

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[24] §2K2.1, comment (backg'd) (1987).

[25] *See, e.g.*, *Horton*, 693 F.3d at 473 n.10 (Defendant charged with felon in possession in federal court, and with murder in state court. State dismissed murder charges after federal court sentenced defendant to life in prison based on the murder guidelines).

[26] The Inspector General of the Department of Justice concluded that "the trend to prosecute at the federal level many offenses that were previously handled largely or exclusively by state and local authorities" has contributed to "the increasing number of prisoners in the federal system over the past 3 decades." Michael Horowitz, Inspector General, *Top Management and Performance Challenges Facting the Dep't of Justice* –2013 (Dec.11, 2013) (urging the Department to "consider how the federalization of criminal law has affected its budget and operations, and whether rebalancing the mix of cases charged federally might help alleviate the budget crisis posed by the federal prison system without sacrificing public safety, particularly where state and local authorities have jurisdiction to prosecute the conduct"), http://www.justice.gov/oig/challenges/2013.htm#1. And earlier this month, the House Judiciary Committee reauthorized the bipartisan Over-Criminalization Task Force. *See* House Judiciary Committee Press Release, *House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force* (Feb. 5, 2014), http://judiciary.house.gov/index.cfm/press-releases?id=2D73C6FD-DAEB-4DA0-B4B4-7A2F32BA784. Just as DOJ and Congress are exploring over-federalization and the appropriate role of the federal criminal justice system, the Commission should consider the impact of the relevant conduct rules on the over-federalization of crime.

[27] *Bragdon v. Florida*, No. 13-2083. The website for the Florida Supreme Court describes the issue in this case as follows: "This case asks whether people are barred from claiming self defense under the 'Stand Your Ground' law when they are engaged in unlawful activity." *See* http://www.floridasupremecourt.org/pub_info/index.shtml.

The costs of the relevant conduct rules are high, but the returns are minimal.[28] The Commission can[29] and should delete §2K2.1(c)(1) and §2K2.1(b)(6)(B) from the guidelines.

B. Option One

If the Commission decides to retain the enhancement and cross-reference in §2K2.1 despite the costs and lack of benefit from considering this uncharged, dismissed and acquitted conduct, limits must be placed on the scope of the conduct to be considered so that §2K2.1(b)(6)(B) and (c)(1) cannot be misused to secure long sentences on the basis of wholly unrelated conduct. The proposed amendment to the guideline set forth in Option One is a critical first step in imposing such limits. No reason justifies stretching the "relevant conduct" rules so far and so thin to include other offenses that do not at the very least involve the same firearm. Defenders believe, however, that Option One could be improved upon by clarifying in the commentary that the offenses must bear some relationship to each other. It may often be the case that when the two offenses involve the same firearm they are related, but that is not true in all cases, so some relationship between the offenses must be shown. Defenders have proposed two different ways to accomplish this above.[30]

1. The Same Firearm

Option One of the Commission's proposal is superior to Option Two because it correctly requires that, at minimum, the enhancement and cross-reference include only offenses involving the same firearm or ammunition as that in the charged offense. This returns the scope of the cross-reference and enhancement to their original purpose. These two provisions in §2K2.1 were never intended to reach further than other offenses involving the same firearm or ammunition, and no evidence suggests that they need to do so.

When the guidelines were promulgated, §2K2.1 did not contain an enhancement for the conduct now addressed in §2K2.1(b)(6)(B), but did include a cross-reference similar to that currently found at §2K2.1(c)(1). [31] It provided:

> If the defendant used **the** firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or 2X1.1

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[28] *See Meyers May 2013 Letter to USSC*, at 31.

[29] *Id.* at 30-31 & nn.125-128.

[30] *See* options *supra* pp. 2-3.

[31] §2K2.1 (1987).

> (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.[32]

This cross-reference was expressly designed to address cases where the "firearm statutes are . . . used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used **the** firearm to rob a gasoline station."[33] It was not designed to reach out and punish the defendant for any other offense involving *any* firearm, but instead, to capture a more narrow range of conduct related to the firearm in the charged offense. *Id.*

In 1991, the Commission substantially revised §2K2.1, merging §§2K2.1, 2K2.2 and 2K2.3 into a single guideline. USSG App. C, Amend. 374 (Nov. 1, 1991). During this process, the language of the cross-reference changed to refer to "*any* firearm or ammunition," rather than "*the* firearm", without explanation.[34] In its Reasons for Amendment, the Commission did not indicate the change was intended to broaden the reach of the cross-reference to unrelated offenses involving different firearms.[35] In addition, a report by Commission staff on the Firearms and Explosive Materials Working Group regarding the proposed revision to the firearms guidelines at that time said nothing about an intent to expand the reach of the cross-reference to unrelated offenses involving separate firearms.[36] According to the report, a primary issue under consideration at that time was whether to extend the cross-reference to "situations where the defendant had reasonable cause to believe **the** firearm would be used or possessed in the commission of the offense."[37] In keeping with a primary focus on consolidating the three

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[32] §2K2.1(c)(1) (emphasis added).

[33] §2K2.1, comment. (backg'd) (1987) (emphasis added). This background note was removed from the guideline in 1991. *See* USSG App. C, Amend. 374 (Nov. 1, 1991).

[34] For ease of reference, the following mark-up compares the cross-reference in 1990 with its amended version in 1991:

> If the defendant used or possessed ~~the~~ any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply….

[35] USSG App. C, Amend. 374, Reason for Amendment (Nov 1, 1991).

[36] USSC, *Firearms and Explosive Materials Working Group Report*, Dec. 11, 1990, at 62 (emphasis added) (*Firearms Working Group Report*).

[37] *Id.* at 62.

guidelines, the Working Group reported that the proposed amendment "presents a single cross-reference to guidelines for underlying offenses associated with **the** firearms offense."[38]

During the same amendment cycle, the Commission also added a new specific offense characteristic to §2K2.1 addressing conduct similar to that in the cross-reference.[39] The Commission's Working Group Report found statutory support for this enhancement, citing provisions that "increase the maximum penalty available where **the** firearm was involved in a variety of serious criminal conduct."[40] The Working Group found additional support in past sentencing practices, arguing sentences were more severe "where criminal use of **the** firearm occurred, or, apparently, could reasonably have been foreseen by the defendant."[41]

Thus, the history reveals no intent to expand the reach of these provisions beyond offenses involving the same firearm as in the charged offense.

Many circuits have interpreted the post-1991 language in the guideline to mean that the enhancement and cross-reference apply when "any" firearm is used in connection with another offense, and not just when the firearm identified in the offense is used.[42] But there is good reason to correct that course. The original purpose of the cross-reference was to address other offenses directly connected with the firearm identified in the indictment. Although the Commission changed the language as part of a significant revision of the firearm guidelines, nothing in the history of the provision shows that the Commission intended to change the scope of the cross-reference or the new enhancement. In addition, no empirical evidence provides a

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[38] *Id*. at 62-63.

[39] §2K2.1(b)(5) (1991). This new enhancement called for a 4-level increase, and a floor of 18 "[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." *Id.*

[40] *Firearms Working Group Report,* at 56.

[41] *Id*.

[42] *See United States v. Williams*, 431 F.3d 767, 770 (11th Cir. 2005); *United States v. Jardine*, 364 F.3d 1200, 1208 (10th Cir. 2004); *United States v. Mann*, 315 F.3d 1054, 1056 (8th Cir. 2003). *But see United States v. Settle*, 414 F.3d 629, 634 (6th Cir. 2005) (requiring a "clear connection" between the firearm in the charged offense and any different firearm used for the other offense); *United States v. Gonzales*, 996 F.2d 88, 92 n.6 (5th Cir. 1993) (While this case involved the same firearm in both offenses, the court noted that if a different firearm is involved in the other offense, it "must at least be related to those in the charged offense." The Court explained: "If the word 'any' were read literally, section 2K2.1(c)(1) would apply even though the weapon involved in the other offense had absolutely no relation to that specified in the charged offense. Such a reading would have section 2K2.1(c)(1) apply, for example to a weapon used by the defendant in a robbery committed months before he ever acquired the weapon specified in the offense of conviction.").

reason to expand them beyond that. A separate offense involving a different firearm or ammunition is not a gap that needs filling by an enhancement or cross-reference. These separate offenses can be charged, and then sentenced upon conviction.

2. Additional Limitations

While limiting application of these provisions to other conduct involving the same firearm is an essential step in both returning these provisions to their original purpose and making clear the limits on the scope of conduct that can be considered, Defenders believe the commentary should specify that this conduct must have some connection to the charged offense in addition to it involving the same firearm. In contrast with other enhancement and cross-reference in the guidelines where the practice is to consider whether the conduct falls within the parameters of §1B1.3(a)(1)-(a)(3), here the proposed commentary specifically excludes these uncharged, dismissed and acquitted offenses from the minimal limitations of §1B1.3(a)(1)-(a)(3) by taking the extraordinary step of invoking (a)(4) which makes *any* offense relevant conduct simply because the guideline says it is, regardless of whether that offense satisfies any of the usual relevant conduct rules. Defenders see no reason to exclude the §2K2.1 enhancement and cross-reference from the usual treatment.

Absent further restriction, the enhancement and cross-reference could apply to an assault or drug offense that occurred years before the charged offense so long as that other offense involved the same gun. They could apply to an extortion offense that occurred more than two years before the charged felon in possession offense.[43] And they also could apply to an offense that occurred when the defendant legally possessed the gun, i.e., before he became a felon, thus having no connection with the current felon in possession offense other than the fact that both offenses happened to involve the same firearm. These are not acceptable outcomes. And they can be easily avoided by adding language to the commentary clarifying that there needs to be a relationship between the charged offense and the other offense which often is, but sometimes is

[43] In *United States v. Kulick*, the Third Circuit held that the cross reference in §2K2.1(c)(1) did not apply to the defendant's extortion offense that occurred more than 2 years before the charged felon in possession offense, even though both offenses involved the same firearm because they were not part of the "same court of conduct" or "common scheme of plan." *Kulick*, 629 F.3d at 174. The Court explained:

> Kulick's extortion offense was not relevant conduct to his unlawful possession of a firearm because the time interval was considerable, there was very little similarity between the offenses, and there was no regularity. Moreover, it would eviscerate the effect and import of the Guidelines to permit an enhancement on these facts. When "illegal conduct does exist in 'discrete, identifiable units' apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct."

Id. (quoting *United States v. Hill*, 79 F.3d 1477, 1482 (6th Cir. 1996)).

not, satisfied when the two offenses involve the same firearm. This is not a radical request. Two possible ways to impose standard limitations on the scope of conduct to be considered are proposed above as Options A and B.[44]

The absence of the usual restrictions on the scope of conduct to be considered would disrupt the law in many circuits. While the Fifth Circuit is internally divided over the issue,[45] in at least five other circuits, when a felon in possession defendant possessed a firearm in connection with another offense, courts must determine whether the other offense is relevant conduct under §1B1.3(a)(1) or (a)(2).[46] Courts are familiar with applying §1B1.3(a)(1) and (a)(2) to these provisions, as they do for many others. Defenders see no good reason to disrupt this settled law.

To the extent the Commission is concerned about the Third Circuit being slightly out of step from the rest because it requires that only the charged offense be groupable under §3D1.2,[47] while other circuits require both the charged offense and the relevant conduct offense to be groupable, the proposed commentary draws a sword to kill a fly. Options A and B both address this without disrupting the common practice of requiring a relationship between the uncharged offense and the offense of conviction.

As noted, rather than track the usual practice on the scope of relevant conduct to be considered, the proposed commentary takes the unprecedented step of specifically invoking §1B1.3(a)(4). If this is what is necessary to avoid the minimal limitations on the use of relevant conduct set out in §1B1.3(a)(1)-(3), it is not worth it. Section 1B1.3(a)(4) is used sparingly in the guidelines and, until this proposal, has been limited to circumstances involving the mens rea

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[44] *See* options *supra* pp. 2-3.

[45] *Compare Gonzales*, 996 F.2d at 92 (§2K2.1(c)(1) "not restricted to offenses which would be relevant conduct but embraces all illegal conduct performed or intended by defendant concerning a firearm involved in the charged offense") and *United States v. Outley*, 348 F.3d 476, 478 (5th Cir. 2003) ("section 1B1.3's relevant-conduct limits do not apply to other offenses under section 2K2.1") *with United States v. Levario-Quiroz*, 161 F.3d 903, 906 (5th Cir. 1998) (defendant's other offense did not fall within definition of "relevant conduct" because "they were not offenses of a character for which § U.S.S.G. 3D1.2(d) would require grouping") and *United States v. Brummett*, 355 F.3d 343, 345 (5th Cir. 2003) (affirming application of §2K2.1 enhancement because it was relevant conduct under §1B1.3(a)(2)).

[46] *See Horton*, 693 F.3d at 478-79 (4th Cir. 2012); *Kulick*, 629 F.3d at 170-71 & n.4 (3d Cir. 2010); *Williams*, 431 F.3d at 772-73 & n.9 (11th Cir. 2005); *Settle*, 414 F.3d at 632 n.2 (6th Cir. 2005); *United States v. Jones*, 313 F.3d 1019, 1023 & n.3 (7th Cir. 2002); *Levario-Quiroz*, 161 F.3d at 906 (5th Cir. 1998). These cases do not discuss §1B1.3(a)(3), and we have not seen any that discuss it when considering application of §2K2.1(b)(6)(B) or (c)(1).

[47] *See Kulick*, 629 F.3d at 170.

in the *charged offense*,[48] the degree of risk created by the *charged offense*[49] and prior *convictions*.[50] This proposed use of §1B1.3(a)(4) is entirely different in nature, as it reaches far beyond the offense and prior convictions to uncharted and far more treacherous territory: uncharged, dismissed and acquitted conduct. If §1B1.3(a)(4) can be used in this manner, it raises serious questions about whether it is ever necessary for conduct to satisfy §1B1.3(a)(1)-(3). What possible meaning could those provisions have if §1B1.3(a)(4) is not reserved for particular and unusual circumstances? We caution the Commission to proceed carefully before opening the door to this new use of §1B1.3(a)(4). The consequences of doing so are unknown. And opening this door is entirely unnecessary. The Commission has good reasons to require that the offenses at issue in (b)(6)(B) and (c)(1), consistent with the history of the guideline, be limited to offenses involving the same firearm, and comply with the minimal requirements of §1B1.3(a)(1)-(a)(3), as is the practice with many other enhancements and cross-references. If the other offense is not groupable under §3D1.2, and thus does not fall within §1B1.3(a)(2), it may fall within §1B1.3(a)(1),[51] and whether or not it does, it can be prosecuted as an independent offense and a sentence for that separate offense can be imposed following a conviction.

C. Option Two

As indicated above, we oppose Option Two. If, however, the Commission proceeds with Option Two, it should change the proposed guidance on how to apply (b)(6)(B) and (c)(1) where the other offense involved a different firearm. The current proposal for addressing this is to provide the following example in new Application Note 14(E):

> *Defendant B is convicted of being a felon in possession of a shotgun. The court determines that Defendant B also unlawfully possessed a handgun and that Defendant B used the handgun in connection with a robbery. Under these circumstances, the threshold question for the court is whether the two unlawful possession offenses (for the shotgun and for the handgun) were part of the same course of conduct or common scheme or plan. See §1B1.3(a)(2). If they were, then both felon in possession offenses are used in determining the offense level. Accordingly,*

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[48] *See* §2A1.4.

[49] *See* §2K1.4.

[50] *See, e.g.*, §2L1.2; §2K2.1.

[51] *See, e.g., United States v. Ashford*, 718 F.3d 377, 383 (4th Cir. 2013) (holding that the cross-reference at §2K2.1(c) applied because the other non-groupable offense fell within §1B1.3(a)(1), even though it did not satisfy §1B1.3(a)(2)).

> *subsection (b)(6)(B) would apply, and the cross reference in subsection (c)(1) would also apply if it results in a greater offense level.*

Although it is not entirely clear, this proposed example seems to suggest a court should piggy back an uncharged felon in possession offense on top of the charged felon in possession offense to get to yet another offense – robbery in this example – that occurred during the uncharged felon in possession offense. Leaving aside the wisdom of such an approach, which is highly questionable as a further expansion of already troubling relevant conduct, it disrupts current case law and is made possible only because of a clerical error during the 2006 amendment process.

The proposed example would disrupt settled law without any justification for so doing. At least two circuits have specifically addressed the situation presented by the example, and have concluded such a scenario does not comply with the requirements of §1B1.3(a)(2) because courts must consider the groupability under §3D1.2 of the substituted offense – in this case the robbery – not the uncharged felon in possession.[52] These circuits have specifically rejected the idea that a court could, as the proposed example suggests, piggy back the robbery on an uncharged felon in possession offense. Applying the reasoning of these opinions to the proposed example, because the *robbery* is not groupable under §3D1.2, it cannot satisfy the requirements of §1B1.3(a)(2), and, absent the ability to satisfy §1B1.3(a)(1) or (a)(3), is not relevant conduct for purposes of §2K2.1(b)(6)(B) or (c)(1). Other circuits have implicitly agreed, without explicitly

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[52] *See Horton*, 693 F.3d at 479-80; *Williams*, 431 F.3d at 772 n.9. In *Horton*, the Court explained:

> We further reject the Government's argument that the relevant conduct 'offense' is the second felon in possession offense occurring on August 17. As we have held above and as applied in the context of cross-references, both the offense of conviction and the cross-referenced offense must be group-able. Contrary to the Government's contention, the relevant conduct offense here is *murder*, because it was the murder offense and its Guideline that was used to set Horton's offense level, and it was the murder that the district court treated as 'relevant conduct.'…. [H]ere it is the murder that must be groupable for Subsection (a)(2) to apply 'because it is the murder guideline that is used to calculate the offense level,' and it clearly is not.

Horton, 693 F.3d at 479-80. In *Williams*, the Court explained:

> The Government also makes an argument that it is not the assault that would be grouped but rather the firearm used in the assault. That is not correct: §2K2.1(c)(1) refers to another offense in which a firearm was used. Therefore it is the other offense which must be subject to the rules regarding grouping because it is the assault guideline that is used to calculate the offense level.

Williams, 431 F.3d at 772 n.9.

addressing the issue, that it is the substituted offense – the robbery – and not a separate uncharged felon in possession offense, that must be groupable to satisfy §1B1.3(a)(2).[53]

In addition to being inconsistent with current case law, the proposed example rests on an interpretation of the definitions of "another felony offense" and "another offense" that is inconsistent with the history of those terms. Before 2006 it was clear, and well-accepted that other felon in possession offenses were categorically excluded from the definitions of "another felony offense" and "another offense."[54] Then, in 2006, as part of a significant revision of §2K2.1, the word "the" was inserted in the definition in a way that has led courts to conclude these definitions no longer categorically exclude all firearms possession and trafficking offenses.[55] But absolutely nothing in the history of the amendment shows that the Commission intended to make this change. By adopting this example in Option Two, the Commission would affirmatively endorse the position that these terms now include other firearm offenses that plainly were categorically excluded from 1992-2006, and would do so without any empirical evidence that it is necessary or wise.[56]

Here are the details on the history of these two terms. In 1992, to "clarif[y] the meaning of the[se] terms" the Commission amended the Commentary to §2K2.1 to add an application note defining the terms as follows:

> *As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses* ***other than explosives or firearms***

[53] *See, e.g.*, *Settle*, 414 F.3d at 632 n.2 ("Settle correctly argues that Guidelines §1B1.3(a)(2) does not apply in his case because the firearms offense cannot be grouped with the post-July 4, 2002 offenses in which he attempted to kill Lonnie Young and committed other acts of violence to avoid detection for that offense. *See* GUIDELINES §3D1.3(d) (providing that 'all offenses in Chapter Two, Part A' are specifically excluded from the operation of that subsection)."); *Jones*, 313 F.3d at 1023 n.3 ("Grouping would not be required in this case – in fact, grouping of the felon in possession count with the homicide charge is specifically excluded from the operation of §3D1.2(d) – rendering §1B1.3(a)(2)'s relevant-conduct definition inapplicable here.").

[54] *See, e.g.*, *United States v. Valenzuela*, 495 F.3d 1127, 1133-34 (9th Cir. 2007); *United States v. Harper*, 466 F.3d 634, 650 (8th Cir. 2006); *United States v. Lloyd*, 361 F.3d 197, 201 (3d Cir. 2004); *United States v. Garnett*, 243 F.3d 824, 827 (4th Cir. 2001).

[55] *See, e.g.*, *United States v. Juarez*, 626 F.3d 246, 255 (5th Cir. 2010); *United States v. Jackson*, __ F.3d __, 2014 WL 351954, *2 (7th Cir., Feb. 3, 2014). *But see United States v. Falcon*, __ Fed. Appx. __, 2014 WL 278931, *1 (9th Cir., Jan. 27, 2014) (accepting for purposes of this case the parties agreement that *United States v. Valenzuela*'s holding that the other offense enhancement categorically excludes other firearm possession offense "is unaffected by the Sentencing Commission's amendment to the commentary in U.S.S.G. app. C amend. 691 (Supp.2006)").

[56] Option One does not solve the problem of the clerical error in the definitions of "anther felony offense" and "another offense," but it does not exacerbate it as Option Two does.

> ***possession or trafficking offenses***. *However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted*.[57]

This definition was maintained until 2006 when, as part of a significant revision of §2K2.1,[58] the Commission separated the definitions for "another felony offense" and "another offense" and in so doing switched from plural references to singular.[59] The new definitions were (and remain today) as follows:

> *"Another felony offense", for purposes of (b)(6)(B), means any federal, state, or local offense, other than* ***the*** *explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.*
>
> *"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than* ***the*** *explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained*.[60]

As mentioned above, before the 2006 amendment, courts routinely interpreted the definition of "another felony offense" to categorically exclude *any* other firearms possession or trafficking offenses, not just the one charged.[61] After the amendment, however, some courts decided that the amendment in 2006, which added the word "the" before the phrase "explosive or firearms possession or trafficking offense" "indicates the Sentencing Commission's intention to no longer exclude all explosives or firearms possession or trafficking offenses from the definition of 'another felony offense' under §2K2.1(b)(6)."[62]

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[57] USSG App. C Amend. 471 and Reasons for Amendment (Nov. 1, 1992) (emphasis added).

[58] Among other things, the amendment modified four base offense levels and added a new specific offense characteristic that required renumbering §2K2.1(b) and related application notes.

[59] USSG App. C, Amend. 691 (Nov. 1, 2006).

[60] *Id.* (emphasis added). *See also* §2K2.1, comment. (n.14(C)) (2013) (emphasis added).

[61] *See* cases cited *supra* note 54.

[62] *Juarez*, 626 F.3d at 255. *See also* cases cited *supra* note 55.

The conclusion that the use of the word "the" in Application Note 14(C) evidenced the Commission's intentional effort to change the definition of "another felony offense" that had been in use for over a decade is not consistent with other information available from that amendment cycle.

First, the reasons for amendment do not discuss this definition.[63] If the Commission had really intended this single word to make such a substantive change to the definition and change the law, it would have provided an explanation for the change.

Second, during that same amendment cycle, the Commission added new Application Note 13(D), which specifies how the then-new trafficking enhancement in subsection (b)(5) should interact with other subsections and includes language that is consistent with the long-standing definition of "another felony offense" as excluding all other firearm possession or trafficking offenses.[64] That note provides:

> *In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than* ***a*** *firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.*[65]

If the Commission had intended to make a substantive change without explanation, one would at least expect the two new provisions to be the same.

Third, there was not (nor is there now) any empirical evidence indicating that extending these definitions to include other felon in possession offenses was necessary. Finally, there were enough serious questions expressed then (as now) regarding the wisdom of relying on relevant conduct at all,[66] that it would be surprising for the Commission to act to expand the scope of relevant conduct beyond its historical parameters without comment or explanation.

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[63] *See* USSG App. C, Amend. 691 (Nov. 1, 2006).

[64] *See* USSG App. C, Amend. 691 (Nov. 1, 2006).

[65] *Id.* (emphasis added).

[66] *See, e.g.*, Letter from Jon M. Sands, Chair Federal Defender Guideline Committee, to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n, Attached Memorandum at 20-25 (July 19, 2006) ("For many years, judges, the Defenders, PAG, and other experts have urged the Commission to abolish 'relevant conduct' rules that require the inclusion of uncharged, dismissed and acquitted offenses in calculating the guideline range.").

Defenders believe that the best interpretation of the amendment in 2006 is that it was a clerical error. We strongly caution the Commission against endorsing the new interpretation of these definitions of "another felony offense" and "another offense" without more careful and direct consideration of the matter.

APPENDIX

an element the use, attempted use, or threatened use of physical force against the person of another.[98]

Consistent, narrow definitions would help maintain uniformity and ensure that only those truly violent offenders are subject to enhanced penalties. Possession of a short-barreled shotgun is just one example of an offense that is treated as a crime of violence under the guidelines, USSG §4B1.2, but may or may not be treated as a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"). *See, e.g., United States v. McGill*, 618 F.3d 1273, 1277 (11th Cir. 2010) (possession of an unregistered sawed-off shotgun is not a violent felony); *United States v. Hall*, 2013 WL 1607612 (11th Cir. April 16, 2013) (possession of sawed-off shotgun is crime of violence); *United States v. Hood*, 628 F.3d 669, 671-73 (4th Cir. 2010) (noting difference between guideline and ACCA definitions), *cert. denied*, 131 S.Ct. 2138 (2011). *But see United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012) (unlawful possession of short shotgun qualified as a violent felony under ACCA), *cert. denied*, 133 S. Ct. 1242 (2013).

We look forward to working with the Commission as it continues to study the many problems with these definitions.

VIII. Relevant Conduct, USSG §1B1.3

We encourage the Commission to consider a comprehensive review of relevant conduct under USSG §1B1.3. Over the years, Defenders have repeatedly urged the Commission to prohibit the use of acquitted conduct, and either eliminate the use of uncharged and dismissed conduct or significantly limit its impact on the guideline range.[99] The problems with the relevant conduct rules persist, so we again ask that the Commission review the issue during the 2013-2014 amendment cycle.

The Defenders are not alone in the belief that the current relevant conduct rules present a critical and long-standing problem. The Commission's recent survey of District Judges shows that 84% of judges believe that it is not appropriate to consider acquitted conduct.[100] A majority also believe that it is not appropriate to consider dismissed conduct (69%) and uncharged

[98] *Id*. at 17-18.

[99] *See, e.g.*, Statement of Alan DuBois & Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, Ga., at 24-26 (Feb. 20, 2009); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2-6 (June 6, 2011); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 33-36 (July 23, 2012).

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

conduct not presented at trial or admitted by the defendant (68%).[101] Judges in the districts and on the courts of appeal, have also expressed their concern in written opinions.[102]

Other federal sentencing experts similarly have criticized the current rules governing uncharged, dismissed, and acquitted conduct. For example, John Steer, former General Counsel and Vice-Chair of the Commission, has called for the Commission to exclude "acquitted conduct" from the guidelines and permit its use only as a discretionary factor.[103] He also stated that uncharged conduct "is the aspect of the guideline that [he] finds most difficult to defend" and accordingly recommended that the Commission "decrease the weight given to unconvicted counts that are part of the same course of conduct or scheme under 1B1.3(a)(2) and (3)."[104]

The Commission has long been aware of the problems with the relevant conduct guidelines. Proposals to abolish the use of acquitted conduct have been published for comment

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[101] *Id.*

[102] *See, e.g.*, *United States v. Canania*, 532 F.3d 764, 776 (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. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (Gertner, J.) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.").

[103] *See An Interview with John R. Steer*, 32 Champion 40, 42 (2008).

[104] *Id. See also* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1627 (2012) ("Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury."); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. Cal. L. Rev. 289, 313-14 (1992) ("If Congress' goals were to eliminate disparity and to have the punishment fit the crime, the modified real-offense system does not serve them well."); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993). The American College of Trial Lawyers formally proposed the following changes: (1) eliminate the use of acquitted conduct; (2) substantially discount the rate of uncharged and acquitted conduct under subsection (a)(2); (3) revise the definition of relevant conduct to eliminate cross-references to more serious offenses; and (4) clarify that sentencing liability for jointly undertaken activity encompasses only those acts "which are in furtherance of the specific conduct and objectives embraced by the defendant's specific agreement." *See The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001).

at various times beginning more than twenty years ago.[105] More than fifteen years ago, the Commission decided that one of its priorities for the 1996-97 amendment cycle was to "develop[] options to limit the use of acquitted conduct at sentencing," and also declared its intent to explore in the future "substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence."[106] Thus far, however, the Commission has declined to act. We urge the Commission to do so now.

This persistent and resounding call to change the relevant conduct rules under §1B1.3 exists because the current rules present numerous and serious problems. Critically, the relevant conduct rules work directly against the goal of eliminating unwarranted disparity. The rules produce unwarranted disparity because they are complex, they rely on untrustworthy evidence, and their application is inconsistent – varying from prosecutor to prosecutor, probation officer to probation officer, and judge to judge. [107]

The relevant conduct rules also provide prosecutors with "indecent power."[108] They give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on

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[105] *See* 57 Fed. Reg. 62, 832 (Dec. 31, 1992) (proposing amendment to §1B1.3 "to provide that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant's offense level but may, in an exceptional case, provide a basis for an upward departure"). *See also* 58 Fed. Reg. 67,522, 67,541, 62 (Dec. 21, 1993); 62 Fed. Reg. 152,161 (Jan. 2, 1997).

[106] 61 Fed. Reg. 34,465 (July 2, 1996). Commission staff began to "investigate ways of incorporating state practices; e.g., using an offense of conviction system for base sentence determination; providing limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range." Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 69 (Sept./Oct. 1995); s*ee also* USSC, *Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing* (Nov. 1996).

[107] *See Fifteen Year Review*, at 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement's role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent'g Rep. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 857 (1992) ("interaction of quantity-driven Guidelines with the relevant conduct standard can produce enormous [sentence increases] for virtually any drug defendant" resulting in manipulation of guidelines; "judicial acquiescence in such manipulation must be understood against the backdrop of this special feature in drug cases"). *See also United States v. Quinn*, 472 F. Supp. 2d 104, 106-7 (D. Mass. 2007) (two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant).

[108] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof and inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained.[109] All a prosecutor must do is provide information about uncharged or acquitted conduct to a probation officer to include in the presentence report. Even though the information is nothing more than hearsay, in some circuits it is enough to shift the burden to the defense to disprove.[110] And, when a defense attorney challenges such "relevant conduct," the defendant runs the risk of having the court deny a sentence reduction for acceptance of responsibility even though the defendant pled guilty and accepted responsibility for the charged conduct.[111] Thus, although one of the reasons the first Commission adopted the "real offense" system was to "curb the ability of prosecutors to manipulate sentences through their decisions on charging,"[112] in practice it has increased the power of prosecutors to control sentences. The Commission has been aware for quite some time that this "real offense" model transferred power to prosecutors and created unwarranted disparity.[113] We urge the Commission to change the relevant conduct rules to address this problem.

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[109] *See, e.g.*, Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 550 (1993) ("Implementation of a conviction-offense system [rather than a 'real offense' system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders' criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified."). The use of acquitted conduct "also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense." Barkow, *supra* note 104, at 1629.

[110] *See* Thomas W. Hutchison, et al., *Fed. Sent. L. & Prac.* §6A1.3, cmt. 5(e) (2013 ed.) (discussing split in circuits on whether district court may treat allegations in PSR as evidence).

[111] *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2111 (2003); *see also* Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 318-19 (2005).

[112] Barkow, *supra* note 104, at 1629. Of course, such concerns are not even theoretically implicated – then or now – with respect to acquitted offenses because an acquitted offense is charged in an indictment and tried to a jury. *Id*. ("But that justification does not account for the Guidelines' use of acquitted conduct because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already.").

[113] *See* Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) ("We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system."); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may

In addition, the relevant conduct rules deprive defendants of their Sixth Amendment right to a jury trial and undermine the legitimacy of the presumption of innocence by permitting the use of acquitted conduct. Although appellate courts have generally upheld the use of acquitted and uncharged conduct after *United States v. Booker*, 543 U.S. 220 (2005), many judges[114] and commentators[115] believe it is inconsistent with the Sixth Amendment.[116] Sentencing guidelines "that require judges to increase sentences on the basis of conduct for which the defendant has

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adversely impact Black defendants and interfere with the Commission's mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the guidelines through plea bargaining, while not "necessarily bad," is "hidden and unsystematic," suggests "significant divergence form the statutory purpose" of the guidelines, and "occurs in a context that forecloses oversight and obscures accountability"). Later, in 2004, the Commission itself acknowledged that real offense sentencing shifted sentencing power to prosecutors and created hidden and unwarranted disparities. *See Fifteen Year Review*, at 50, 86, 92.

[114] *See, e.g.*, *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."); *Mercado*, 474 F.3d at 658 (Fletcher, B., J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment."); *Canania*, 532 F.3d at 776 (Bright, J., concurring) (writing separately to "express [his] strongly held view that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional," and explaining that "[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second guessing of the jury-it entirely trivializes its principal fact-finding function").

[115] *See, e.g.*, Ngov, *supra* note 104, at 241, 244-69 (concluding that "use of acquitted conduct to enhance sentences, even under the advisory Guidelines, violates the Sixth Amendment because judges are permitted to find facts that enhance a defendant's sentence beyond that authorized by the jury's verdict"); *see also Recent Case: Criminal Law-Federal Sentencing-Ninth Circuit Affirms 262-Month Sentence Based on Uncharged Murder-United States v. Fitch, 659 F.3d 788 (9th Cir. 2011)*, 125 Harv. L. Rev. 1860, 1863-64 (2012) (discussing case where sentence relied on finding regarding uncharged conduct, and explaining that "because substantive reasonableness review may produce sentences that would not be upheld as reasonable but for judge-found facts, it implicates the *Apprendi* rule – and defendants should be able to bring as-applied Sixth Amendment challenges raising this very claim").

[116] The Supreme Court has not squarely addressed the issue. The Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), held only that the use of acquitted conduct did not violate the Double Jeopardy Clause. In *United States v. White*, 551 F.3d 381 (6th Cir. 2008) (en banc), six dissenting judges concluded that *Watts* did not govern the Sixth Amendment issue and "[b]ecause the sentence cannot be upheld as reasonable without accepting as true certain judge-found facts, the sentence represents an as applied violation of White's Sixth Amendment rights." *White*, 551 F.3d at 387, 392 (Merritt, J., dissenting). In addition, "the Court has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains 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 v. United States*, 552 U.S. 38, 60, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring).

been acquitted" is "one of the starkest threats to the jury's role."[117] Cross-references based on acquitted or uncharged conduct provide a particularly egregious example of how the rules work an end-run around fundamental rights. While the Supreme Court has called it "an absurd result" that a person could be sentenced "for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it,"[118] that is precisely what is authorized under the guidelines, and what has happened in many cases, including one that was affirmed by the Eighth Circuit just last year. *See, e.g., United States v. Stroud*, 673 F.3d 854 (8th Cir. 2012) (affirming the sentence where, after being acquitted of murder in state court, Mr. Stroud was convicted of being a felon-in-possession of a firearm in federal court, and the sentencing court "found" that Mr. Stroud had committed murder, and applied the cross-reference in §2K2.1(c), thus increasing his offense level from 22 to 43, and resulting in a sentence of 120 months, the statutory maximum, even though his guideline range without the cross-reference was 46-57 months), *cert. denied*, 133 S.Ct. 1581 (2013).[119]

The rules come at a great cost. They contribute to undue severity, which unjustly deprives individuals of their liberty, and unnecessarily consumes limited resources and tax payer dollars.[120] Take, for example, a typical drug case like *United States v. Curtis*, 96 Fed. App'x 223 (5th Cir. 2004). The conduct of conviction in 2002 involved 45.36 kg of marijuana. At sentencing, the court relied on "relevant conduct," holding the defendant accountable for 511.55 kg based on conduct that occurred as far back as 1996. As a result of this "relevant conduct," Mr. Curtis was sentenced to 60 months imprisonment. Had his sentence been based on the conduct underlying the count of conviction, his guideline range would have been 24-30 months.

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[117] *See* Barkow, *supra* note 104, at 1627, 1628. Professor Barkow further explained her position on this issue: "Advising judges to increase a sentence on the basis of relevant conduct, even when a jury acquitted a defendant of that conduct, may no longer violate the Constitution in fact, but it 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." *Id.* at 1628.

[118] *Blakely v. Washington*, 542 U.S. 296, 306 (2004). One district judge compared the rules governing cross-references based upon relevant conduct rules to the strange occurrences in Lewis Carroll's Wonderland: "As the Queen of Hearts said, 'Sentence first-verdict afterwards.' *See* L. Carroll, *Alice's Adventures in Wonderland* 146 (Random House, 1946). Federal offenders deserve better justice than that meted out in the court of the King and Queen of Hearts." *United States v. Carroll*, 798 F. Supp. 291, 294 (D. Md. 1992) (Smalkin, J.,), *vacated*, 3 F.3d 98 (4th Cir. 1993).

[119] *See also* Statement of Alan Dubois and Nicole Kaplan before the U.S. Sentencing Comm'n, Atlanta, GA, at 24 (Feb. 10, 2009) (describing case in Eastern District of North Carolina where defendant would have had excellent argument for self-defense had he been tried for murder before a jury).

[120] One study "concluded that one half of all sentences imposed in the districts studied had been increased, sometimes doubled or tripled, by uncharged conduct." Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 289, 311-12 (1992).

The additional 30-36 months took up limited bed space[121] and cost tax payers as much as $86,680.[122]

The rules also lead to disrespect for the law because they are contrary to what ordinary citizens take for granted. The rules encourage punishment on the basis of allegations that are not subject to the basic rudiments of due process assumed to apply in our criminal justice system and on information that is often unreliable. "It would only confirm the public's darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit."[123] This is particularly true when the evidence relied upon was suppressed because of unconstitutional conduct by law enforcement.[124] When prosecutors can manipulate charges and sentences to suit them, and can rely at sentencing on suppressed evidence they could not use to obtain a conviction, it removes incentives for law enforcement to respect and follow the law, which only further erodes the moral authority of the criminal justice system.

The Commission can and should address these problems by changing the rules governing relevant conduct. "Instructing judges to consider 'real' conduct was a discretionary decision by one set of Commission members [from the first Commission] who seemed to believe the Guidelines could and should occupy the entire field."[125] Adopting a "real offense" model was

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[121] "System wide, the Bureau [of Prisons] is operating at 37 percent over rated capacity. Crowding is of special concern at higher security facilities, with 54 percent crowding at high security facilities and 44 percent at medium security facilities." *Federal Bureau of Prisons FY2013 Budget Request Before the Subcommittee on Commerce, Justice, Science and Related Agencies of the Committee on Appropriations* (Apr. 17, 2013) (statement of Charles E. Samuels, Jr., Director of The Federal Bureau of Prisons), http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf.

[122] The average cost of incarceration for a Federal inmate is $28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711 (Mar. 18, 2013).

[123] *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) ("[M]ost 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."), *vacated*, 271 Fed. App'x 298 (4th Cir. 2008). Numerous judges have agreed. *See*, *e.g.*, *Canania*, 532 F.3d at 778 & n.4 (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v. Coleman*, 370 F. Supp. 2d 661, 670 n.14 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'").

[124] *See*, *e.g.*, *United States v. Gonzalez*, 290 Fed. App'x 80 (10th Cir. 2008) (sentencing court relied on evidence suppressed from a previous seizure to increase the sentence from offense level 26 to 28, resulting in an additional 14 months imprisonment).

[125] Barkow, *supra* note 104, at 1628.

not directed by Congress.[126] Indeed, it is "arguably contrary to the [Sentencing Reform Act's] most basic instructions," which directed the Commission to take into account the circumstances under which the "offense was committed."[127] The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged or acquitted conduct.[128]

No compelling reason justifies the current rules. The experiences in the states – none of which requires that courts consider a defendant's acquitted conduct – "show that a real offense sentencing scheme is not necessary for maintaining low crime and incarceration rates."[129] "No evidence" suggests that the states' decisions not to "mandate the consideration of a defendant's acquitted conduct has led to increased crime rates. Further, many states have experienced decreases in their incarceration rates since they passed their guidelines."[130]

For all of these reasons, Defenders renew their request that the Commission review the relevant conduct rules.

IX. Resolution of Disputed Factors, USSG §6A1.3

We reiterate our request that the Commission resolve a Circuit split about the reliability of information set forth in presentence reports and strengthen USSG §6A1.3 so that it provides greater procedural protections against the use of undisclosed evidence and unreliable hearsay.[131] The current guideline has been so loosely interpreted that it permits prosecutors to provide

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[126] *Id*. at 1626. "Nor is there any evidence in the Sentencing Reform Act's legislative history that suggests Congress even intended the outcome." *Id.*

[127] Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. Pa. L. Rev. 1631, 1661 & n.157 (2012) ("The Commission was to take into account 'the circumstances under which the *offense was committed*' and 'the nature and degree of the harm caused by the *offense*.' SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), §994(c)(2)-(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. §994(c)(2)-(3) (2006).") (emphasis added)).

[128] *See* Barkow, *supra* note 104, at 1626. State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. *See* Newton, *supra* note 106, at 69 ("Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines."). While some state guideline systems permit the use of *some* facts – in the nature of details *about* the offense of conviction, the federal guidelines require that separate offense of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted. *See* USSC, Guidelines Simplification Draft Paper on Relevant Conduct and Real Offense Sentencing (Nov. 1996).

[129] Barkow, *supra* note 104, at 1629.

[130] *Id.*

[131] Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 16-18 (June 6, 2011).