



February 22, 2024

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

Re: Proposed Amendments for the 2024 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless lives, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission on December 14, 2023.

*I. Proposed Amendment 2 – Youthful Individuals*

FAMM applauds the Commission for examining the treatment of youthful individuals in the Guidelines. Notably, the use of juvenile convictions to augment adult criminal history calculations has been included in its original form at §4A1.2(d) since 1987. In the over 35 years since §4A1.2(d) was adopted, our understanding of the juvenile justice system has evolved.<sup>1</sup> Nationwide, juvenile justice systems vary significantly. The resulting patchwork system is rife with inequality and disparate treatment of youthful offenses. In fact, the first Commission recognized issues inherent to counting juvenile convictions. The Commission initially limited the kinds of juvenile priors that would count towards criminal history points because, “[a]ttempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. . . . To avoid disparities from jurisdiction to jurisdiction in

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<sup>1</sup> See, e.g., *Miller v. Alabama*, 567 U.S. 460, 471 (2012).



the age at which a defendant is considered a ‘juvenile,’ this provision applies to all offenses committed prior to age 18.”<sup>2</sup> Sadly, even with this adjustment, large disparities persist.

Calculating a federal guideline sentence using state juvenile adjudications does not advance the purposes of federal sentencing. Doing so only exacerbates racial disparities and other inequities in the instant conviction. It is high time that the Commission eliminate this practice in the Guidelines. FAMM believes that Option 3 is the only option that will realize the goals of the Commission and the purposes of sentencing.

Before delving into the details, we find it imperative to acknowledge the backdrop against which this proposal sits. Crimes committed by youth are on the rise. These crimes, often influenced by and encouraged on social media, include carjackings that are serious and have a detrimental impact on victims and their communities.<sup>3</sup> CNN recently identified a “youth crime emergency,” as juveniles, whose average age is 15, make up “the majority of arrests in DC for crimes like robbery and carjacking.”<sup>4</sup> The sentences imposed on those youngsters are likely to be lengthy and unforgiving.<sup>5</sup> One might think that this is therefore not the time to consider revisiting the impact of youthful criminal history on adult convictions. But the exact opposite is true. The high incidence of youthful crime is precisely why the Commission needs to revisit the impact of juvenile convictions on adult sentences.

As the Commission noted, there are a plethora of reasons to be concerned about baking a juvenile sentence into a federal sentence. Juvenile courts are distinct from their adult counterparts. Not all youth are sentenced in juvenile courts. And juvenile court processes, including when and whether to transfer a youth to adult court, vary by state. Youthful convictions are thus a faulty basis on which to increase a sentence in the federal system that strives to treat similarly situated defendants similarly.

Juvenile courts were originally created with the intent to establish a separate path for minors accused of crimes, with a focus on rehabilitation and their treatment, rather than

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<sup>2</sup> USSG §4A1.2(d), comment 7.

<sup>3</sup> See e.g., Taylor Dorrell, *The Kia Boys Will Steal your Car for Clout*, The Verge (Jun. 8, 2023) (discussing the phenomenon known as “kia boys” which started on TikTok and involves youth who steal Kias and Hyundais and post about their crimes on social media), <https://www.theverge.com/23742425/kia-boys-car-theft-steal-tiktok-hyundai-usb>; Tim Arango & Jacey Fortin, *Teens are Stealing More Cars. They learn How on Social Media*, NYTimes (March 10, 2023).

<sup>4</sup> Gabe Cohen, “*It’s definitely a crisis’: This is the reality for kids caught up in DC’s violent crime spike*,” CNN (Feb. 19, 2024), <https://www.cnn.com/2024/02/17/us/washington-dc-teens-crime-mentors/index.html#:~:text=Data%20show%20juveniles%20make%20up,of%20carjackings%20C%20police%20data%20show>.

<sup>5</sup> See, e.g., Dana Thiede, John Croman, *Carjacking penalties established by state sentencing commission* (July 28, 2023) (reporting that carjacking was increased to a level 9 crime, making it more serious than robbery), <https://www.kare11.com/article/news/crime/carjacking-penalties-increased-by-state-sentencing-commission/89-a470dfbb-0fb2-4939-ac17-6a829594dddc>.

punishment.<sup>6</sup> The lack of formal process, which was once seen as a beneficial feature of the system, quickly became a bug as the impact of juvenile adjudications resulted in substantial deprivation of “children’s liberty through extensive periods of incarceration.”<sup>7</sup>

In 1967, the Supreme Court held that juvenile courts must afford youth the same due process rights as afforded adults accused of crimes.<sup>8</sup> But that command has not been followed.<sup>9</sup> As one scholar noted, *Gault* may have ironically created more procedural unfairness in juvenile courts “[b]y endorsing an adversarial court process for children and engrafting into the juvenile court some, but not all, of the procedural rights afforded to adults.” As a result, “the Court unwittingly triggered the juvenile court’s ideological, jurisprudential, procedural, jurisdictional, and penal transformation into a second-class criminal court for youth that meted out punishment without the protection of its criminal counterpart. . . . [T]hese changes disproportionately disadvantaged youth of color.”<sup>10</sup>

In present day, youth accused of crimes still do not have the same procedural safeguards as adults accused of crimes. Protections that are a given in adult criminal court are not a given in juvenile court. Juveniles do not have the right to a jury,<sup>11</sup> they are not subject to open court proceedings,<sup>12</sup> and they do not have access to effective counsel.<sup>13</sup> Moreover, court and agency records that are kept regarding youth offenses vary by state.<sup>14</sup> Given the lack of uniformity among the states and the lack of procedural protections for youth accused of crimes, the Commission’s reliance on juvenile adjudications as meaningful evidence of culpability is misplaced and undermines the carefully crafted process the Commission uses to fashion a fair adult sentence.

This may prompt one to ask whether the reliability concerns with juvenile court might be ameliorated by counting solely youthful convictions in *adult* courts. This question is reflected in

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<sup>6</sup> See Juvenile Law Center, *Youth Justice System Overview*, [www.jlc.org/youth-justice-system-overview](http://www.jlc.org/youth-justice-system-overview).

<sup>7</sup> *Id.*

<sup>8</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>9</sup> See Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 772 (2010), [https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1058&context=faculty\\_publications](https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1058&context=faculty_publications); Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 AU L. Rev. 743 (2020).

<sup>10</sup> Barry C. Feld & Perry Moriearty, *Race, Rights, and the Representation of Children*, 69 AU L. Rev. 743, 772 (2020).

<sup>11</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>12</sup> Charles Puzanchera et al., Nat’l Ctr. for Juvenile Just., *Youth and the Juvenile Justice System: 2022 National Report* at 93 (2022) (Twenty-six states and D.C. restricted the public from attending delinquency adjudication hearings, with limited exceptions). Although closed courtrooms for youth are seen to protect their privacy, closed courtrooms can also invite predatory practices that likely would not occur with observers.

<sup>13</sup> See *supra* n.9.

<sup>14</sup> See generally, Juv. L. Ctr., *A National Review of State Laws on Confidentiality, Sealing and Expungement* (2014), [https://jlc.org/sites/default/files/publication\\_pdfs/national-review.pdf](https://jlc.org/sites/default/files/publication_pdfs/national-review.pdf).

the Commission’s Option 2, which would count as relevant to the criminal history calculation only those juvenile convictions that were prosecuted in adult court. But adult convictions for youth are also rife with inequality and counting them would not solve unwarranted disparities in federal sentencing.

Juvenile transfer is a product of state law. Transfer of youth to adult court is a common practice in many states for certain crimes. As such, there is no uniformity in who is transferred or under what circumstances those cases are transferred. In 2019, 47 states had laws designating some category of cases as subject to a waiver of jurisdiction from juvenile court to criminal court.<sup>15</sup> In 14 states, prosecutors have the power to determine whether to file a juvenile case in juvenile or adult court.<sup>16</sup> And in 27 states, legislatures have provisions in law excluding certain crimes from jurisdiction in juvenile court.<sup>17</sup> Compounding this patchwork of state law is the fact that each state has a different age limit for youth who may be transferred to adult court. In 21 states, there is *no minimum age* limit, meaning that a child as young as five years old may be transferred to adult criminal court.<sup>18</sup> And unsurprisingly, Black youth are waived into adult criminal court more often than other youth, regardless of the offense type.<sup>19</sup> Thus, Option 2 is not a “compromise” position – it would incorporate into the federal sentence an adult conviction that is rife with disparity.

For similar reasons to those outlined above, some states have initiatives to examine whether their own state’s juvenile adjudications should be used to enhance state adult convictions. FAMM recently was involved in a successful effort in Washington State to eliminate the use of most juvenile adjudications to increase sentences for adults convicted of crimes.<sup>20</sup> In Washington, racial disparities in youth convictions were a primary motivation for the legislative change.<sup>21</sup> That same disparity is evident in federal sentencing.<sup>22</sup> Nearly everyone who received a criminal history point for a youth offense in Fiscal Year 2022 was non-white.<sup>23</sup>

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<sup>15</sup> See *supra* n.12.

<sup>16</sup> *Id.* at 98.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 162.

<sup>20</sup> See Wa. Ch. 415 L. 23, <https://lawfilesextd.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1324.SL.pdf#page=1>.

<sup>21</sup> Derrick Belgard, et al., *Comment: Counting Juvenile Crimes Against Adults Unjust to Many*, The Herald Net (Apr. 11, 2023), [https://www.heraldnet.com/opinion/comment-counting-juvenile-crimes-against-adults-unjust-to-many/?fbclid=IwAR001xn\\_Hl1tFs3jezUaMfbyfF0NbOzwVXrX\\_HbqJqAgTcw1mznzwfAg7xz8](https://www.heraldnet.com/opinion/comment-counting-juvenile-crimes-against-adults-unjust-to-many/?fbclid=IwAR001xn_Hl1tFs3jezUaMfbyfF0NbOzwVXrX_HbqJqAgTcw1mznzwfAg7xz8)

<sup>22</sup> See U.S. Sent’g Comm’n, *Public Data Presentation: Proposed Amendments on Youthful Individuals* 28 (Jan. 2024) (“USSC Data Briefing”), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024\\_Youthful-Sentenced-Individuals.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2024_Youthful-Sentenced-Individuals.pdf).

<sup>23</sup> *Id.* (reporting that of the 3,112 people who received at least one point for an offense prior to age 18, 11.2% were white, 59.7% were Black, 26.5% were Hispanic, and 2.6% were another race).

Amidst all the statistics and policy positions, let us not forget who we are talking about. We are talking about children. Should we equate the legal and moral culpability of a thirteen-year-old with that of a thirty-year-old? The “Kia boys” example is contextualized by recent brain science research, which demonstrates that children are more likely to make impulsive decisions influenced by their peers.<sup>24</sup> Of course this does not diminish the harm that youthful crimes can cause. A judge may very well find youthful crimes relevant to the analysis under 18 U.S.C. § 3553(a). But given the disparities – procedural and racial – that permeate the juvenile justice system, juvenile convictions should not be used to calculate adult criminal history. Option 3 is the only option that will ensure the criminal history calculation does not perpetuate unwarranted disparities in federal sentencing.

As for the Commission’s proposal regarding Chapter 5 departures, FAMM understands that this proposed amendment is subject to the Commission’s decision regarding simplification more generally. However, assuming that amendment is not adopted, and §5H1.1 remains, FAMM supports the proposed amendment with changes recommended by the Federal Defenders.<sup>25</sup>

FAMM commends the Commission in its endeavor to ensure the guidelines create more fair sentences. For the reasons discussed above, including youthful convictions in criminal history calculations undermines this endeavor. We are hopeful that the Commission will adopt Option 3 and eliminate all offenses incurred prior to age 18 from the adult criminal history calculation.

## *II. Proposed Amendment 3 – Acquitted Conduct*

We wrote to the Commission on August 1, 2023, to recommend that it include in its initiatives a proposal to revisit acquitted conduct, and we are particularly pleased that the Commission decided to include such a proposed amendment.

FAMM supports Option 1 of the proposal to end the use of acquitted conduct as relevant conduct for the purposes of calculating a guideline range, sentence within the range, or departure above the range. We support defining acquitted conduct as conduct underlying the charge of which the defendant was found not guilty. Further, we favor not excluding from the definition admissions made by the defendant during a plea colloquy or found beyond a reasonable doubt by the trier of fact.

We prefer this bright line rule because it will help ensure the sentencing guidelines meet the Commission’s aim of advancing the purposes of punishment. Furthermore, it avoids providing prosecutors undue influence over sentencing, respects the jury’s verdict, enhances

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<sup>24</sup> See, e.g., U.S. Sent’g Comm’n, *Youthful Offenders in the Federal System* at 6–7 (2017); Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 Dev. Cognitive Neuroscience 19 (2017); Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. Dev. Psych. 21 (2019).

<sup>25</sup> See Comment to the Sent’g Comm’n, Federal Public and Community Defenders on Youthful Individuals, Part II (2024).

public confidence in the criminal justice process, and helps ensure procedural and actual fairness and accuracy. Should the Guidelines exclude acquitted conduct, courts, exercising sentencing discretion guaranteed by 18 U.S.C. § 3661 and guided by 18 U.S.C. § 3553(a), may resort to acquitted conduct rarely and only when necessary to accurately fashion a sentence that is sufficient but no greater than necessary to meet the purposes of punishment.<sup>26</sup>

*a. Eliminating acquitted conduct entirely will help ensure the Sentencing Guidelines better advance the purposes of punishment.*

Sentencing Guidelines exist to “assure the ends of justice.”<sup>27</sup> These include just punishment, deterrence, incapacitation, rehabilitation, and respect for the law.<sup>28</sup> Sentencing a defendant using acquitted conduct can and does undermine several of these goals.

When a jury has found a person not guilty of a charge, it might be because the defendant is factually innocent. Punishment for a crime not committed is the antithesis of just punishment. But jury decisions are often opaque with respect to the underlying reasons for acquittal.<sup>29</sup> Even when the jury makes special findings supporting actual innocence, or finds for the government only on lesser included charges, relevant conduct counsels a judge to set aside the jury’s finding using the relaxed preponderance of the evidence screen. Permitting a judge to enhance a guideline sentence using the lower standard of proof when a person is factually innocent defeats the guideline goal of just sentencing. In addition, juries are “fundamental to the American scheme of justice.”<sup>30</sup> As such, this practice is patently unjust and offends due process. The relaxed preponderance of evidence standard is used to set aside acquittals and, under the veil of “relevant conduct,” undermines the careful deliberation of a jury.<sup>31</sup>

Acquitted conduct fails in other respects as well. One can hardly be rehabilitated for or deterred from a crime they did not commit. As U.S. Senators Durbin, Booker, and Hirono pointed out when they commented on the acquitted conduct rule proposed last year: “since most

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<sup>26</sup> Clare McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 82 St. John’s L. Rev. 1419, 1421 (2011) (suggesting “balancing the good of accuracy in sentencing with the compelling public policy reasons weighing against any introduction of prior acquitted conduct at sentencing.”), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1038&context=lawreview>.

<sup>27</sup> USSG Ch.1, Pt. A, intro, 1.2. *The Statutory Mission* 1.

<sup>28</sup> *Id.* at 2.

<sup>29</sup> Letter from Jonathan J. Wroblewski to Hon. Carlton W. Reeves at 14 (Feb. 15, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180\\_public-comment.pdf#page=387](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=387).

<sup>30</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>31</sup> See Eang L. Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 269-70 (2009) (providing multiple examples of courts disregarding jury’s special verdicts and sentencing based on acquitted conduct supported by jury special findings).

people are unaware that they can be punished for acquitted conduct, the availability of such punishment does not result in either specific or general deterrence.”<sup>32</sup>

While it is argued that acquitted-conduct sentencing perhaps at times can advance some ends of justice, for example when a person is factually guilty but nonetheless found not guilty, the many harms associated with the practice counsel against its use even in such circumstances. Moreover, our constitutional system privileges legal guilt and legal innocence, as evidenced by the Sixth Amendment guarantee of trial by jury, which may only convict on a finding of guilt beyond a reasonable doubt.<sup>33</sup> The full impact of disregarding that protection is felt at sentencing, where courts can sentence without the need to provide the defendant with trial protections, such as the opportunity to confront witnesses and exclude evidence.<sup>34</sup>

One key protection afforded at sentencing is against unwarranted disparity among similarly situated defendants.<sup>35</sup> One area of consistent concern to the Commission is unwarranted racial disparity at sentencing. The Commission historically has exposed and worked steadily to eradicate facially neutral rules that result in disparate outcomes based on race. Starting in 1995, the Commission has steadily worked to end the racially disparate outcomes of the crack-powder sentencing delta.<sup>36</sup> As with those rules, acquitted conduct sentencing produces racially disparate outcomes. Acquitted conduct is used more frequently against defendants of color than against white defendants, transforming this facially neutral practice into a racialized one.<sup>37</sup> Acquitted conduct leads to longer sentences that are imposed disproportionately on defendants of color.

Racially disparate sentencing outcomes due to acquitted conduct are abhorrent and it is within the Commission’s power to address and mitigate the cause. Eliminating the use of acquitted conduct will also advance other goals of sentencing.

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<sup>32</sup> Letter from Senator Richard J. Durbin, et al., to Hon. Carlton W. Reeves at 5 (March 14, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180\\_public-comment.pdf#page=298%20target=](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=298%20target=).

<sup>33</sup> See Letter from Nancy Gertner to Hon. Carlton W. Reeves at 8 (March 14, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180\\_public-comment.pdf#page=1505](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1505); see also Clare McCusker Murray, *supra* n.26 at 1460 (arguing that even in the face of acquitted actual guilt, “compelling public policy reasons” favor not enhancing using acquitted conduct), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1038&context=lawreview>.

<sup>34</sup> *Supra* n.32.

<sup>35</sup> See 18 U.S.C. § 3553(a)(6); see also 28 U.S.C. § 994(f).

<sup>36</sup> See, e.g., U.S. Sent’g Comm’n, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf).

<sup>37</sup> See Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L. Rev. 676, 709-10 (2014), <https://digitalcommons.law.scu.edu/lawreview/vol54/iss3/4/>.

b. *Ending acquitted conduct sentencing will lessen inappropriate government influence over sentencing.*

Permitting acquitted-conduct sentencing distorts every phase of the criminal sentencing process, handing prosecutors undue influence over outcomes for people who elect to go to trial. It incentivizes prosecutorial overcharging without fear of the consequence of losing, infects the plea-bargaining process, and mangles trial strategies as defendants find themselves required to argue two different standards of proof to two different factfinders. And, it forces defendants who may wish to acknowledge their blameworthiness at the sentencing phase for convicted conduct to continue to dispute acquitted conduct.<sup>38</sup>

Acquitted conduct has also helped lead to the demise of the jury trial, which has been reduced to a vanishing act in the criminal justice system. The Guidelines' recognition of acquitted conduct provides the government with risk-free incentives to overcharge defendants in an effort to secure a guilty plea. The risk of losing a conviction at trial is no bar to this practice. Overcharging works. Only 2.5 percent of the 64,142 federal defendants convicted in 2022 went to trial.<sup>39</sup> Even when it doesn't secure a plea, overcharging has its benefits for the government.

One consequence of prosecutorial control is the punishment structure colloquially known as the "trial penalty." The trial penalty is expressed as the delta between the sentence imposed on a person found guilty on their plea and the one imposed following conviction at trial. The National Association of Criminal Defense Lawyers (NACDL) has demonstrated that acquitted conduct contributes to the trial penalty. The practice discourages a defendant from exercising their constitutional right to trial because they can be sentenced despite being found not guilty.<sup>40</sup> Attorneys find themselves sometimes explaining to their clients that it is in their best interest to plead guilty to weak charges to avoid a partial acquittal that could do them more harm than good.<sup>41</sup>

The availability of acquitted conduct sentencing promises the government a win if you win; win if you lose bonanza. The prosecution wins if (1) the defendant succumbs and pleads

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<sup>38</sup> *McClinton v. United States*, No. 21-1557, Brief of Nat'l Ass'n of Federal Defenders and FAMM as Amici Curiae Supporting Petitioner for Cert. at 5-6 (July 14, 2022).

<sup>39</sup> U.S. Sent'g Comm'n, *F.Y. 2022 Sourcebook of Federal Sentencing Statistics*, Tbl. 11, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf>.

<sup>40</sup> See letter from JaneAnne Murray et al. to Hon. Carlton W. Reeves at 24 (March 14, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180\\_public-comment.pdf#page=1152](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=1152); see also, Statement of Melody Brannon, on Behalf of the Federal Public and Community Defenders before the U.S. Sentencing Commission Public Hearing on Acquitted Conduct at 12 (Feb. 24, 2023) (relating how counsel used examples of acquitted conduct sentencing to advise clients considering going to trial), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FPD3.pdf>.

<sup>41</sup> *Supra* n.38 at 11.



guilty, even when not factually guilty;<sup>42</sup> (2) if they go to trial and are convicted of a charge; or (3) when they go to trial and are found not guilty, including by being actually innocent.<sup>43</sup> The prosecution need only secure a conviction on a more easily proven charge and then persuade the sentencing judge of the defendant's guilt, notwithstanding acquittal, using reliable "information" which is not necessarily "evidence."<sup>44</sup>

This has a corrosive effect on the charging and sentencing phases and on a defendant's ability to take a case to trial secure in the meaning of the jury's verdict.

Ending the use of acquitted conduct in the calculation of a guideline sentence will lessen the incentives currently available to prosecutors to lard on charges and over-punish defendants who prevail at the guilt phase.

*c. Ending acquitted conduct will strengthen public and stakeholder confidence in the criminal justice system.*

*"It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty."*<sup>45</sup>

A criminal justice system that deprives its citizens of liberty as punishment for wrongdoing depends on the trust of the governed for its legitimacy. As bond for that trust, our system provides defendants significant constitutional protections against the unwarranted deprivation of liberty. The use of acquitted conduct makes a mockery of constitutional protections that can be set aside so readily and at the direction of sentencing guidelines that purport to ensure that the purposes of punishment are met. The practice also undermines respect for the law.

With the exception of the U.S. Department of Justice, it appears that nearly every criminal justice system stakeholder and student of the system; those subject to the practice and their loved ones; and every observer who learns that our system of law sentences people for conduct for which they were found not guilty, abhors the practice. From Supreme Court justices, including Scalia, Thomas, and Ginsburg who proclaimed: "This has gone on long enough"; to then-Judge Kavanaugh, who implored the Court to "fix it" based on "good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness"<sup>46</sup>; to Justice Sotomayor, who expressed "concerns about procedural fairness and accuracy when the State gets a second bite of the apple with evidence that did not

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<sup>42</sup> See NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 9-10 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

<sup>43</sup> *Supra* n.38 at 7.

<sup>44</sup> *Id.*

<sup>45</sup> *McClinton v. United States*, No. 21-1557, Brief of 17 Former Federal Judges as *Amicus Curiae* in Support of Petitioner, at 15 (Aug 10, 2022).

<sup>46</sup> *Id.* at 3.

convince the jury coupled with a *lower* standard of proof.”<sup>47</sup> Appellate and lower court jurists have criticized the practice.<sup>48</sup>

The Model Penal Code does not recognize acquitted conduct sentencing and its drafters have described acquitted conduct sentencing as “an anomaly with grave impacts upon fairness and process regularity.”<sup>49</sup>

People subject to acquitted conduct sentencing naturally have strong feeling on the topic. They include FAMM constituents.

Raul Villarreal was acquitted of an obstruction of justice charge, but received a two-level obstruction of justice enhancement. He told us he “feels devastated and betrayed by the justice system” due to the use of acquitted conduct to increase his sentence. In electing to go to trial he “sacrificed everything for believing in something” when he was treated as “guilty” when [he] was declared ‘not guilty’ in a public trial by a jury of [his] peers.” A jury acquitted Davon Kemp, another FAMM member, of conspiracy charges. The judge nonetheless enhanced his base offense level significantly using the conspiracy charge of which he had been found not guilty. He described the criminal justice system as “foul for stripping [him] of [his] right to a jury trial.” Mr. Kemp’s mother attended the sentencing hearing and was “shock[ed] at the outcome. She came away feeling that acquitted conduct sentencing rendered “worthless” her son’s right to a jury trial. Elichi Oti, acquitted of a gun charge that was, nevertheless used to enhance her sentence, asked “[w]hy did I have a jury if the government was going to usurp their authority and implement their own judgment regardless of the jury’s decision?”<sup>50</sup> Why, indeed?

Meanwhile, everyone who pays attention has a story about what the uninformed say when told that a person acquitted at trial can be sentenced as if found guilty. Even Justice Sotomayor remarked that “[v]arious jurists have observed that the woman on the street would be quite taken aback to learn about this practice.”<sup>51</sup>

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<sup>47</sup> *McClinton v. United States*, No. 21-1557, 600 U.S. \_\_\_\_ (2023) (Sotomayor, J.) *denial of certiorari* at 4.

<sup>48</sup> See *McClinton v. United States*, No. 21-1557, Brief of Professor Douglas Berman as *Amicus Curiae* in Support of Petitioner at 9-11 (July 8, 2022) (collecting quotes from numerous appellate and district court pronouncements on the practice of acquitted conduct); see also Statement of Melody Brannon *supra* n.40 at 3-4, n.7 (collecting judicial statements and law review articles critical of the practice).

<sup>49</sup> See Model Penal Code: Sentencing § 6B.06 (Comment) (Am. Law Inst., Proposed Official Draft 2017).

<sup>50</sup> *Supra* n.38 at 18-20.

<sup>51</sup> *Supra* n.47 at 4.

d. *Ending the use of acquitted conduct will help ensure procedural and actual fairness and accuracy.*

“It is a matter of significant debate whether using acquitted conduct, established by a preponderance of the evidence, appropriately meets due process standards.”<sup>52</sup> FAMM believes there is *no* debate that ignoring a jury verdict raises due process alarms and surfaces more policy concerns than it addresses. Ending its hold on the criminal justice system will advance the aims of fairness and accuracy.

In fashioning §6A1.3, the Commission explained that it believed that “use of the preponderance of the evidence standard is appropriate to meet the due process requirements and policy concerns in resolving disputes regarding applications of the guideline to the facts of the case.”<sup>53</sup> The Commission may not have had acquitted conduct in the frame when it devised this comment on the policy statement. Since then, however, it has become apparent that disputes regarding applying acquitted conduct are not appropriately addressed by a relaxed preponderance of the evidence standard. The U.S. Supreme Court has likely only held off addressing the practice to give the Commission an opportunity to review and in the view of many, correct course.

There are “compelling public policy reasons” for avoiding the use of acquitted conduct. These reasons include: undermining the meaningful message that acquittal should convey, interfering with the deterrence value of sentencing, and providing probation officers and judges too much power and discretion.<sup>54</sup> While acquittal may not convey actual innocence, “failing to treat it as such in the sentencing context would result in an acquitted defendant essentially reaping no benefits from the jury’s finding of not guilty, and continuing to carry the stigma and consequences of being accused of a crime.”<sup>55</sup> This cannot be what the Commission intends as a matter of policy or a measure of fairness and accuracy. And it cannot be what the founders intended when they enshrined in the constitution significant protections against unjustified deprivations of liberty.

Past Commissions have tried on several occasions to examine the use of acquitted conduct as relevant conduct. Commissions of the 1990s published numerous proposals to end the use of acquitted conduct at sentencing.<sup>56</sup> In 1995 the staff looked into ways to limit consideration

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<sup>52</sup> John Elwood, *Acquitted Conduct Sentencing Returns*, Relist Watch, SCOTUSblog (May 24, 2023) (stating that the Court was entertaining 13 petitions for certiorari challenging on due process and jury right grounds the use of acquitted conduct.) <https://www.scotusblog.com/2023/05/acquitted-conduct-sentencing-returns-the-constitutionality-of-felon-disenfranchisement-and-good-behavior-in-capital-sentencing/>.

<sup>53</sup> USSG §6A1.3, p.s., comment.

<sup>54</sup> *Supra* n.26 at 1469-70.

<sup>55</sup> *Supra* n.32 at 5.

<sup>56</sup> *See* 62 Fed. Reg. 152-01 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg 62,832 (1992).

of acquitted conduct to calculations within the guideline range<sup>57</sup> and the next year floated a priority that would “develop[] options to limit the use of acquitted conduct at sentencing.”<sup>58</sup>

Acting to end the use of the practice will do no significant harm to our sentencing practice and promises instead to do a world of good with respect to the fairness, integrity and public perception of our federal sentencing system. While curtailing consideration of acquitted conduct at sentencing would be a significant departure from longstanding sentencing practice,<sup>59</sup> it would be an appropriate one. Longevity alone is no reason to continue a practice that has been demonstrated to be unjust, abusive of defendant’s due process protections, and antithetical to the purposes of punishment.

*e. Establishing a bright-line rule will abolish the harms of acquitted conduct while providing clear guidance to the judiciary.*

FAMM supports ending the use of acquitted conduct for all guideline considerations, including for departures and for within-range decisions. The policy and equity concerns that lead us to oppose setting aside a jury verdict apply with equal force to its use locating the range, identifying the sentence within the range, and/or departing from that range. Permitting its use for departures, for example, risks inviting back in the disparities that plague the practice. Actors in the system who criticize acquitted conduct sentencing are unlikely to change their view because it is confined to departures and within-guideline calculations. Departures in such situations can swamp the fix, erasing any benefit that eliminating acquitted conduct from calculating the guideline range might have. Permitting the use of acquitted conduct to depart above the guideline defeats the purpose and likely eliminate any mitigating impact of discarding it for guideline calculation purposes.

Moreover, all acquitted conduct sentencing should be eliminated, no matter the basis, real or imagined, for the acquittal. Distinguishing among types of acquittals can be difficult, given the relative opacity of the jury findings. A bright-line rule is easy for the court to follow, gives parties and stakeholders in the system confidence that the jury verdict is not undermined, and avoids the policy concerns that animate the proposal to discard acquitted conduct.

Finally, to the extent that overlapping conduct is an issue, it should only be used when the conduct is clearly underlying the instant federal offense of conviction. While that conduct may overlap with acquitted conduct from another forum, so long as the jury has used that conduct to find the instant conviction, there should be no concern that the sentence resulting from the instant conviction relies on acquitted conduct. If the conduct admitted or proven elsewhere is not considered by the instant jury in arriving at its decision, it should be treated as acquitted conduct and not feature in the sentence.

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<sup>57</sup> Brent Newton, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 FED. SENT. RPTR. 68, 69 (1995).

<sup>58</sup> See 61 Fed. Reg. 34,465 (1996).

<sup>59</sup> *Supra* n.29 at 13.

*f. Conclusion*

Justice Brennan said: “A society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . There is always, in litigation, a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake **an interest of transcending value**—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.”<sup>60</sup>

While the protections envisioned by Justice Brennan have suffered erosion, it is commendable that the Commission is considering ending the use of acquitted conduct for purposes of calculating a guideline sentence or departure from the sentence. We urge the Commission to do so.

*III. Proposed Amendment 7 – Simplification of the Three-Step Process*

It has been nearly two decades since the Supreme Court transformed the Guidelines from a mandatory to an advisory system.<sup>61</sup> The *Booker* three-step sentencing process has guided courts for quite some time. That the process has been used for a long time does not mean, however, that it should continue in its current form. After all, departures have taken on the characteristics of a legal fiction.

Given that the entire post-*Booker* Guideline sentencing scheme is advisory, departures are simply less important than they were pre-*Booker*. A sentencing court is required to consider departures but can then use its discretion to apply the departure or disregard it entirely and/or to vary up or down. The Commission’s own data demonstrates that judges are relying on departures less and variances more.<sup>62</sup> What is more, the law already requires judges to consider an individual’s unique circumstances, including many that are not addressed by departures, in determining an appropriate sentence. To this end, the Supreme Court makes pellucid that fashioning a sentence requires two steps, not three: (1) correctly calculating the applicable Guideline range; and (2) weighing the factors set out in 18 U.S.C. § 3553(a).<sup>63</sup> The factors in § 3553(a) are required by statute and account for many, if not all, of the circumstances highlighted by the guidelines departures. To be sure, there may be some judges who rely on the departures as a basis for diverging from a guideline range. But the fact that some judges use departures while others do not only proves the case for eliminating them. Using § 3553(a) as a basis from which to vary from a guideline sentence, instead of departures, will likely lead to more fair and less disparate sentencing outcomes. The § 3553(a) factors together comprise a

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<sup>60</sup> *In re Winship*, 397 U.S. 358, 363-64 (1970) (emphasis added).

<sup>61</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>62</sup> U.S. Sent’g Comm’n, *Proposed Amendments to the Federal Sentencing Guidelines* at 123 (Dec. 2023).

<sup>63</sup> *Peugh v. United States*, 569 U.S. 530, 536 (2013).

standard set of considerations that must be weighed in every single case and promote the ability of courts to consider the broadest set of information as relevant to sentencing.

In eliminating departures from the Guidelines, however, the Commission should be careful to avoid converting 18 U.S.C. § 3553(a) into a guideline. The open-ended nature of § 3553(a) already directs the sentencing judge to consider a breadth of information.<sup>64</sup> This is critical, as no two defendants are alike and sentencing considerations therefore should, and do, differ in each case. A constitutionally sound sentence requires judges to freely consider a “largely unlimited” set of information at sentencing.<sup>65</sup> The Commission’s proposal may result in the unintended consequence of constraining judge’s discretion under § 3553(a).

FAMM supports the Commission in its innovative effort to eliminate departures from the Guidelines. We wholeheartedly agree with the comment submitted by the Federal Public Defenders. We thank the Defenders for their exhaustive analysis which assess the chapter-by-chapter impact of the proposed modification. We also agree with and echo the concerns voiced by the Defenders regarding § 3553(a), as discussed briefly above. FAMM remains optimistic that the Commission can accomplish its commendable goal of eliminating departures and simplifying the guidelines without unduly constraining individual sentencing as designed by 18 U.S.C. § 3553(a).

*IV. Conclusion*

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We also appreciate the Commission’s invitation to incarcerated individuals to write directly to the Commission. The Commission’s commitment to hear from those whose lives your work touches is deeply appreciated. We look forward to the public hearings on these issues.

Sincerely,



Mary Price  
General Counsel



Shanna Rifkin  
Deputy General Counsel

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<sup>64</sup> *Concepcion v. United States*, 597 U.S. \_\_\_, 142 S. Ct. 2389, 2398 (2022) (“There is a ‘long’ and ‘durable’ tradition that sentencing judges ‘enjoy discretion in the sort of information they may consider’ at an initial sentencing proceeding.”).

<sup>65</sup> *Id.* at 2399.