United States Court of Appeals
District of Columbia Circuit
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February 27, 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: Written Testimony for the Public Hearing on the Proposed Acquitted-Conduct Amendment to the Federal Sentencing Guidelines

Dear Chair Judge Reeves, Vice Chairs, and Commissioners:

Thank you for addressing the important topic of acquitted-conduct sentencing and for allowing me to share my thoughts.

I urge the Commission to amend the Sentencing Guidelines to make explicit that charges of criminal conduct for which a defendant has been acquitted may not be resurrected at the sentencing stage to calculate the relevant Guidelines range for an offense of conviction, to influence the chosen sentence within the Guidelines range, or to justify an upward departure from the Guidelines range. Increasing a criminal defendant's sentence based on acquitted conduct undermines the jury's central role in our criminal justice system, erodes the public's trust in our judiciary, raises significant procedural-fairness concerns, and further skews the justice system against jury trials—the "heart and lungs" of ordered liberty.[1] For those reasons, a growing number of Supreme Court Justices and other federal judges have decried the

[1] JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (2000) ("These two popular powers"—the franchise and trial by jury—"therefore, are the heart and lungs, the mainspring and the centre wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution. In these two powers consist wholly the liberty and security of the people.").

use of acquitted conduct to increase a defendant's term of imprisonment—to increase his loss of liberty—as "Kafka-esque[,]"[2] "repugnant[,]"[3] "strange[,]"[4] "unfair[,]"[5] and "uniquely malevolent[,]"[6] and have criticized the practice on both constitutional and policy grounds.[7]

The Commission has been aware of this issue for decades. Although the Commission has previously considered remedying this erosion of the fundamental jury-trial right, it has not yet acted. This untenable practice "has gone on long enough."[8] Now is the time for the Commission to answer the repeated call by Supreme Court Justices and others to right the due-process ship and ensure that the Sentencing Guidelines will no longer deprive a defendant of liberty based on alleged conduct that a jury found he did not commit.

* * *

I. Acquitted-Conduct Sentencing Undermines the Essential Role of the Jury in a Government of Ordered Liberty

The Framers' "enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution."[9] The run-up to the Revolution is replete with examples of colonial juries saving defendants from politically charged prosecutions.[10] Indeed, Britain became so frustrated with the pattern that it labored to avoid American juries and incarcerate colonists through nonjury proceedings and trials held in England.[11] Such attempts were listed in the Declaration of Independence as proof that King George was set on establishing "absolute Tyranny" in America.[12] And they were so remembered by the time of the Constitutional Convention that the "friends and adversaries of the plan

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[2] *United States v. Ibanga*, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006).

[3] *United States v. Watts*, 519 U.S. 148, 169–170 (1997) (Stevens, J., dissenting).

[4] *McClinton v. United States*, 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., statement respecting the denial of certiorari).

[5] *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) (Kavanaugh, J.).

[6] *United States v. Canania*, 532 F.3d 764, 776–777 (8th Cir. 2008) (Bright, J., concurring).

[7] *See Jones v. United States*, 574 U.S. 948, 948–950 (2014) (Scalia, J., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 927–928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

[8] *Jones*, 574 U.S. at 948 (Scalia, J., dissenting from denial of certiorari).

[9] Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994).

[10] *See id.* at 871–875 (listing examples).

[11] *See id.* at 875.

[12] The Declaration of Independence (U.S. 1776).

of the convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury * * * as a valuable safeguard to liberty[.]"[13]

Our constitutional system thus relies upon the jury as the "great bulwark of our civil and political liberties[.]"[14] Juries "preserve[] the democratic element of the law" by providing "[t]he opportunity for ordinary citizens to participate in the administration of justice[.]"[15] And the jury-trial right "ensures the people's ultimate control * * * in the judiciary" by guaranteeing that a neutral arbiter stands between the defendant and a government bent on depriving him of his liberty.[16] The jury, in Jefferson's words, is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution."[17]

There is no greater threat to representative government—to government of the People, by the People, and for the People—than the power of the state to strip individuals of their liberty. For when liberty is taken away, the People lose all ability to select, control, and even speak out against the government. That is why the Framers' conviction that the government cannot deprive a person of liberty unless it first goes through a jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[18] "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it."[19] When a jury acquits a defendant, the constitutionally appointed decisionmaker has said that the state may not criminally punish the defendant for the charged conduct.[20] The power to punish—to incarcerate on that charge—has been denied to the government.

An example drives home the point. Imagine a jury acquits in a single-charge case. No one would think that the government could still deprive the defendant of even one hour of liberty by re-proving the conduct to a judge under a preponderance standard. Loss of liberty for the acquitted charge would be out of the question. That

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[13] The Federalist No. 83 (Alexander Hamilton).

[14] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (brackets omitted) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–541 (4th ed. 1873)).

[15] *Powers v. Ohio*, 499 U.S. 400, 406–407 (1991).

[16] *Blakely v. Washington*, 542 U.S. 296, 306 (2006); *see Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [jury-trial right] was clearly intended to protect the accused from oppression by the Government[.]").

[17] Letter to Thomas Paine (July 11, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (Adrienne Koch & William Peden eds., 2004).

[18] *Blakely*, 542 U.S. at 305–306.

[19] *Yeager v. United States*, 557 U.S. 110, 122–123 (2009).

[20] *See McClinton*, 143 S. Ct. at 2401–2402 (Sotomayor, J., statement respecting the denial of certiorari).

outcome should not change just because the defendant is convicted of a different crime in the same trial.

Acquitted-conduct sentencing pushes the jury and its verdict to the sidelines. It allows the state to incarcerate for charged conduct that the jury has said cannot be punished. When the Sentencing Guidelines allow prosecutors and judges to increase a defendant's sentence based on facts that were submitted directly to and rejected by the jury, it vitiates the "unassailable"[21] and "inviolate"[22] finality of an acquittal and the "particular significance" that our legal system has traditionally attached to a jury's decision to acquit.[23] "The jury c[an] not function as circuitbreaker in the State's machinery of justice if it [is] 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."[24] Acquitted-conduct sentencing transfers the power to decide whether liberty may be deprived from the jury to the prosecutor and judge, removing the ultimate power to preserve and maintain liberty from the hands of the People and putting it right back in the hands of the government.

As Justice Sotomayor has explained, the use of acquitted-conduct sentencing also erodes the "public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system."[25] Those who take time away from their daily lives, work, and sometimes families to do the essential work of adjudicating criminal cases will consider their efforts an exercise in futility or formality if the defendant they acquitted is sentenced to extra years in prison for the very conduct that the jury said had not been proven. As one judicial colleague has explained:

> What would it say to those 12 people [of the jury] if I significantly increased your sentence based on evidence that they rejected? For me, it would say that I really didn't mean what I told them about the importance and the sanctity of jury service, and it would also say that I really didn't, despite what I said, value the fundamental purpose of the Sixth Amendment jury trial right, which is to ensure that before the government deprives someone of liberty it needs to persuade a jury that

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

[22] *McElrath v. Georgia*, No. 22–721, slip op. at 6 (U.S. Feb. 21, 2024).

[23] *United States v. Scott*, 437 U.S. 82, 91 (1978); *see United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight.").

[24] *Blakely*, 542 U.S. at 306–307.

[25] *McClinton*, 143 S. Ct. at 2402–2403 (Sotomayor, J., statement respecting the denial of certiorari).

> it has proven each element of the crime charged beyond a reasonable doubt.[26]

Jurors themselves are now learning of the incursion on their role and expressing outrage. In one case, federal prosecutors requested a forty-year sentence for a criminal defendant "despite the fact that a jury had acquitted him of *every* charge except a $600, half-ounce, hand-to-hand crack cocaine deal seven years ago."[27] After learning of the prosecutor's request, one of the jurors—who had served for eight months on the case's jury—wrote to the district court judge:

> 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, and it is a very noble cause as you know, sir. We looked across the table at one another in respect and in sympathy. We listened, we thought, we argued, we got mad and left the room, we broke, we rested that charge until tomorrow, we went on. Eventually, through every hour-long tape of a single drug sale, hundreds of pages of transcripts, ballistics evidence, and photos, we delivered to you our verdicts.
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> 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.[28]

"[J]ustice must satisfy the appearance of justice."[29] When a jury acquits a defendant of a charge, then justice, public perception, and common reason require that no criminal punishment follow from that charged conduct.

Finally, acquitted-conduct sentencing raises significant procedural-fairness concerns. The "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."[30] As such, our criminal justice system has long operated on the premise that "[n]o man should be deprived of his life [or liberty] under

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[26] Sentencing Transcript at 59:8–17, *United States v. Abukhatallah*, No. 1:14-cr-00141 (D.D.C. 2018).

[27] *Canania*, 532 F.3d at 778 n.4 (Bright, J., concurring).

[28] *Id.*

[29] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

[30] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."[31] The reasonable-doubt standard is not only "a prime instrument for reducing the risk of convictions resting on factual error[,]" it also ensures that "the moral force of the criminal law [is] not * * * diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned" and incarcerated.[32] Acquitted-conduct sentencing upends the foundational role that the reasonable-doubt standard plays in our criminal justice system. It allows the government to strip the defendant of liberty on the very grounds the jury found not proven, magnifying the risk that the defendant will be deprived of his freedom based on innocent conduct.[33]

Defenders of acquitted-conduct sentencing argue that there is nothing inconsistent here: A jury's acquittal decision merely denotes its judgment that the government has not met its burden to prove guilt beyond a reasonable doubt, whereas the trial judge's factual decisions at sentencing must satisfy only the preponderance standard.

That answers the wrong question.

First, the question is not the requisite standard of proof at sentencing—it is what conduct (however proven) can be the basis for a deprivation of liberty. Our constitutional values wall certain types of evidence off as a basis for calculating a sentence—for example, race, ethnicity, religion, gender, being unhoused, and poverty or other economic status.[34] And the Sentencing Commission has restricted consideration of other categories, such as educational level,[35] childhood difficulties,[36] work history,[37] addiction,[38] and family or civic ties.[39] The question before this Commission is whether the considered judgment of hard-working jurors to acquit a defendant of charged conduct merits similar treatment.

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[31] *Davis v. United States*, 160 U.S. 469, 493 (1895).

[32] *In re Winship*, 397 U.S. 358, 363–364 (1970).

[33] *Id.* at 363; *cf. United States v. Restrepo*, 946 F.2d 654, 664 (9th Cir. 1991) (Pregerson, J., dissenting) ("I cannot believe * * * that the Constitution permits the defendant to be deprived of his freedom and imprisoned for years on the strength of the same evidence as would suffice in a civil case.") (quotation marks omitted).

[34] *See* U.S.S.G. § 5H1.10.

[35] *Id.* § 5H1.2.

[36] *Id.* § 5H1.12.

[37] *Id.* § 5H1.5.

[38] *Id.* § 5H1.4.

[39] *Id.* §§ 5H1.6, 5H1.11.

Second, and relatedly, jury verdicts in our system of government do not say the government was close but just fell short of the reasonable-doubt standard. When jurors acquit a defendant, they pronounce him "not guilty." Full stop. History, tradition, and the Sixth Amendment all say that decision is the jury's to make. Allowing a judge to effectively treat the jury's decision that the government is not entitled to deprive the defendant of liberty as merely advisory because the judge is applying a different standard of proof misses the point. The Sixth Amendment right to a jury trial is as much, if not more, about *who* gets to decide guilt as it is about the relevant standard of proof.

It bears repeating that the jury stands as a neutral decisionmaker between the government and the accused—a constitutional check the government must hurdle before depriving an individual of liberty. That bulwark is foundational to our constitutional system of government and to public faith in the justice system. The standard of proof at sentencing is no excuse for functionally erasing that protection.

Finally, I feel compelled to respond to the government's recent assertion that an acquittal should not be equated with innocence.[40] Innocence for purposes of the prosecuting sovereign's power to punish the defendant is precisely what the jury decided. It is common ground that, after a jury acquittal, the government may not incarcerate the defendant for the acquitted charge because the criminal conduct was not proven. Neither may the government prosecute him again or impose any form of criminal sanction upon him. To be sure, a *civil jury* might later find that the defendant committed a tort. Or a different sovereign might be able to convince a jury that its laws were violated. But the prosecuting sovereign may not label or treat the acquitted defendant as anything other than innocent of the charged conduct.

More fundamentally, even school children know that, in our criminal justice system, a defendant is presumed innocent until proven guilty. That means that if the defendant is not proven guilty of a crime, he retains the status of being innocent in the eyes of the law—and he should do so in the eyes of the government. The government's interest in a criminal prosecution, after all, "is not that it shall win a case, but that justice shall be done."[41]

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[40] *See* Letter from Jonathan J. Wroblewski, Dir., Off. of Policy & 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; Letter from Prob. Officers Advisory Grp. to 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/POAG3.pdf.

[41] *Berger v. United States*, 295 U.S. 78, 88 (1935).

The government must "turn square corners" when seeking to deprive a person of liberty.[42] It should not be allowed to cut corners with constitutional safeguards at sentencing, then, by having the court override the jury's judgment and deprive the defendant of liberty as if he had committed the charged-but-acquitted conduct. For that same reason, the Sentencing Commission should ensure that disregarding the jury's acquittal is neither baked into the Sentencing Guidelines nor given the Commission's imprimatur, since the Guidelines are the starting point and framework for all federal sentencing.[43]

II. Acquitted-Conduct Sentencing Further Eviscerates the Role of the Jury-Trial Right in Ensuring Justice and Counterbalancing the Government's Power

The Framers "well understood the lesson that the jury right could be lost not only by gross denial, but [also] by erosion."[44] That detrition is well underway. "[C]riminal justice today is for the most part a system of pleas, not a system of trials."[45] In Fiscal Year 2022, nearly ninety-eight percent of federal convictions were the result of guilty pleas.[46]

Even those defendants who choose to exercise their right to a jury trial face mounting barriers. Criminal defendants confront what is commonly referred to as a "trial penalty"—prosecutors are willing to offer significantly lower sentences for guilty pleas than those that would be imposed following a trial.[47] Plus, if a defendant proceeds to trial and loses on any count, the Sentencing Guidelines may deprive him of a reduction for acknowledgment of responsibility.[48] Given these systemic deterrents, it should come as no surprise that even innocent defendants may be

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[42] *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

[43] *See Hughes v. United States*, 584 U.S. 675, 686 (2018).

[44] *Jones v. United States*, 526 U.S. 227, 248 (1999).

[45] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

[46] U.S. SENTENCING COMM'N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl.11 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas).

[47] NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018).

[48] *See* U.S.S.G. § 3E1.1.

"coerced into pleading to a lesser offense because the consequences of going to trial and losing are too severe to take the risk."[49]

Add acquitted-conduct sentencing to those headwinds, and the pressure on a presumed-innocent defendant to forgo his constitutional right to a trial by jury becomes almost insurmountable.[50] When acquitted-conduct sentencing is allowed, defendants choosing to put the government to its proof "face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges."[51]

This problem is far from hypothetical. In one appeal I heard, the government indicted a criminal defendant on 22 counts of serious criminal conduct, including assault, extortion, kidnapping, first-degree burglary while armed, and other drug- and violence-related offenses.[52] And yet, as to almost all of those charges, the government had no case: eight were dismissed for lack of evidence before they even reached a jury, the government chose not to present six others to the jury, and of the eight remaining charges, the jury acquitted the defendant of seven. The defendant was convicted on only one count of unlawful possession of a firearm.[53] Undeterred, the government argued for a stiff sentence based on the very burglary and assault charges of which the defendant had just been acquitted, and the district court sentenced the defendant significantly above the Guidelines range by adding on punishment for the acquitted conduct.[54]

In another appeal I heard, the jury acquitted the defendant of ten of the thirteen charges against him, convicting him of only three drug distribution charges that together involved just five grams of crack cocaine.[55] Because the defendant had no significant criminal history and the amount of cocaine was relatively small, his Sentencing Guidelines range was just 51 to 63 months.[56] Yet at sentencing, the

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[49] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014); WRITTEN STATEMENT OF MICHAEL P. HEISKELL ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 6 n.15 (February 24, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/NACDL.pdf ("Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely exonerated of the crime they were once convicted of—pleaded guilty.").

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

[51] *Id.*

[52] *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring).

[53] *Id.* at 408–409.

[54] *Id.*

[55] *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc).

[56] *Id.*

district court found that the defendant had engaged in the very cocaine conspiracy of which the jury had acquitted him and, on that basis, sentenced him to 192 months in prison—a sentence that was more than 300% above the top of the Guidelines range for the crimes of which he was actually convicted.[57]

These cases are not outliers. Although I sit on a court of appeals that traditionally has a relatively small criminal docket, I have encountered instances of judges overriding jury acquittals at sentencing all too often.[58] This practice encourages prosecutors to overcharge defendants on the promise that, even if the government secures a conviction on only a less serious crime, it can request that the judge impose a stiff sentence based on all the charges of conduct the jury rejected. It is a win-win scenario for the government. And it is a lose-lose scenario for defendants who, though sincerely believing in their innocence of some or all charges, are too often dissuaded by a deck heavily stacked against holding the government to its burden of proof.

The Framers considered the jury such a vital defense against governmental overreach and mistaken deprivations of liberty that they embedded it in the Constitution twice.[59] Multiplying a defendant's loss of liberty based on conduct of which a jury acquitted him sets the Framers' design at naught.

III. The Commission Should Exclude Acquitted Conduct from the Guidelines Sentencing Process

The call from all corners of the legal profession for this Commission to remove the bane of acquitted-conduct sentencing from the Guidelines regime has swelled in recent years. I urge the Commission to heed that call. The erosion of foundational constitutional values, the reality and perception of profound unfairness for defendants, the dishonoring of the jury system and jurors' work, and the strain on public trust in the judiciary necessitates action now.

Of the Commission's proposals, Option 1 is the only proposed amendment that meaningfully addresses the problem. Option 1 would make acquitted conduct irrelevant "for purposes of determining the guideline range." Because that guideline range is the starting point of federal sentencing,[60] excluding acquitted conduct at that stage would be an important step forward.

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[57] *Id.*

[58] *See, e.g.*, *id.*; *Brown*, 892 F.3d at 408; *United States v. Bagcho*, 923 F.3d 1131 (D.C. Cir. 2019); *United States v. Abukhatallah*, 41 F.4th 608 (D.C. Cir. 2022).

[59] U.S. CONST. Art. III, § 2, cl. 3; U.S. CONST. Amend. VI.

[60] *Hughes*, 584 U.S. at 686.

At the same time, the Commission should not invite courts to consider acquitted conduct "in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted." Depriving a defendant of liberty for conduct of which he was acquitted is equally troubling, unjust, and harmful to the jury system whether used to calculate a higher range, to select a longer sentence within a range, or to justify an upward departure. By adopting the first part of Option 1, the Commission would rightly acknowledge that this practice is wrong and antithetical to our constitutional history and values. Turning around and officially labeling acquitted conduct an appropriate basis for increasing a defendant's sentence would be logically dissonant; it would simply dress the acquitted-conduct wolf in sheep's garb.

The Commission should thus excise acquitted conduct as a basis for incarceration from the Sentencing Guidelines. Specifically, the Commission should add Option 1's proposed subsection (c) to Section 1B1.3. But the Commission should *not* amend the commentary to Section 6A1.3 to license courts to consider acquitted conduct when imposing a within-range sentence or when departing from the Guidelines. Rather, it should amend that commentary and related policy statements to make clear that—as far as the Guidelines are concerned—acquitted conduct has no role in lengthening a defendant's sentence.

The Commission asked whether excluding acquitted conduct from sentencing would be consistent with 18 U.S.C. § 3661. That statute 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."[61] Removing acquitted conduct as a basis for increasing sentences would not tread on Section 3661 for two reasons.

First, Section 3661 speaks to the decisional process undertaken by an individual judge in an individual case. What we are addressing here is whether acquitted conduct is a relevant input to a formal and structured calculation scheme designed by the Commission as a baseline starting point—not end point—for judicial sentencing across the board. The whole point of the Guidelines scheme is to identify which facts are relevant and which are not, to prescribe those facts' roles at different steps in the sentencing process, and to advise how weighty certain factors or combinations of factors should be.

For example, when addressing departures from applicable Guideline ranges, the Commission has proscribed the use of facts like "[t]he defendant's acceptance of

[61] 18 U.S.C. § 3661.

responsibility for the offense," "[t]he defendant's aggravating or mitigating role in the offense," and "[t]he defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense[,]" all of which are dealt with elsewhere in the Guidelines.[62] The Guidelines further state that departures may not "ordinarily" be based on factors such as "education and vocational skills[,]"[63] "[d]rug or alcohol dependence or abuse[,]"[64] a defendant's "[e]mployment record[,]"[65] a defendant's "family ties[,]"[66] or a defendant's "civic, charitable, or public service[,] employment-related contributions[,] and similar good works[.]"[67] And the Guidelines purport to prohibit *any* departures based on a defendant's "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing[,]"[68] a defendant's "[a]ddiction to gambling[,]"[69] or a defendant's "[r]ace, [s]ex, [n]ational [o]rigin, [c]reed, [r]eligion, and [s]ocio-[e]conomic [s]tatus[.]"[70] I am not aware of any court holding that those proscriptions run afoul of Section 3661.

Second, and in any event, any possible tension with Section 3661 was mooted when the Supreme Court "rendered the Guidelines effectively advisory" in *United States v. Booker*, 543 U.S. 220 (2005).[71] Post-*Booker*, a district court must "consider" both "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" and "any pertinent policy statement" issued by the Commission.[72] But "a district court may[,] in appropriate cases[,] impose a non-Guidelines sentence based on a disagreement with the Commission's views[,]" whether embodied in the "now-advisory Guidelines" or the "accompanying policy statements[.]"[73] Accordingly, any statement by the Commission as to the appropriate role of acquitted conduct in the Sentencing Guidelines will not hem in the information that a sentencing court "may" receive and consider at sentencing.[74] Post-*Booker*, any restriction the Guidelines place on the use of acquitted conduct would remain at most

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[62] U.S.S.G. § 5K2.0(d)(2)–(4).
[63] *Id.* § 5H1.2.
[64] *Id.* § 5H1.4.
[65] *Id.* § 5H1.5.
[66] *Id.* § 5H1.6.
[67] *Id.* § 5H1.11.
[68] *Id.* § 5H1.12.
[69] *Id.* § 5H1.4.
[70] *Id.* § 5H1.10.
[71] *Pepper v. United States*, 562 U.S. 476, 495 (2011).
[72] 18 U.S.C. § 3553(a)(4)–(5).
[73] *Pepper*, 562 U.S. at 501.
[74] 18 U.S.C. § 3661; *see also Kimbrough v. United States*, 552 U.S. 85, 101 (2007) ("In sum, while the statute still requires a court to give respectful consideration to the Guidelines * * * *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well[.]'") (quoting *Booker*, 543 U.S. at 246).

advisory. Tellingly, the United States Solicitor General has taken the position that the Commission has the authority to promulgate guidelines to preclude acquitted-conduct sentencing.[75]

The Commission also sought comment on whether "it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps." While such a statement would have some value, the structural problem of acquitted conduct factoring into the Guidelines range—the starting point for sentencing—must be excised as well.

Still, whether styled as a policy statement or otherwise, I do not believe the Commission should phrase any statement about the role of acquitted conduct in terms of a "recommendation." The many prohibitions on the bases for departures are all "policy statements."[76] But none is a mere suggestion. Simply "recommending" that a sentencing court not consider acquitted conduct would therefore be inconsistent with the Commission's standard practice and would risk sending the message that the Commission's position with respect to acquitted-conduct sentencing is equivocal. The Commission should instead eliminate the use of acquitted conduct within the Guidelines scheme itself and remove the Commission's approbation from the consideration of such evidence.

The Commission also sought comment on "whether any of these more expansive potential prohibitions exceeds the Commission's authority under 28 U.S.C. § 994[.]" That statute broadly empowers the Commission to prescribe guidelines and policy statements concerning "whether to impose a sentence to probation, a fine, or a term of imprisonment" and regarding "the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment[.]"[77] The Supreme Court has described the Commission's statutory authority as embracing "significant discretion[,]" including over "the relative severity of federal crimes and * * * the relative weight of the offender characteristics that Congress listed for the

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[75] *See* Brief for the United States in Opposition at 15, *McClinton v. United States*, 143 S. Ct. 2400 (2023) (No. 21-1557) (stating that Supreme Court intervention is not "necessary" to address acquitted-conduct sentencing concerns because "the Sentencing Commission could promulgate guidelines to preclude such reliance"); *see also* Brief for the United States in Opposition at 6 n.*, *Sanchez v. United States* (No. 22-6386) ("The Sentencing Commission has recently proposed amendments to the Sentencing Guidelines addressing the use of acquitted conduct at sentencing."); Brief for the United States in Opposition at 7 n.*, *Cain v. United States* (No. 22-6212) (same).

[76] U.S.S.G. §§ 5H1.2–12, 5K2.0(d)(2).

[77] 28 U.S.C. § 994(a)(1)(B); *see Watts*, 519 U.S. at 158 (Scalia, J., concurring) (arguing that, in a world of mandatory Guidelines, 18 U.S.C. § 3661 was not consistent with the Commission's prohibiting consideration of acquitted conduct in sentencing).

Commission to consider."[78] The Court has likewise described the Commission as statutorily "[e]ntrusted" with the power "to make policy judgments," including when those policy judgments result in Guidelines ranges that fall below (and therefore must give way to) statutory mandatory minimums.[79] As such, there is no apparent statutory bar to the Sentencing Commission—in the words of then-Judge Kavanaugh—"conclud[ing] as a policy matter that sentencing courts may not rely on acquitted conduct."[80]

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Jurists around the country—including nine former and current Supreme Court Justices and at least six State supreme courts—have criticized the practice of acquitted-conduct sentencing on constitutional and policy grounds.[81] Indeed, just last

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[78] *Mistretta v. United States*, 488 U.S. 361, 377 (1989).

[79] *Neal v. United States*, 516 U.S. 284, 295 (1996).

[80] *Settles*, 530 F.3d at 924 (Kavanaugh, J.).

[81] *See, e.g.*, *McClinton*, 143 S. Ct. at 2401–2403 (Sotomayor, J., statement respecting the denial of certiorari); *id.* at 2403 (Kavanaugh, J., statement respecting the denial of certiorari); *Bell*, 808 F.3d at 927–928 (Kavanaugh, J., concurring in the denial of rehearing en banc); *Jones*, 574 U.S. at 948–949 (Scalia, J., dissenting from denial of certiorari); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *Watts*, 519 U.S. at 169–170 (Stevens, J., dissenting); *id.* at 170 (Kennedy, J., dissenting); *United States v. Martinez*, 769 F. App'x 12, 17 (2d Cir. 2019) (Pooler, J., concurring); *Canania*, 532 F.3d at 776–778 (Bright, J., concurring); *United States v. White*, 551 F.3d 381, 390–397 (6th Cir. 2008) (Merritt, J., dissenting); *United States v. Mercado*, 474 F.3d 654, 658, 662–665 (9th Cir. 2007) (Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349–1353 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Baylor*, 97 F.3d 542, 549–553 (D.C. Cir. 1996) (Wald, J., concurring); *United States v. Concepcion*, 983 F.2d 369, 394–396 (2d Cir. 1992) (Newman, J., dissenting); *Ibanga*, 454 F. Supp. 2d at 539 (Kelley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 151–152 (D. Mass. 2005) (Gertner, J.); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028–1029 (D. Neb. 2005) (Bataillon, J.); *State v. Melvin*, 258 A.3d 1075, 1094 (N.J. 2021) (finding that, under New Jersey's constitution, "[f]undamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial"); *People v. Beck*, 939 N.W.2d 213, 226 (Mich. 2019) ("This ends here. * * * [W]e do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment. We hold that it is."); *id.* at 227–242 (Vivano, J., concurring) (arguing for a similar result under the Sixth Amendment); *State v. Koch*, 112 P.3d 69, 79 (Haw. 2005) (holding that a sentencing court "did not have the discretion to consider alleged conduct of which [the defendant] was acquitted in sentencing"); *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988) ("To allow the trial court to use at sentencing

year, three Supreme Court Justices declined to vote to grant certiorari to decide the constitutionality of acquitted-conduct sentencing in favor of allowing this Commission first to address the practice under the Sentencing Guidelines.[82]

Thirty years of jury-defying incarcerations is long enough. I ask the Commission to act now (i) to honor the constitutional and historic role of the jury in limiting the power of government; (ii) to respect the hard work of women and men who put their lives on hold to stand between the government and the accused and neutrally decide if liberty should be deprived or not; (iii) to be faithful to the constitutionally guaranteed jury process when it tells the government that it has not earned the right to punish a person; (iv) to strengthen defendants' and the public's trust in our justice system at a time when that trust is under strain; and (v) to eliminate the heavy hand of acquitted-conduct sentencing on a defendant's constitutionally enshrined decision to put the government to its proof. I know the decision before the Commission is a challenging one. But when something is wrong—when something gnaws as sharply as acquitted-conduct sentencing does at the fundamentals of constitutional government and ordered liberty—it is our duty to recognize it as wrong, and to say so directly.

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an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself."); *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (holding that, "where the defendant has been acquitted of five of eight charges, and convicted of three others occurring at one date and time, the sentencing judge abused his discretion in * * * consider[ing] evidence of charges of which the defendant had been acquitted"); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979) (stating that the sentencing judge "did not properly consider the armed robbery charge which resulted in acquittal[,]" since "[a] not guilty judgment is more than a presumption of innocence; it is a finding of innocence"); *id.* ("[T]he courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system."); *see also* Brief of 17 Former Federal Judges as Amici Curiae in Support of Petitioner at 2–3, *McClinton v. United States*, 143 S. Ct. 2400 (2023) (No. 21-1557) ("No alleged conduct upon which a jury has acquitted a defendant should be used to enhance the defendant's penalty for any crime."); Model Penal Code: Sentencing § 10.03(2)(b), comment e (stating that allowing "sentencing courts * * * to base penalties on alleged criminal acts for which the jury has returned acquittals" constitutes "an unjustified expansion of prosecutorial power to increase the severity of sentences").

[82] *See McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., statement respecting the denial of certiorari).