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February 22, 2024

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

Re: Comments on Proposed Amendment to the Guidelines Manual Regarding Acquitted Conduct

Dear Commissioners:

On behalf of the Federal Courts, Criminal Courts, and White Collar Crime Committees of the New York City Bar Association ("City Bar"),[1] we respectfully submit the following comments

[1] The City Bar, founded in 1870, has 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Criminal Courts Committee studies the workings of the Criminal Term of the New York State Supreme Court and the New York City Criminal Court. The White Collar Crime Committee focuses on the white collar criminal space and includes prosecutors and former prosecutors, as well as defense attorneys. The White Color Crime Committee joins in the letter, except for those members who are government lawyers and are not able to take a position.

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

on the United States Sentencing Commission's ("Commission") Proposed 2023–2024 Amendments to the Federal Sentencing Guidelines Manual. More specifically, the City Bar submits its comments concerning Proposed Amendment 3 regarding Acquitted Conduct. The City Bar appreciates this opportunity to comment on the Proposed Amendment.

I. INTRODUCTION

The City Bar has consistently encouraged limitations on the use of acquitted conduct in applying the Federal Sentencing Guidelines ("Guidelines") by supporting and endorsing legislation, issuing reports, and commenting on the Commission's 2022 proposed amendment regarding acquitted conduct. The City Bar welcomes the Commission's continued efforts to amend the Guidelines to limit the use of acquitted conduct.

As detailed in the April 2020 Report of the City Bar's Federal Courts Committee on the Prohibiting Punishment of Acquitted Conduct Act of 2019, jurists, academics, practitioners, and commentators have for years raised concerns that Supreme Court jurisprudence, federal statutory law, and the Guidelines permit sentencing courts to use conduct for which a defendant was acquitted to enhance a convicted defendant's sentence.[2] While legal practitioners and commentators have almost uniformly decried the use of acquitted conduct in federal sentencing, federal courts have continued to consider such conduct in applying the Guidelines. Following the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997), every single circuit court has affirmed lower courts' consideration of acquitted conduct when sentencing within the statutory range authorized by the jury verdict.[3]

In recent years, however, an increasing number of jurists have expressed concerns about the constitutionality of permitting the use of acquitted conduct to factor into and increase a

[2] *See* N.Y. City Bar Ass'n, "Report on Legislation by the Federal Courts Committee: Prohibiting Punishment of Acquitted Conduct Act of 2019" (Apr. 2020), https://www.nycbar.org/reports/prohibiting-punishment-of-acquitted-conduct-act-of-2019-report/?back=1; *see also United States v. Lasley*, 832 F.3d 910, 921 (8th Cir. 2016) (Bright, J., dissenting) (collecting cases); *United States v. Baylor*, 97 F.3d 542, 549 & n.2 (D.C. Cir. 1996) (Wald, J., specially concurring) ("[M]any individual judges have expressed in concurrences and dissents the strongest concerns, bordering on outrage, about the compatibility of such a practice with the basic principles underlying our system of criminal justice."); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1627–28 (2012) (noting that even after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), "the Guidelines preserve the problem of acquitted conduct increasing sentences," which "stands in sharp tension with the jury's constitutional role because judges continue to comply with the Guidelines, and the Guidelines continue to instruct judges to consider relevant conduct in sentencing"); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 27 (2016).

[3] *See, e.g.*, *United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022) ("The Supreme Court has held that 'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.' The holdings in this circuit have followed this precedent, as they must." (quoting *Watts*, 519 U.S. at 157)); *United States v. Medley*, 34 F.4th 326, 336 (4th Cir. 2022) ("Whether or not we agree or disagree with the precedent from the Supreme Court and this Court, we are bound to follow it."); *see also United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014) (noting that, following *Watts*, the D.C. Circuit and "every numbered circuit ha[ve] addressed the constitutionality of sentencing based on acquitted conduct and reached the same conclusion"); Br. for the United States in Opp'n to Pet. for Writ of Cert. at 11–12, in *McClinton v. United States*, No. 21-1557 (filed October 28, 2022; petition pending) ("[E]very federal court of appeals with criminal jurisdiction has recognized, after *Booker*, that a district court may consider acquitted conduct for sentencing purposes.")

defendant's sentence, including the late Justices Scalia and Ginsburg, and current Justices Thomas, Gorsuch, and Kavanaugh.[4] Last year Justice Sotomayor joined this chorus in her statement respecting the denial of certiorari in *McClinton v. United States*; however, she acknowledged that the Commission had "announced that it will resolve questions around acquitted-conduct sentencing in the coming year."[5] Justice Kavanaugh, joined by Justices Gorsuch and Barrett, likewise commented that it was "appropriate for the Court to wait" for the Commission to act.[6] Meanwhile, the Commission decided to consider the 2022 proposed amendment further and postpone any implementation by another year.[7] Given the Supreme Court's deferral to the Commission, the time is ripe for the Commission to take action on acquitted-conduct sentencing.

For the reasons expressed by these jurists and commenters, the City Bar supports, with the modifications stated below, the proposed amendment's limitation on the use of acquitted conduct for purposes of determining the applicable Guidelines range in individual cases as set forth in Option 1.

II. PROPOSED AMENDMENT 3

On December 26, 2023, the Commission proposed an amendment to Guidelines Sections 1B1.3 and 6A1.3 that would limit the ability of federal judges to consider acquitted conduct for purposes of calculating a defendant's advisory Guidelines range. Rather than propose a single amendment, the Commission presented three different options for consideration.

Option 1 would amend Guidelines Section 1B1.3 to explicitly exclude acquitted conduct from consideration as relevant conduct for purposes of determining the applicable Guidelines range. However, the proposed amendment would continue to permit judges to consider acquitted conduct in determining the sentence to impose within the Guidelines range or whether a departure from the Guidelines is warranted. The Commission also proposed an amendment to the Commentary for Section 6A1.3 to conform with the amendment to Section 1B1.3.

The other two options would continue to allow federal judges to consider acquitted conduct in determining the applicable Guidelines range with some modifications. Option 2 would amend the Commentary to Guidelines Section 1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate

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[4] *See Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of *certiorari*) (calling for a review of consideration of acquitted conduct at sentencing); *United States v. Bell*, 808 F.3d 926, 927–28 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (explaining that courts using acquitted conduct to "impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning constitutionality of sentencing judge changing defendant's sentence "within the statutorily authorized range based on facts the judge finds without the aid of a jury or the defendant's consent").

[5] *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., statement).

[6] *McClinton v. United States*, 600 U.S. __, 143 S. Ct. 2400, 2403 (2023) (Kavanaugh, J., statement).

[7] Remarks as Prepared for Delivery by Chair Carlton W. Reeves Public Meeting of the United States Sentencing Commission Thurgood Marshall Federal Judiciary Center, 22 (April 5, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf (last visited Feb. 21, 2024).

impact in determining the guideline range. While Option 3 would amend Section 6A1.3 to provide that acquitted conduct should only be considered if it has been established by clear and convincing evidence.

The Commission has invited any comments on four issues concerning the proposed amendment:

1. (a) With respect to Option 1, whether the amendment should also prohibit the consideration of acquitted conduct for purposes beyond the determination of the Guidelines range, such as in determining the sentence to impose within the range or whether a departure is warranted. If so, the Commission seeks comment on whether a more substantial prohibition on such conduct would conflict with 18 U.S.C. § 3661 or exceed the Commission's authority under 28 U.S.C. § 994 or other Congressional directives.

   (b) Whether as an alternative to amending Section 1B1.3, the Commission should instead adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct in certain respects.

2. Whether the proposed definition of "acquitted conduct" should be expanded to include acquittals from state, local or tribal jurisdictions.

3. Whether the proposed definition of "acquitted conduct" in Option 1 should exclude conduct establishing the offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt in order to address "overlapping" conduct.

4. Whether any of the options presented should specifically address acquittals for reasons unrelated to the substantive evidence, such as for lack of jurisdiction or venue or the statute of limitations.

III. THE CITY BAR SUPPORTS, WITH MODIFICATIONS, OPTION 1 OF THE PROPOSED AMENDMENT LIMITING THE USE OF ACQUITTED CONDUCT AT SENTENCING

The City Bar supports Option 1 set forth in the proposed amendment to the Guidelines, which limits the use of acquitted conduct at sentencing. The City Bar, however, recommends modifications to the proposed amendment's definition of acquitted conduct to make clear that (i) "acquitted conduct" includes acquittals from state, local, or tribal jurisdictions; (ii) conduct forming the basis of an acquitted charge that overlaps with conduct underlying an offense of conviction may be considered only to determine the applicable advisory Guidelines to the extent such overlapping conduct is legally necessary to establish the offense of conviction; and (iii) other

conduct underlying an acquitted charge that was not legally necessary to establish guilt may only be considered as relevant conduct if otherwise appropriate. In addition, the City Bar encourages the Commission to prohibit more broadly the use of acquitted conduct in determining whether a departure from the Guidelines is warranted.

a. Comment on Issue 1: Scope of Limitation on Use of Acquitted Conduct

The Commission should adopt Option 1 of the proposed amendment with an additional modification to the proposed language in the Commentary Section 6A1.3. The proposed amendment is too narrow in that it permits the continued consideration of acquitted conduct, on a preponderance of the evidence standard,[8] for determination of upward departures. Multiple Guidelines provisions allow for upward departures based on factual circumstances that may be presented to, but rejected by, the jury.[9] To the extent that the proposed amendment allows for upward departures on the basis of acquitted conduct, the amendment does not go far enough to address the concerns that have motivated the amendment itself, and leaves an exception that might, in practice, render the amendment ineffectual. The City Bar recommends that the consideration of acquitted conduct for purposes of upward departures be prohibited under the proposed amendment.

The City Bar's support for such an expanded prohibition, as a policy matter, should not be construed as providing any legal opinion on the interaction between the proposed amendment, as expanded above, and either 18 U.S.C. § 3661 or the Commission's statutory authority. Nevertheless, the City Bar notes that under the proposed expanded amendment, federal judges will continue to be permitted to consider acquitted conduct in determining the sentence to impose within the Guidelines range, as well as ultimately whether to vary from the Guidelines range to impose a sentence pursuant to the factors mandated by 18 U.S.C. § 3553(a).

The Guidelines already limit sentencing judges in a number of notable aspects in determining when a departure from the Guidelines is warranted. Among those characteristics which cannot be considered, or given only limited consideration, are the following: (1) age (U.S.S.G. § 5H1.1, p.s.); (2) education (Id. at § 5H1.2, p.s.); (3) vocational skills (Id.); (4) drug dependency (Id. at § 5H1.4, p.s.); (5) employment history (Id. at § 5H1.5, p.s.); (6) family and community ties (Id. at § 5H1.6, p.s.); (7) prior civic, charitable, public service or good works (Id. at at § 5H1.11, p.s.); and (8) lack of guidance as a youth or disadvantaged upbringing (Id. at § 5H1.12, p.s.). Nevertheless, Courts can and do consider at least some of these factors in imposing a sentence that is "sufficient, but not greater than necessary to comply with the purposes set forth in" 18 USC § 3553(a). Furthermore, the Commission adopted these existing limitations pursuant to 28 USC § 994(c) & (d), which provide a-non-exhaustive list of matters for which the Commission "shall consider" whether certain offender characteristics "have any relevance to the nature, extent, place of service or other incidents of an appropriate sentence."

[8] *See, e.g., United States v. Rasheed*, 981 F.3d 187, 193 (2d Cir. 2020).

[9] *See, e.g.*, U.S.S.G. § 5K2.5 (upward departure for property loss or damage not otherwise taken into account by Guidelines); *id.* § 5K2.6 (upward departure for use of a weapon); *id.* § 5K2.9 (upward departure when offense of conviction was committed to facilitate or conceal another offense).

Indeed, the proposed expanded prohibition on the consideration of acquitted conduct would be consistent with existing Guidelines Commentary. In the Introductory Commentary to Chapter 5, Part H, the Guidelines Manual observes:

> Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guidelines range but for other reasons such as in determining the sentence within the applicable guidelines range, the type of sentence . . ., and various other aspects of an appropriate sentence.

Guidelines Manual (Nov. 1, 2023) at 466.

b. Comment on Issue 2: Non-Federal Acquitted Conduct

The Commission should adopt an inclusive definition of "acquitted conduct" that would incorporate acquittals from state, local, or tribal jurisdictions. This broader definition would vindicate the policy concerns animating the proposed Guidelines amendment, conform with the constitutional principles of federalism and comity, accord with long-standing concerns expressed by the Supreme Court regarding duplicative prosecutions, and be consistent with well-established Department of Justice policy regarding successive prosecutions (and the risk of punishment) for the same underlying conduct.

There is no substantive reason for excluding from the definition of "acquitted conduct" acquittals from non-federal jurisdictions. The Guidelines already incorporate convictions from state and local jurisdictions, and reflect policy decisions to consider in a uniform manner prior dispositions from the federal system, fifty state systems, District of Columbia, territories, and foreign, tribal, and military courts.[10] There is no meaningful justification for treating acquittals from non-federal jurisdictions differently than convictions from non-federal jurisdictions. Indeed, sentences resulting from tribal court convictions are already not counted for purposes of calculating a defendant's Criminal History Category.[11]

Permitting the consideration of acquitted conduct from non-federal proceedings for purposes of federal sentencing would also be in derogation of the principles of comity and respect federal and state sovereigns should afford each other's proceedings.[12] Several states preclude the consideration of acquitted conduct as part of their state sentencing regimes.[13] A definition of "acquitted conduct" that treats state acquitted conduct equally to federal acquitted conduct for purposes of the Guidelines would be more faithful to the principles of federalism and reflect these state constitutional and policy decisions.

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[10] *See* U.S.S.G. §§ 4A1.1, 4A1.2.

[11] *See* U.S.S.G. § 4A1.2(i).

[12] *See generally Younger v. Harris*, 401 U.S. 37 (1971).

[13] *See, e.g.*, *State v. Melvin*, 248 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019); *State v. Koch*, 112 P.3d 69 (Haw. 2005); *State v. Cote*, 530 A.2d 775 (N.H. 1987).

Treating acquittals under state or tribal law the same as acquittals under federal law for purposes of the Guidelines would also be consistent with long-standing concerns expressed by the Supreme Court, and well-established Department of Justice policy, regarding prosecutions in state and federal courts for the same underlying conduct. The Supreme Court has repeatedly called for "protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct," which "but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause."[14] In response to these concerns, "the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement," the so-called *Petite* policy.[15] As the Department of Justice has explained, "[t]his policy applies whenever there has been," among other outcomes, "a prior state or federal prosecution resulting in an acquittal . . . or a dismissal or other termination of the case on the merits after jeopardy has attached."[16]

Permitting the consideration of acquitted conduct from state, local, or tribal jurisdictions for purposes of the Guidelines would be contrary to these concerns and policies.

c. Comment on Issue 3: "Overlapping" Conduct

The Commission should revise the proposed definition of acquitted conduct in Option 1 to provide additional guidance regarding overlapping conduct. The current definition proposed under Option 1 provides as follows:

> (2) DEFINITION OF ACQUITTED CONDUCT.—"Acquitted conduct" means conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.
>
> ["Acquitted conduct" does not include conduct that—
>
> (A) was admitted by the defendant during a guilty plea colloquy; or
>
> (B) was found by the trier of fact beyond a reasonable doubt;
>
> to establish, in whole or in part, the instant offense of conviction[, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted].]

The bracketed terms setting forth possible language in this definition—specifically, "[underlying] [constituting an element of]"—potentially have very different meanings and could significantly

[14] *Rinaldi v. United States*, 434 U.S. 22, 27, 29 (1977).

[15] *See Petite v. United States*, 361 U.S. 529, 530–31 (1960); *Rinaldi*, 434 U.S. at 28–29.

[16] U.S. Dep't of Justice, Justice Manual § 9-2.031, "Dual and Successive Prosecution Policy ('Petite Policy')" (Jan. 2020).

influence the application of the Guidelines in particular cases. The City Bar recommends modifications to the proposed amendment's definition of acquitted conduct to account for these differences.

First, the Commission should clarify that conduct constituting an element of an acquitted charge that overlaps with conduct later found beyond a reasonable doubt to establish an offense of conviction should be considered only for purposes of determining the applicable Guidelines range where such conduct is legally necessary to establish a count of conviction. As presently drafted, proposed Guidelines Section 1B1.3(c) is ambiguous. Absent clarification, it is unclear whether courts should consider qualifying acquitted conduct for all purposes or only where such conduct forms a necessary element of the offense of conviction. The City Bar urges the Commission to provide additional guidance adopting the latter position, as the former may result in significant and unprincipled disparities in certain cases.

For example, this ambiguity could be particularly salient in cases involving conspiracy or money laundering charges. A defendant might be convicted of a money laundering offense, but acquitted of charges that he committed an alleged specified unlawful activity underlying that charge.[17] Similarly, a defendant might be convicted of a conspiracy involving multiple alleged objects or overt acts—without the jury specifying which object or overt act had been proven beyond a reasonable doubt—and simultaneously acquitted of one or more substantive offenses linked to particular overt acts that had been alleged.[18] The issue also could arise in the reverse scenario, where a defendant is acquitted of a conspiracy charge but, along with his alleged co-conspirator, convicted of substantive charges that had been alleged as overt acts.[19]

In each of these cases, additional guidance is required to give meaningful effect to the Commission's prohibition on the consideration of acquitted conduct. Thus, the City Bar recommends that the Commission modify the language of the proposed amendment to Section 1B1.3 to make clear that conduct constituting an element of an acquitted charge that overlaps with conduct underlying a later offense of conviction may be considered only for purposes of determining the applicable advisory Guidelines range to the extent that such conduct is legally necessary to the factfinder's determination of guilt.[20] In the alternative, the Commission should provide additional guidance for the application of the new provision to the same effect.

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[17] *See, e.g., United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008) (vacating sentence for money laundering where district court failed to consider defendant's acquitted drug trafficking conduct).

[18] In *United States v. Young*, 09 Cr. 223 (TEJ), 2011 WL 884002 (S.D. W.Va. Mar. 11, 2011), for example, the defendants were convicted of a multi-object conspiracy to possess, transport, and sell stolen property, but were acquitted of a substantive count concerning the possession of a specific stolen vehicle that was found on the property of a co-conspirator. The possession of the stolen vehicle was the only alleged overt act that specifically involved the co-conspirator. At sentencing, the district court included as relevant conduct not only the vehicle, but also all stolen property found in the possession of the co-conspirator. *Id.* at *11; *cf. United States v. Kiel*, 658 F. App'x 701, 711–12 (5th Cir. 2016) (affirming district court's calculation of offense level for multi-object conspiracy based on every bank robbery listed as an overt act, even those not charged as substantive offenses).

[19] *See, e.g., United States v. Sumerour*, 18 Cr. 582 (KGS), 2020 WL 5983202 (N.D. Tex. Oct. 8, 2020) (rejecting loss amount for health care fraud calculated by the U.S. Probation Office that included losses stemming from an acquitted conspiracy charge).

[20] To avoid confusion regarding the deference to be accorded the Commission's understanding of the proposed Guidelines amendment, the Commission should incorporate such changes into the text of the proposed Guidelines provision itself, and not limit such guidance to the commentary. *Cf. United States v. Banks*, 55 F.4th 246, 255 (3d

Second, the Commission should clarify that other overlapping conduct that did not constitute an element of an acquitted charge may, if otherwise consistent with Guidelines Section 1B1.3, be considered as relevant conduct for purposes of determining the applicable advisory Guidelines range for an offense of conviction. Again, proposed Guidelines Section 1B1.3(c) as presently drafted is ambiguous on this point. The City Bar urges the Commission to provide additional guidance in recognition of the fact that a determination of guilt or innocence necessarily focuses on the elements of charged offenses.[21] Without additional guidance, a prohibition on considering any "conduct (*i.e.*, any acts or omission) underlying a charge" may sweep too broadly, impeding courts' ability to consider circumstantial or other facts that were related to, but not legally essential to prove, the acquitted conduct.

For example, this ambiguity could arise in cases involving multiple charges in which a factfinder acquits on some but not all of the charged offenses. In a case involving multiple charges where a weapon was alleged to have been possessed during the commission of both offenses, for instance, it may be unclear what shared facts—such as the possession of a weapon—a court may consider if the factfinder acquits only as to one offense. Conversely, the issue also could arise in cases where a factfinder was previously presented with evidence tending to mitigate culpability that also informs a later offense of conviction. Where prior conduct reveals duress or other circumstances that also bear on why a later offense of conviction may have been committed, courts should not be prohibited from considering such conduct in determining the applicable advisory Guidelines range.

d. Comment on Issue 4: Non-Substantive Acquitted Conduct

The City Bar believes that there is no meaningful distinction between acquittals based on the substantive evidence and acquittals for other reasons, such as lack of jurisdiction, venue, or violations of the statute of limitations. Consideration of all acquittals should be precluded for purposes of determining the applicable advisory Guidelines range.

A contrary rule would lead to inconsistency in the treatment of acquittals rendered by juries versus those rendered by judges for the same reasons. For example, a jury that determined the prosecution had not adequately proven venue could render an acquittal on a general verdict form with no further explanation. Yet, a court, on its own or presented with a motion for acquittal, could enter a judgment of acquittal on the same record for the same reason. If conduct relating to "non-substantive" acquittals could be considered, the defendant acquitted by the court would be unfavorably situated compared to the defendant acquitted by the jury, as the acquitted conduct could be considered for the Guidelines range for the former, but not the latter. There is no principled basis for treating these similarly situated defendants differently.

Cir. 2022) (holding that, following *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), courts must exhaust all the traditional tools of construction and conclude that a Guidelines provision is genuinely ambiguous before according deference to the Commission's commentary interpreting the Guidelines).

[21] *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (stating that the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt").

IV. CONCLUSION

The City Bar fully supports the Commission's efforts to limit the use of acquitted conduct at sentencing and recommends that the Commission adopt Option 1 with certain modifications. Specifically, the amendment should also preclude the use of "acquitted conduct" in determining whether to depart from the applicable Guidelines range, and make clear that: (i) "acquitted conduct" includes acquittals from state, local, or tribal jurisdictions; (ii) conduct forming the basis of an acquitted charge that overlaps with conduct underlying an offense of conviction may be considered only to determine the applicable advisory Guidelines to the extent such overlapping conduct is legally necessary to establish the offense of conviction; and (iii) other conduct underlying an acquitted charge that was not legally necessary to establish guilt may only be considered as relevant conduct if otherwise appropriate. The City Bar also respectfully recommends that the proposed limitations should include acquittals from non-federal jurisdictions and apply without any distinction between acquittals based on the substantive evidence and acquittals for other reasons.

Respectfully,

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