February 22, 2024

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

Re: Proposed Amendments to the Sentencing Guidelines

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on these important proposed amendments.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

I. Proposed Amendment 1: Rules for Calculating Loss

The Commission seeks comment on whether it should adopt the proposed amendment to Application Note 3(A) of the Commentary to § 2B1.1 to address the Third Circuit's decision in *United States v. Banks*, 55 F.4th 246 (3rd Cir. 2022) during this amendment cycle, or whether it should defer making changes to § 2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of § 2B1.1. NACDL does not support the proposed amendment being adopted during this cycle and requests that the Commission delay any changes to § 2B1.1.

The proposed amendment, which merely moves Application Note 3(A) of § 2B1.1 from the Commentary to the text of the guideline, does nothing to ameliorate the long-standing criticisms of § 2B1.1 shared by NACDL and other stakeholders. As NACDL has previously

informed the Commission, it supports a wholesale reevaluation of § 2B1.1 to address issues such as overlapping enhancements, the existence of a loss chart, and the problematic use of "intended loss" in lieu of "actual loss."[1] NACDL also believes a complete modification of § 2B1.1, similar to the example presented by the American Bar Association and submitted to the Commission for consideration in 2014, is needed.[2]

As a part of a comprehensive examination of § 2B1.1, NACDL believes the Commission should modify § 2B1.1 to reduce the extent to which offense levels are based on loss amount. Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from bench and bar alike.[3] NACDL continues to believe that § 2B1.1 should be re-conceptualized to address these criticisms by reducing the outsized role that loss amount currently plays in sentencing determinations.

Additionally, NACDL has long advocated for the Commission to reconsider the use of "intended loss" in § 2B1.1. The current construction often produces unfair sentencing outcomes for defendants whose offenses have caused little or no losses, as those defendants often face years or decades in prison because of what they purportedly intended but failed to achieve. Along with the unjust result of a sentence so vastly disproportionate to the injury caused by the crime, this approach raises serious questions regarding a court's ability to determine what a defendant intended in the absence of actual harm. NACDL recommends that that the Commission consider decoupling "intended loss" from the loss table and instead treat any disparity between actual and intended loss as grounds for a potential sentence enhancement.

Additionally, NACDL continues to support modifications that would lessen the impact of the loss table for all defendants sentenced under § 2B1.1 who gain little or nothing from their

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[1] *See* NACDL Comments on Proposed Amendments for 2015 Cycle, https://www.nacdl.org/Document/Comments-USSC-2015Amend-03182015, at 8-13 (2015).

[2] American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. (Nov. 10, 2014).

[3] *See*, *e.g.*, *United States v. Gupta*, 904 F.Supp.2d 349, 350 (S.D.N.Y. 2012) (noting that "the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice"); *United States v. Parris*, 573 F.Supp.2d 744, 751 (E.D.N.Y. 2008) ("[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."); *see also* James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED SENT. R. 138, 139 (2010) (describing the current high-loss guidelines as "overkill"); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED SENT. R. 167, 169 (2008) ("In sum, since *Booker*, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high"); Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1648-49 (2007) (discussing how the loss table often overstates the actual harm suffered by the victim).

conduct, and better adhere to the statutory directive in 28 U.S.C. § 994(j) to ensure the Guidelines reflect the appropriateness of a non-custodial sentence for first-time, non- violent, non-serious offenders. Such a revision is required to promote fairness in sentencing for offenses that do not produce pecuniary harm (or that produce less harm than a defendant may arguably have intended).

Accordingly, NACDL submits that any changes to § 2B1.1 be delayed until the Commission can fully address these as well as other fairness and equity concerns through a comprehensive examination of § 2B1.1.

II. Proposed Amendment 2: Youthful Individuals

The Commission's examination of the treatment of youthful individuals and the interplay of youth on calculation of criminal history and age-related sentencing departures is warranted and welcome. Youthful individuals are different – the science of the adolescent brain has told us this for some time. For this reason, NACDL supports promulgation of Part A – Option 3: excluding all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of one's criminal history score. NACDL further supports promulgation of Part B of the proposed amendment: consideration of youth as grounds for a departure is warranted.

In addition to our comments below, we at NACDL have had an opportunity to review the Federal Public and Community Defenders' Comment on Youthful Individuals, and we join in their comments.

Proposed Amendment: Part A

In the Synopsis of its Proposed Amendment, the Commission aptly recognizes that juvenile proceedings vary widely by state: whether juveniles are entitled to trial by jury; whether juvenile proceedings are open to the public; whether juvenile adjudications may be expunged or sealed; or at what age a juvenile may be transferred to criminal court to be prosecuted as an adult. *See* "Proposed Amendment: Youthful Individuals (Juvenile Proceedings in General)," *citing* Charles Puzzanchera *et al.,* Nat'l Ctr. for Juv. Just., *Youth and the Juvenile Justice System: 2022 National Report 93 (2022).* Indeed, it's not just the age at which transfer hearings are possible but the very procedure by which such a life-changing decision is made: is the court a gate-keeper, determining if certain factors have or have not been established to determine whether a juvenile is amenable to treatment in juvenile court or should instead be transferred; or, is the decision one made solely by the prosecution without an external check (e.g., by way of direct filing)?

However, it's not simply the effort to seek parity and avoid the disparities that can result from the differences in juvenile proceedings among the states that supports promulgation of Part A – Option 3. Perhaps of even greater import is the recognition that youthful offenders are

different than adult offenders. Youthful offenders simply aren't the equivalent of adults developmentally, and, thus, their adjudications must not be treated as equivalent to convictions sustained by adults for criminal history purposes.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court banned mandatory life-without-parole sentences for youthful offenders under the age of 18, finding that such punishment is disproportionate for nonviolent offenses; further, in a later ruling, the Court reiterated that even for murder convictions the punishment of life-without-parole should be reserved "for all but the rarest children, those whose crimes reflect irreparable corruption."[4] As recognized by the Supreme Court, the characteristics of youth diminish adolescents' culpability and heighten their potential for change, thus "weaken[ing] rationales for punishment."[5]

Roper and its progeny established a chronological age of 18 as the cutoff point. However, significant advances in social science and developmental psychology have occurred in the ensuing years.[6] Said advances have unequivocally demonstrated that significant brain development supporting greater complexity in brain functions continues to take place well beyond the age of 18 years, leading to a paradigmatic shift in the way that the behavior of adolescents and young adults is understood.[7]

In a 2011 publication, the National Institute of Mental Health detailed research that striking changes in brain development take place during the teen years, altering long-held assumptions about the timing of brain maturation. In significant ways, the brain doesn't look like that of an adult until the early 20s. The parts of the brain responsible for more 'top-down' control, controlling impulses, and planning ahead—the hallmarks of adult behavior—are, in fact, among the last to mature.[8] Additional recent studies indicate that the riskiest behaviors arise from a mismatch between the maturation of networks in the limbic system, which drives emotions and becomes turbo-boosted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses, documenting that the prefrontal cortex – the region of the brain responsible for risk-weighing and

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[4] *Montgomery v. Louisiana*, 577 U.S. 190, 195 (2016) quoting *Miller* 567 U.S. at 479-480.; *see also Roper v. Simmons,* 543 U.S. 551, 573 (2005).

[5] *Miller*, 567 U.S. at 473, 479.

[6] *See, e.g., How Should Justice Policy Treat Young Offenders*? BJ Casey, Richard J. Bonnie, BJ Casey, Andre Davis, David L. Faigman, Morris B. Hoffman, Owen D. Jones, Read Montague, Stephen J. Morse, Marcus E. Raichle, Jennifer A. Richeson, Elizabeth S. Scott, Laurence Steinberg, Kim Taylor-Thompson, Anthony Wagner; *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* (2017).

[7] McCaffrey, R.J., Reynolds, C.R. Neuroscience and Death as a Penalty for Late Adolescents. *J Pediatr Neuropsychol* **7,** 3–8 (2021). https://doi.org/10.1007/s40817-021-00104-y.

[8] The Teen Brain: Still Under Construction, National Institute of Mental Health (2011), p.3. http://www.ncdsv.org/images/NIMH_TeenBrainStillUnderConstruction_2011.pdf.

understanding consequences – continues to change prominently until well into one's twenties.[9] Put simply, the brain is still under construction until age 25:

The development and maturation of the prefrontal cortex occurs primarily during adolescence and is fully accomplished at the age of 25 years. The development of the prefrontal cortex is very important for complex behavioral performance, as this region of the brain helps accomplish executive brain functions.[10]

These findings also explain why a young adult is more susceptible to negative outside influences, further exacerbating the already-existing predisposition to risk-taking and deficiencies in decision making.[11]

Moreover, as discussed in detail by the Federal Public and Community Defenders, racial and ethnic disparities are endemic to the juvenile legal system. Beginning at arrests and running throughout the entire process – from referrals to juvenile court, to diversion out of the system, to the disposition of the petition (and whether or not said disposition is community-based or entails confinement), to the decision to transfer the case to adult court, youth of color are disproportionately represented in the school-to-prison pipeline.[12] As the Defenders aptly note, by using youth priors to enhance guideline ranges, §4A1.2(d) compounds and extends the racial and ethnic disparities that abound in the juvenile legal system – and that alone is reason to amend §4A1.2(d) as proposed in Part A – Option 3.[13]

The Commission acknowledged the research recognizing that youthful offenders have diminished culpability and, thus, are different from adults for purposes of sentencing in its 2017 report, *Youthful Offenders in the Federal System*. It is time to act on this acknowledgement.

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[9] Jay N. Giedd, "The Amazing Teen Brain," SCIENTIFIC AMERICAN (June 2015), Vol. 312, 34; *see also* Arain et al., *Maturation of the Adolescent Brain,* 9 Neuropsychiatric Disease & Treatment 449, 449-450, 453-454 (2013).

[10] *See* Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health (Sept. 2009); National Institute of Mental Health, *The Teen Brain: Still Under Construction* (2011); *see also* Icenogle et al, *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample,* 43 Law & Hum. Behav. 69, 0 (2019).

[11] *See* Gardner & Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision making in Adolescence and Adulthood: An Experimental Study,* 41 Dev. Psychol. 625, 629-634 (2005).

[12] *See, e.g.,* Ellen Marrus & Nadia N. Seeratan*, What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America,* 8 J. Marshall L. J. 437, 439–440, 444 (2015) ("*What's Race Got to Do with It?*"); *see also* U.S. Dep't of Justice, Ofc. of Juvenile Justice & Delinquency Prevention, *Racial and Ethnic Disparity in Juvenile Justice Processing* (Mar. 2022) ("OJJDP Racial and Ethnic Disparities"), http://tinyurl.com/4pzsu84f;NCJJ National Report at 163.

[13] *See* U.S. Sentencing Comm'n, *Public Data Presentation: Proposed Amendments on Youthful Individuals*, at 28 (Jan. 2024), https://www.ussc.gov/education/videos/2024-youthful-individuals-data-briefing (data showing that, of those who received at least one criminal history point for offenses prior to age 18 in FY 2022, 89% were non-white and almost 60% were Black).

Considering the disparity in juvenile rights and processes across the country, the documented science surrounding the adolescent brain, and the disparate impact of the juvenile legal system on children of color, it is time the Commission change its current stance on counting juvenile adjudications and adult convictions sustained prior to the age of 18 when determining an individual's criminal history. The Commission should, as set forth in Part A – Option 3, amend § 4A1.2(d) to exclude all sentences resulting from offenses committed prior to age 18 from being considered in the calculation of the criminal history score.

Proposed Amendment: Part B

For the reasons detailed above, NACDL also urges the Commission to amend the language of § 5H1.1 to specifically provide for a downward departure in instances where the defendant was a youthful offender at the time of the offense. Recognition that a person's age may warrant a mitigated sentence and that age may be considered when determining the sentence to be imposed is welcomed and appropriate.

III. Proposed Amendment 3: Acquitted Conduct

NACDL is pleased that the U.S. Sentencing Commission's Proposed Amendments to the Federal Sentencing Guidelines once again include changes to partially address the unfair practice of allowing acquitted conduct to be considered as relevant conduct under Sentencing Guideline Section 1B1.3. Permitting the use of sentencing based on acquitted conduct violates defendants' due process rights, subverts the crucial role of juries in protecting constitutional rights, and contributes to the trial penalty, which—as the Commission's own statistics[14] prove—has virtually eliminated jury trials in our criminal legal system. Unsurprisingly, acquitted conduct sentencing has been roundly criticized by groups across the political spectrum[15] and is a perennial topic of Supreme Court *certiorari* petitions[16] as defendants seek to challenge this unfair, but unfortunately persistent, practice.

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[14] U.S. Sentencing Comm'n, 2022 Annual Report and Sourcebook of Federal Sentencing Statistics, tbl. 11 (noting that only 2.5% of federal criminal convictions in 2022 were due to guilty verdicts at trial while the other 97.5% were the result of pleas).

[15] *E.g.*, Am. Bar Ass's, *Not Guilty but Might as Well Be: Ending Acquitted Conduct Sentencing*, https://www.americanbar.org/groups/litigation/committees/criminal/articles/2015/fall2015-0915-not-guilty-but-might-well-be-ending-acquitted-conduct-sentencing/ (Sept. 17, 2015); Ams. for Prosperity, *Diverse coalition urges Supreme Court to end acquitted conduct sentencing* (July 9, 2021); Cato Institute, *Addressing the Gross Injustice of Acquitted Conduct Sentencing*, https://www.cato.org/blog/addressing-gross-injustice-acquitted-conduct-sentencing (Sept. 26, 2019); Nat'l Ass'n of Crim. Defense Lawyers, https://www.nacdl.org/search?term=*&activefilter=Acquitted%20Conduct (collecting letters, amicus briefs, and other resources in opposition to acquitted conduct sentencing) (last visited Feb. 6, 2023).

[16] *See, e.g.*, *McClinton v. United States*, No. 21-1557, *cert. denied* (2023); *Osby v. United States*, 142 S. Ct. 97, No. 20-1693, *cert. denied* (2021); *Asaro v. United States*, 140 S. Ct. 1104, No. 19-107, *cert. denied* (2020).

Punishing a defendant for acquitted conduct undermines both the essential role of the jury and the defendant's Sixth Amendment rights. The right to jury trial was sacrosanct to the Constitution's framers and was considered among the most important constitutional bulwarks against tyranny.[17] The right to trial holds a vaunted place in the Constitution itself; it is the only individual right established and guaranteed in both the Constitution's original text and in the Bill of Rights.[18] Permitting the judge to override or nullify a jury's acquittal by sentencing a defendant based on conduct they were acquitted of by the jury undermines this crucial constitutional right.

The right to jury trial is not just important for the defendant. It is also an important part of public oversight of the legal system. Jury participation is a civic obligation and acts as a community check on the power of the government.[19] Sentencing based on acquitted conduct also undermines the legitimacy and public respect for the legal system.[20] It conveys the message to jurors that their carefully considered decision was wrong and that their jury service was inconsequential. It communicates to the jury, the defendant, and the public that the courts are skewed in favor of the prosecution and that verdicts in favor of the accused need not be respected. This understandable sense of unfairness and loss in public confidence is particularly felt in impacted communities.[21] A review of the public comments on acquitted conduct shows

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[17] John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000) ("Representative government and trial by jury are the heart and lungs of liberty.").

[18] U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[19] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 10 (2018), https://nacdl.org/TrialPenaltyReport [hereinafter, NACDL Trial Penalty Report]; *see also* Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Emp. L. Studies 973, 974 (2004) ("In its political aspect, the jury is a 'republican' body that 'places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.").

[20] *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415 (2011) (stating that the "admission of prior acquittals in sentencing undermines the claim of the criminal justice system to be doing justice, and thus its broader legitimacy."); *see also R. v Sussex Justices ex p. McCarthy*, 1 K.B. 256, 259 (1923) (Eng.) (Lord Hewart, C.J.) (Not only must Justice be done; *it must also be seen to be done*.") (emphasis added). The use of acquitted conduct in sentencing, however, is perhaps an even easier case than what was before Lord Hewart. Its use does not merely *seem* unjust; it is unjust.

[21] *See* Tom Tyler, *Why People Obey the Law* (2006) (arguing that the perception that the law is fair is critical to engendering respect for the law, thus promoting public safety).

nearly uniform opposition to the use of acquitted conduct in sentencing[22] and shows that the harms noted above are both understood and felt by the public.

It is not just citizens or even just advocacy groups that have criticized acquitted conduct sentencing. A 2010 survey of over 600 District Judges conducted by the Sentencing Commission found that only 16% believed that acquitted conduct should be considered relevant conduct.[23] This is important for two reasons. First, it indicates widespread concern and opposition to this practice by those who are, of course, responsible for sentencing: roughly every five out of six District Judges oppose the use of acquitted conduct in sentencing. But secondly, the fact that many District Judges would still sentence using acquitted conduct, while many more will not, contributes to the likelihood of unfair disparities in sentencing that sentencing judges are required by federal statute to seek to avoid.

Because it is unjust and causes significant harm to the fairness and legitimacy—both actual and perceived—of the criminal legal system, NACDL categorically opposes any use of acquitted conduct in sentencing. If it is wrong to consider acquitted conduct as relevant conduct in sentencing, as we believe it is, then it is wrong to do so in any context.

For this reason, NACDL does not unreservedly support any of the three options proposed by the Commission for limiting acquitted conduct sentencing. Option 2 is unsatisfactory because it seems unlikely that a judge who has chosen to include acquitted conduct as part of relevant conduct would then decide that its use was "disproportionate" and grant a downward departure. This is particularly true because, as noted above,[24] most district judges already oppose the use of acquitted conduct in sentencing. Option 3 presents only a minor change, a slight strengthening of the evidentiary standard. Again, we doubt this would meaningfully limit the use of acquitted conduct and may introduce confusion by adding a new evidentiary standard that is not otherwise seen in a frequently used Guideline.

Option 1 presents the most favorable out of three suboptimal choices. We do think that prohibiting the use of acquitted conduct to set the Guideline range presents some incremental limitation on its use. We prefer it to the status quo, where acquitted conduct may be used without limitation. However, the fact that it may still be used for upward departures or variances means that the injustice and harms it causes will persist.

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[22] *See, e.g.*, March 2023 Sample of Public Comment Received on Proposed Amendments, 88 Fed. Reg. 7180 (Mar. 14, 2023), https://www.ussc.gov/policymaking/public-comment/public-comment-march-14-2023#acq, Ltr. 1663 (stating that acquitted conduct sentencing has "reduced the dignity of our justice system").

[23] U.S. Sentencing Comm'n, Results of Survey of U.S. District Judges Jan. 2010 to March 2010, at Question 6 (June 2010), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

[24] *See supra* n.23 and accompanying text.

We urge the Commission to take action to amend the relevant conduct Guidelines to prohibit the use of acquitted conduct entirely. We also note that even the complete prohibition of acquitted conduct in sentencing—while deeply important in those cases and for the perception of justice—will not radically transform the system as a whole. As the Commission knows, nearly every person convicted in the federal system is convicted by guilty plea, not at trial.[25] Of the remaining few who do go to trial and are convicted, only 286 in 2022 were acquitted of at least one count and found guilty of at least one count in the same case.[26] While this does not include the also rare possibility prior state or federal acquittals being included, it is clear that the possible universe of cases where acquitted conduct sentencing *could* occur is an extremely small part of the federal system.

We now turn to the four issues for comment regarding acquitted conduct. On issue 1, our position is clear: while we believe option 1 is the best of the three amendments offered, the Guidelines should be amended to prohibit the use of acquitted conduct as relevant conduct for any purpose, be it to determine the Guideline range or any departure or variance.

With respect to issue 2, we favor a bright line rule. Acquittals from other sources—a not guilty verdict before a trier of fact or on motion—or other courts should count the same, and conduct from those acquittals should not be considered relevant conduct in a federal sentencing. This affords the deserved due respect to both acquittals and to our federal system of courts and is also a bright line rule that should be straightforward to administer.

The Commission also requests comment on issue 3, the treatment of overlapping conduct. Where there is overlapping conduct involving acquitted and convicted counts, the principle of not sentencing on acquitted conduct dictates that the benefit should go to the defendant. To hold otherwise creates a back-door mechanism to negate the impact of the acquittal, and the fundamental unfairness of using acquitted conduct at sentencing—and the resulting appearance of unfairness—persists. Where the task of carving out acquitted conduct from convicted conduct is complex in an individual case, the Commission should trust district judges to do a careful analysis in light of the prohibition. And, consistent with its traditional role, the Commission can always revisit the guideline and its commentary in the future in light of experience and feedback.

We also oppose use of acquitted conduct that was admitted by the defendant during a guilty plea colloquy. To the extent this refers to the rare situation where a defendant pleaded guilty to some federal charges but elected to proceed to trial on others, we reiterate our position set forth above that where there is overlapping conduct involving acquitted and convicted counts, the benefit should go to the defendant. The proposed clause could also apply to the more common situation where an individual had pled guilty to related conduct in a state court. A

[25] *See* U.S. Sentencing Comm'n, Sourcebook, *supra* n.14, at tbl. 11.

[26] *See* U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary), at *44 (Dec. 14, 2023).

defendant's statements during a guilty plea colloquy, which unlike a written plea agreement may not have a full opportunity for vetting and review, could be misspoken, misstated, or misinterpreted. This is especially true of guilty pleas made hurriedly in state courts laboring under heavy dockets. For these reasons, statements during a plea colloquy should not override an acquittal.

On issue 4, NACDL opposes any exception for acquittals on the basis of jurisdiction, venue, or statute of limitations. As an initial matter, we disagree with the suggestion that acquittals on these bases are somehow merely procedural or less valid. We respectfully disagree with the characterization that an acquittal on the basis of an expired statute of limitations is "unrelated to the substantive evidence," as decades of jurisprudence makes clear that statutes of limitations, particularly in criminal cases, are intended to avoid wrongful convictions by the bringing of cases where evidence is unreliable or missing.[27] Acquittals based on jurisdiction or venue are also acquittals. It is part of the government's burden in a criminal case to prove that the United States has jurisdiction over the charged conduct and the charged person. For some federal crimes, jurisdiction is even an element that must be proven to the jury beyond a reasonable doubt.[28] In any event, an acquittal on these grounds is still an acquittal, in the eyes of the jury, the defendant, and the public. Additionally, a bright line rule disallowing the use of acquitted conduct in sentencing regardless of the manner of acquittal provides much clearer guidance to prosecutors, defendants, and the public and will be easier for district judges to apply.

IV. Proposed Amendment 7: Simplification of the Three-Step Process

As the Commission notes in explaining Proposed Amendment 7 (Simplification of the Three-Step Sentencing Process), the trend across the country has been for judges to use their variance power more expansively and to use departures with less frequency. This trend is one that NACDL has welcomed, since it is more faithful to the Supreme Court's *Booker* jurisprudence, which, time and again, has admonished courts to recognize their broad power under *Booker* "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the

[27] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary) (Dec. 14, 2023). Rather, the primary rationale of statutes of limitations is to ensure that fresh evidence is reliable and available. Criminal statutes of limitations, therefore, prevent wrongful convictions. *See* Wayne LaFave et al., 5 Crim. Proc. § 18.5(a) (4th ed. Nov. 2022 Update) (calling preventing wrongful convictions the "foremost" purpose of statutes of limitations); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348–49 (1944) (statutes of limitations prevent cases where "evidence has been lost, memories have faded, and witnesses have disappeared").

[28] *E.g.*, *Taylor v. United States*, 579 U.S. 301, 309 (2016) (stating that the government must prove Hobbs Act element of affecting ""commerce over which the United States has jurisdiction" beyond a reasonable doubt); *United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) ("The existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), which must be proved to the jury beyond a reasonable doubt.").

punishment to ensue."[29] Indeed, since 2005, NACDL and its partners, like the Federal Defenders, have devoted thousands of hours training its members on creative and client-centered plea bargaining and sentencing advocacy. As a result, the quality of sentencing advocacy across the country has improved considerably and the federal sentencing process has become closer to the ideal that the Supreme Court initiated with *Booker* and its progeny.

In recognition of the trend in favor of variances, the Commission has proposed (a) the elimination of departures other than those for substantial assistance and early disposition, (b) the transformation of what is currently a three-step sentencing process (calculate the guidelines, determine any applicable departures, and then apply the sentencing factors under 18 U.S.C. § 3553) into a two-step one (calculate the guidelines and then apply the § 3553 factors); and (c) the creation of a new Chapter Six to facilitate the court's consideration of 18 U.S.C. § 3553(a).

NACDL has concerns about and suggestions for this proposal.

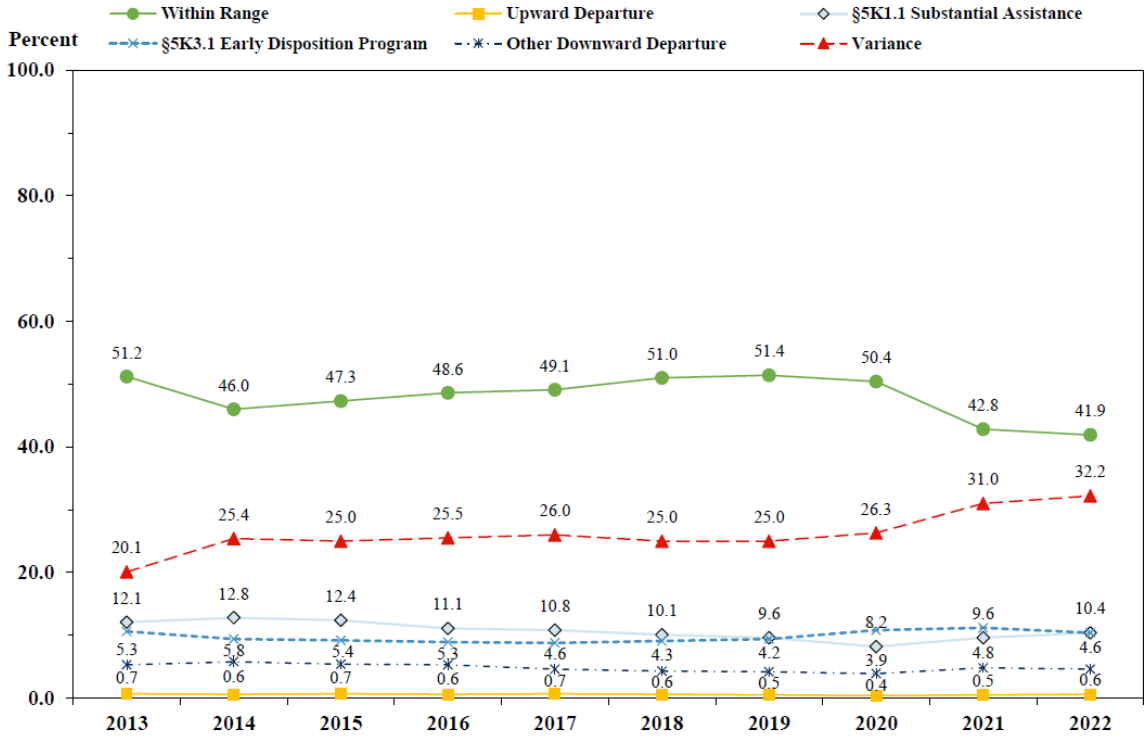
First, and foremost, NACDL is concerned how this proposal will impact the sentencing practices of those judges who persistently decline to grant variances but remain comfortable with downward departures. The Commission's own data indicates that such judges exist. Its most recent graph demonstrating sentences imposed relative to the guideline range over a ten-year period (reproduced below) reveals that the percentage of downward departures remains fairly constant at around 5%, a statistic that represents thousands of individuals every year. The apparent resilience of this departure rate, which judges could have folded into a variance decision, suggests that there is a group of judges deeply anchored in a guideline-centric sentencing methodology. Psychological literature on decision-making teaches us that such anchors can be difficult to displace, and the elimination of departures could well result in more within-guidelines sentences by judges who view variances as less legitimate.[30] The potential for thousands of criminal defendants to receive higher sentences from judges who will refuse to embrace their variance authority as a substitute for their departure authority should be evaluated before overhauling the federal sentencing process in the manner the Commission proposes.

[29] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (quotation omitted).

[30] *See*, *e.g.*, *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J. concurring) (noting that the "so-called 'anchoring effects' long described by cognitive scientists and behavioral economists, show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point"), citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

Figure 9

SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE OVER TIME[1]
Fiscal Years 2013 - 2022



[1] Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2013 - 2022 Datafiles, USSCFY13 - USSCFY22.

See 2022 Annual report and Sourcebook of Federal Sentencing Statistics, Figure 9.[31]

Second, the Commission's proposal to convert departure provisions in each individual guideline into "additional considerations" under 18 U.S.C. § 3553(a) threatens to collapse the federal sentencing into a one-step process rather than the two-step one the Commission envisages. This is directly contrary to the Supreme Court's *Booker* framework which mandates that the guideline range be calculated as an initial benchmark, but then the sentencing judge must fully consider the factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient but not greater than necessary.

Third, the Commission's proposal to create a separate chapter listing and essentially codify § 3553 factors is directly contrary to the congressional directive, oft repeated in the Supreme Court's *Booker* jurisprudence, that there is "*no limitation*" on "information concerning

[31] Available at https://www..gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[32]

Finally, the Commission has not explained how it plans to roll out and implement this proposal – such as through its traditional educational programs, surveys designed to identify and later address judges' specific concerns, and/or the use of respected judicial ambassadors – to ensure that it achieves its objective.

In light of these reservations, NACDL proposes that this overhaul of the federal sentencing process be implemented in stages, pending the Commission's engagement in the kind of empirical research it does so well and the development of an effective intervention strategy to ensure that the proposal does not result in unintended consequences, which include the potential for thousands of individuals receiving within-Guidelines sentences where they would have received downward departures under the current three-step process.

First, NACDL agrees that the "Original Introduction to the Guideline Manual" should be deleted and replaced with one that reflects the sentencing framework outlined by the Supreme Court in *Booker* and its progeny.

Second, NACDL believes that the Commission could very easily begin its goal of eliminating departures by first eliminating upward departures, which, as the Commission's data indicates, are used in little over .5% of the time. *See* Figure 9 *supra*. Judges would, of course, be free to use their variance authority to impose a sentence above the Guidelines and the elimination of upward departures would be a modest and less troubling mechanism of introducing the concept of replacing departure authority with variance authority.

Third, the Commission should eliminate the concept of prohibited and disfavored downward departures other than invidious ones, as these limitations are not consistent with § 3661 and the post-*Booker* sentencing landscape in which sentencing courts are authorized to consider any relevant information.[33]

Fourth, the Commission should conduct surveys, structured interviews and focus groups – perhaps engaging in particular with chief judges and former chief judges – to better determine how the elimination of the departure step in federal sentencing will be received and applied by judges across the country. Such research will inform a successful roll-out of the Commission's

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[32] 18 U.S.C. § 3661.

[33] *See Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) *citing* *United States v. Tucker*, 404 U.S. 443, 446 (1972 ("Accordingly, a federal judge in deciding to impose a sentence 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'")

simplification proposal, and potentially identify alternative interventions to ensure the proposal does not produce unintended consequences.

Fifth, the Commission should ensure (if it does not already do so) that its educational programs for judges include a robust presentation on the judges' post-*Booker* duty to view each criminal defendant holistically as an individual, and their power to vary from the Guidelines.

Once the above have been implemented and analyzed, the Commission is in a much better place to propose the entire elimination of downward departures from the Guidelines.

Finally, the NACDL joins with the Federal Defenders in opposing any effort by the Commission to define and essentially codify the universe of potential variances. To do so risks introducing limitations despite the Supreme Court's repeated instruction that there should be no limitation on the information a sentencing court may consider.

Respectfully Submitted,

JaneAnne Murray
Co-Chair, NACDL Sentencing Committee

Darlene Comstedt
Member, NACDL Sentencing Committee

Marci G. LaBranche
Member, NACDL Sentencing Committee

Nathan Pysno
Director, NACDL Economic Crime & Procedural Justice

Elizabeth Blackwood
Director, NACDL First Step Act Resource Center