

Deconstructing the Relevant Conduct Guideline: Challenging the Use of Uncharged and Acquitted Offenses in Sentencing

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Under certain portions of the “relevant conduct” guideline and its commentary, judges are required to calculate the guideline range based not only on the crime of conviction, but on separate crimes, comprised of their own elements, of which the defendant was acquitted, with which the defendant was never charged, or which were dismissed.¹ The Commission advises judges to find these separate crimes by a preponderance of the “information,” without regard to its admissibility under the rules of evidence, if there is sufficient indicia of reliability to support its “probable accuracy.”² The guideline range is then increased by the same number of months or years as if the defendant had been charged by indictment and convicted by a jury on proof beyond a reasonable doubt, limited only by the statutory maximum for the offense of conviction. These provisions were a radical departure from past practice in the federal courts and national experience in the states, were not authorized by Congress, and were adopted without empirical support. They have been subject to enduring criticism and calls for reform since their inception, to no avail.

Under the Supreme Court’s recent decisions, judges are invited to consider arguments that a guideline fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Judges “may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,” *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (internal quotation marks omitted), and when they do, the courts of appeals may not “grant greater factfinding leeway to [the Commission] than to [the] district judge.” *Rita*, 127 S. Ct. at 2463. Practitioners and judges are invited to peel back the veneer of a given guideline to discover whether it was developed by the Commission in “the exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 575. This role, drawn from the Sentencing Reform Act (SRA), has two basic components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of comments, data and research. *Rita*, 127 S. Ct. at 2464-65. “Notably, not all of the Guidelines are tied to this empirical evidence.” *Gall v. United States*, 128 S. Ct. 586, 594 n.2 (2007). When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)’s purposes, “even in a mine-run case.” *Kimbrough*, 128 S. Ct. at 575.

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¹ USSG § 1B1.3(a)(1) & (a)(2) & comment. (n.3) & comment. (backg’d).

² USSG § 6A1.3(a), p.s., & comment. (backg’d).

The highly deferential abuse-of-discretion standard of review that applies to every sentence, the presumption of reasonableness for guideline sentences in a number of circuits, and the judge’s duty to explain her acceptance or rejection of nonfrivolous grounds for a sentence outside the guideline range, mean that this type of challenge is best developed and won in the district court. However, the same reasons, if rejected by the district court, should be presented on appeal to rebut the presumption of reasonableness and to demonstrate the substantive unreasonableness of the sentence. It is important to remind judges that their reasoned determination that a particular guideline provision reflects unsound judgment does not undermine the work of the Sentencing Commission or produce unwarranted disparity. To the contrary, this will serve a core function of the SRA. Such decisions actively implement the dialogue between the courts and the Commission and the evolutionary process Congress intended. *Rita*, 127 S. Ct. at 2464, 2465, 2468-69; *Kimbrough*, 128 S. Ct. at 573-74; *United States v. Jones*, ___F.3d___, 2008 WL 2500252 *8 n.8 (2d Cir. June 24, 2008).

Part I of this paper recounts the history of the guideline provisions requiring district courts to calculate the guideline range based on uncharged, dismissed and acquitted crimes. It demonstrates that these provisions were not authorized by the SRA or reviewed by Congress, and were adopted without empirical testing or support. Part II demonstrates that these provisions were not based on past practice, have not been revised in light of feedback or research, have failed to achieve their untested theoretical goals, and instead transfer sentencing power to prosecutors, create hidden and unwarranted disparities, and promote disrespect for the law. Part III discusses open constitutional challenges to these provisions.

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I. HISTORY

A. Not Authorized by the Sentencing Reform Act

The plain language of the Sentencing Reform Act demonstrates that Congress intended that guideline ranges for a given offense of conviction would differ based on aggravating or mitigating circumstances of that offense, not that the guideline range for the offense of conviction would be increased based on separate uncharged, dismissed or acquitted offenses.

Congress directed the Commission to take into account “the circumstances under which the *offense was committed*” and the “nature and degree of the harm caused by the *offense*,” and to “avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct,” 28 U.S.C. §§ 994(c)(2), (3), 991(b)(1)(B) (emphasis supplied). It directed that the courts “shall impose a sentence sufficient, but not greater than necessary” “to reflect the seriousness of *the offense*” and “to provide just punishment for the *offense*,” and in doing so to consider the “nature and circumstances of the *offense*,” and “the need to avoid unwarranted sentence disparities among defendants . . . who have been *found guilty* of similar conduct,” 18 U.S.C. § 3553(a)(1), (2)(A), (6) (emphasis supplied).

The term “offense” was left undefined in the SRA, and thus is “give[n] its ordinary meaning.” *United States v. Santos*, 128 S. Ct. 2020, 2024 (2008). A “straightforward reading” of the word “offense” means the “offense of conviction.” *Hughey v. United States*, 495 U.S. 411, 416 (1990). This is particularly clear when Congress simultaneously directed the Commission and the courts to avoid disparity among defendants “found guilty” of similar conduct. Congress did not say that disparity is to be avoided among those who have *committed* similar crimes in similar ways. There can be no doubt that “offense” means “offense of conviction.”

Despite the plain language and its ordinary meaning, the Commission has expanded the meaning of “offense” to incorporate uncharged, dismissed, and acquitted offenses beyond the “offense of conviction.” See USSG § 1B1.1, comment. (n.1(H)) (defining the term “offense” to mean the offense of conviction plus all relevant conduct under § 1B1.3). In doing so, the Commission exceeded its authority. See *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (commentary “at odds” with plain statutory language “must give way”); *Stinson v. United States*, 508 U.S. 36, 45, 47 (1993) (commentary that is inconsistent with a statute is invalid).

There is nothing in the legislative history of the SRA to support the use of uncharged and acquitted offenses in calculating the guideline range, and much that indicates this was contrary to congressional intent. The House Judiciary Committee explicitly rejected the form of “real offense” sentencing contained in USSG § 1B1.3: “The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit ‘real offense’ sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties.” H.R. Rep. No. 98-1017, at 98 (1984). It explained: “The rejection of a ‘real offense’ sentencing scheme does not prevent the sentencing court from considering factors not directly established as an element of the offense. The sentencing guidelines should reflect differences in the various manners in which the offense of conviction can be committed. This does not permit the use of factors that would justify a conviction for a different, more serious offense.” *Id.* at 99.

The Senate Report made no mention of “real offense” sentencing guidelines and maintained the same focus on the offense of conviction with variations based on the manner in which that offense was committed.⁴ In explaining 28 U.S.C. § 994(c)(2) & (3), the Senate Judiciary Committee said that the Commission in promulgating the guidelines was to consider “the circumstances under which the offense was committed that might aggravate or mitigate the seriousness of the offense,” such as “whether the offense was particularly heinous; whether the offense was committed on the spur of the moment or after substantial planning, whether the offense was committed in reckless disregard of the safety of others; whether the offense involved a threat with a weapon or use of a weapon; whether the offense was committed in a manner plainly designed to limit the danger to the victims; whether the defendant was acting under a form of duress not rising to the level of a defense, etc,” and the “nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust.” S. Rep. No. 98-225 at 170 (1983). It said that judges, in considering the “nature and circumstances of the offense,” will “consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor

⁴ The Senate version was adopted insofar as it made the guidelines mandatory while the House version would have made the guidelines advisory. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 233, 236, 257-80 (1984). The provision requiring a sentence not greater than necessary to satisfy sentencing purposes, however, originated in the House version, *id.* at 271-72, and now controls as the “overarching” instruction to district courts. See *Kimbrough*, 128 S. Ct. at 570.

way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense.” *Id.* at 75.

Significantly, in the only reference in the SRA to offenses in the “same course of conduct,” Congress directed the Commission to “insure that the guidelines” reflect the “appropriateness of imposing an *incremental* penalty for each offense” when the defendant is convicted of . . . multiple offenses committed in the same course of conduct” or “multiple offenses committed at different times.” 28 U.S.C. § 994(*I*)(1) (emphasis supplied). The Senate Report explained what “incremental” meant in the course of discussing 18 U.S.C. § 3584(a), the related directive to judges stating that unless the court orders otherwise, multiple terms imposed at the same time run concurrently and multiple terms imposed at different times run consecutively: “Ordinarily, under the guidelines system, if the court is sentencing for multiple offenses at the same time, the guidelines will specify an incremental penalty by which some portion of the sentence for the first offense is added to the sentence for each similar offense. [citing 28 U.S.C. § 994(*I*)(1)] Thus, for example, if the term of imprisonment recommended in the guidelines for one offense is two years, the guidelines might recommend a sentence of two and a half or three years if the defendant was convicted of three or four such offenses.” S. Rep. No. 98-225 at 127. Congress could not have intended such incremental punishment for multiple offenses of conviction, but at the same time the equivalent of consecutive sentences for uncharged and acquitted offenses.

In the only reference in the SRA to punishment for a conspiracy and its objects, Congress directed the Commission to “insure that the guidelines” reflect the “general inappropriateness of imposing consecutive terms of imprisonment for conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.” 28 U.S.C. § 994(*I*)(2). Again, Congress could not have intended that it would be generally inappropriate to impose consecutive sentences for a conviction for conspiracy and a conviction for its object, but to intend at the same time that a defendant convicted only of a substantive offense be sentenced to the equivalent of consecutive sentences for an uncharged conspiracy and its various objects committed, or allegedly committed, by others.

Finally, 18 U.S.C. § 3661 – often cited as support for the use of uncharged and acquitted crimes to calculate the guideline range – says no such thing. Section 3661 provides simply that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person *convicted of an offense* which a court of the United States may receive and *consider* for the purpose of imposing an appropriate sentence.” (emphasis supplied) Section 3661 codified a principle from the purely indeterminate sentencing regime in place before the guidelines. While it remains on the books, it is mentioned nowhere in the legislative history of the SRA, indicating that Congress did not intend that it be a component of the guideline calculation. Indeed, § 3661 does not say that unlimited information, much less uncharged and acquitted offenses, may or must be used in calculating a determinate guideline range.⁵ When

⁵ On its face, § 3661 does not include uncharged or acquitted crimes in “conduct of a person.” Under the “rule of the last antecedent,” a limiting phrase (“convicted of an offense”) is read as modifying the phrase it immediately follows (“conduct of a person”). See *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005).

that precise issue was addressed in a guideline (and guidelines, unlike commentary, are reviewed by Congress, *see* 28 U.S.C. § 994(p)), such unlimited information was not to be used in calculating the guideline range. *See* USSG § 1B1.4; *see also* Part I.B.2, *infra*. The Supreme Court also eventually recognized that the principle reflected in § 3661 is not transferable to judicial factfinding in a determinate guideline system. *See Blakely v. Washington*, 542 U.S. 296, 305 (2004).

B. Promulgation and Amendment History

The text of the relevant guidelines, commentary and policy statements as originally promulgated and all material amendments are reproduced in the Appendix.

The following review reveals that the enduring aspects of the requirement that judges find (by a preponderance of the probably accurate information) and use uncharged, dismissed and acquitted crimes in calculating the guideline range – at the same rate as if charged in an indictment and conviction obtained – originated in commentary and for the most part remain in commentary. Congress examined the initial set of guidelines, and thereafter presumably reviewed amendments to guidelines, but Congress does not review commentary. *Stinson*, 508 U.S. at 41, 46; *see also* 28 U.S.C. § 994(p). The initial set of guidelines sent to Congress in May 1987 contained no “relevant conduct” guideline, but rather a “General Principle[] Governing Chapter Two,” which defined “relevant conduct” as “conduct, circumstances, and injuries relevant to the offense of conviction.” The extraordinary concept of punishing defendants for uncharged and acquitted crimes, and at the same rate as if charged and conviction obtained, was gradually crafted and slipped into the commentary over the course of several years; in one instance, commentary was later moved to the guideline. Throughout the progression to the current scope of the rule, the Commission has given a single reason: to “clarify” the initial guideline.

1. USSG § 1B1.3

Most are likely unaware (or have long forgotten) that the initial set of Guidelines submitted to Congress for examination in May 1987 did not include a “relevant conduct” guideline as such. *See* 52 Fed. Reg. 18,046 (May 13, 1987). Rather, it included a “General Principle[] Governing Chapter Two,” a chapter “pertain[ing] to offense conduct,” and defined “relevant conduct” as “conduct, circumstances, and injuries relevant to the offense of conviction.” *See id.* (Chapter 2, Overview & § 202).

In October 1987, before the six-month congressional review period had passed and before the November 1, 1987 effective date of the initial set of guidelines, the Commission distributed for use by judges and practitioners a revised version (in loose-leaf form) that included several “technical and conforming amendments” to guidelines, commentary and policy statements. These amendments included a revised version of Chapter One that included a relevant conduct guideline at § 1B1.3 that was identical in substance to the general principle governing offense conduct in Chapter Two that was sent to Congress in May 1987. The new §

1B1.3 guideline was placed in Part B of Chapter One, entitled “General Application Principles,” but was defined the same, as “conduct, circumstances, and injuries relevant to the offense of conviction.”⁶ The Commission published these changes in the Federal Register a few weeks after the November 1, 1987 effective date, explaining there that it did not believe the amendments were substantive in nature or that Congress needed to review them. *See* 52 Fed. Reg. 44,674 (Nov. 20, 1987) (“[T]he Commission does not believe that the revisions effect any substantive change, or that Congressional review of these revisions is required.”).

Guideline § 1B1.3, as in the general principle in the Overview of Chapter Two sent to Congress in May 1987, defined “conduct relevant to the offense” as “conduct, circumstances, and injuries relevant to the offense of conviction.” *See* USSG § 1B1.3 (Nov. 1, 1987); 52 Fed. Reg. 44,674 (Nov. 20, 1987). It said only that such conduct should be “taken into account” to “determine the seriousness of the offense conduct,” and made no reference to using offenses the government did not charge or failed to prove at trial to calculate the guideline range. Indeed, the guideline suggested otherwise by referring to acts committed by a “person for whose conduct the defendant is *legally* accountable,” *id.* (emphasis supplied), that is, *convicted* of aiding or abetting, solicitation, accessory-after-the-fact, or conspiracy. As to acts that were “part of the same course of conduct, or a common scheme or plan, as the offense of conviction,” *id.*, the commentary explained that this was “conduct indicating that the offense was to some degree part of a broader purpose, scheme, or plan,” and that it was “derived from” Rule 8(a) “governing joinder of similar or related offenses,” *id.*, that is, *charged* offenses. The commentary also said that “other crimes” that are inadmissible under Rule 404(b) “may not be ‘relevant to the offense of conviction’” under Chapter Two but would be considered under Chapters Three, Four and Five. *Id.* If the Commission intended at this point that uncharged and acquitted crimes should be used to calculate the guideline range, it surely did not convey that message in any discernible way.

Confusion and uncertainty surrounding the controlling status of these October 1987 amendments prompted the Commission to formally re-adopt them on January 15, 1988 as temporary amendments, along with several other amendments, without notice and comment. *See* 53 Fed. Reg. 1,286 (Jan. 15, 1988). These amendments replaced the original § 1B1.3 with a completely revised § 1B1.3, which introduced for the first time the concept of conduct “for which the defendant would be otherwise accountable” (as opposed to “legally accountable”) and for the first time referred, in oblique language in the commentary, to conduct for which no conviction was obtained. USSG, App. C, Amend. 3 (Jan. 15, 1988). This guideline constitutes the conceptual genesis of the current formulation of § 1B1.3 and provided as follows:

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

⁶ There was one slight difference in the wording of the commentary to the two versions, though it appears to be a distinction without a difference with respect to calculating the guideline range. The commentary to the general principle in Chapter Two specified that it applied only to “offense characteristics,” while “offender characteristics, which may include other similar misconduct, are determined under Chapter Three (Adjustments), and Chapter Four (Criminal History).” *See* 52 Fed. Reg. 18,046 (May 13, 1987). The commentary to new § 1B1.3 as distributed in October 1987 said that “[f]or purposes of assessing offense conduct, the relevant conduct and circumstances of the offense of conviction are as follows . . .” *See* 52 Fed. Reg. 44,674 (Nov. 20, 1987).

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) All acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) Solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) All harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;

(4) The defendant's state of mind, intent, motive and purpose in committing the offense; and

(5) Any other information specified in the applicable guideline.

(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

In the commentary, the Commission explained what it meant by conduct "for which the defendant would be otherwise accountable":

Conduct "for which the defendant is otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. *18 U.S.C. 2*.) If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. *See generally* §§ 2X1.1-2X4.1.

USSG § 1B1.3 comment. (n.1) (Jan. 15, 1988). By its terms, the commentary to this nascent guideline stated that courts were to consider the conduct of persons other than the defendant only when the defendant was *convicted* of aiding and abetting under 18 U.S.C. § 2 or *convicted* of conspiracy.

However, with respect to “same course of conduct or common scheme,” the Commission explained, also in commentary, that this concept applied to “offenses of a character for which § 3D1.2(d) would require grouping of multiple counts,” such as drug, fraud, theft, and tax offenses. As to such offenses, it said, “multiple convictions are not required.” USSG § 1B1.3 comment. (n.2) (Jan. 15, 1988). Buried in the background commentary was the following additional language: “Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses.” USSG § 1B1.3, comment. (backg’d) (1988); USSG, App. C, Amend. 3 (Jan. 15, 1988).

For these and every other amendment to § 1B1.3, the Commission explained simply that “the purpose of the amendment is to clarify the guideline” and that “[t]he amended language restates the intent of § 1B1.3 as originally promulgated.” Of course, “as originally promulgated” in May 1987 in the Overview of Chapter Two and as distributed in October 1987 and then published in the Federal Register on November 20, 1987 as guideline § 1B1.3, that original provision defined “relevant conduct” as “conduct, circumstances, and injuries relevant to the offense of conviction,” and there was no statement that uncharged or acquitted offenses should be used to calculate the guideline range, much less that such allegations should be given the same weight as if charged in an indictment and conviction obtained. By the time the Commission sent the January 1988 amendments to Congress as part of the regular amendment cycle in April 1988, *see* 53 Fed. Reg. 15,530 (incorporating by reference the January amendments), however, the idea that multiple convictions need not be obtained for offenses for which § 3D1.2(d) would require grouping was a *fait accompli*.

In its next series of amendments, the Commission continued to “clarify” the guideline as it was “originally promulgated.” In 1989, it amended the commentary regarding “jointly undertaken activity” so that it would encompass the conduct of others, regardless of whether the defendant or anyone else was charged with a conspiracy:

In the case of criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*, the conduct for which the defendant “would be otherwise accountable” also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

USSG, App. C, Amend. 78 (Nov. 1, 1989) (emphasis supplied). The Commission stated only that “[t]he purpose of this amendment is to clarify the definition of conduct for which the defendant is ‘otherwise accountable.’” *Id.*

On November 1, 1990, the Commission again amended Application Note 2 of § 1B1.3 to expand the language regarding those offenses for which § 3D1.2(d) would require grouping under subsection (a)(2):

“Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts,” as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. *Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts.* For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.”

USSG § 1B1.3, comment. (n.2) (1991); USSG, App. C, Amend. 309 (Nov. 1, 1990) (emphasis supplied).⁷ The Commission explained that “[t]his amendment clarifies the intended scope of § 1B1.3(a)(2) in conjunction with Chapter Three, Part D (Multiple Counts) to ensure that the latter is not read to limit the former only to conduct of which the defendant was convicted.” *Id.* In 1991, the Commission further amended the Application Note to “clarify that ‘offenses of a character for which § 3D1.2(d) would require grouping of multiple counts’ is not limited to offenses proscribed by the same statutory provision.” USSG, App. C, Amend. 389 (Nov. 1, 1991).

In 1992, the Commission specified for the first time in the guideline itself (as opposed to commentary alone) that for purposes of determining relevant conduct for jointly undertaken activity, no conspiracy need be charged:

[I]n the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, *whether or not charged as a conspiracy*), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

⁷ This material, in further amended form, now appears at Application Note 3. *See* USSG § 1B1.3 comment. (n.3) (2007).

USSG, App. C, Amend. 439 (Nov. 1, 1992) (emphasis supplied); USSG § 1B1.3(a)(1)(B) (1993). The Commission also replaced Application Note 1, from which this language originated, with the following open-ended description:

The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

Ibid. The Commission explained that “[t]his amendment clarifies and more fully illustrates the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity.” USSG, App. C, Amend. 439 (Nov. 1, 1992).

2. *USSG § 1B1.4*

In commentary to the original version of § 1B1.3, the Commission referred, in limited fashion, to 18 U.S.C. § 3577 (the statutory precursor to 18 U.S.C. § 3661), but did not issue a separate guideline addressing the scope of information to be considered at sentencing or for what purpose. When the Commission re-promulgated and amended this initial version of § 1B1.3 in January 1988, it also moved the content of the existing guideline at § 1B1.4 to § 1B1.1, and created a new guideline at § 1B1.4 adapted from 18 U.S.C. § 3661. In this new § 1B1.4, called “Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guideline),” the Commission stated that “[i]n determining the sentence within the guideline range, or whether a departure is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” USSG § 1B1.4 (1988); USSG, App. C, Amend. 4 (Jan. 15, 1988).

This guideline by its terms did not (and still does not) require or allow the use of uncharged or acquitted crimes in calculating the guideline range. If anything, it allows the consideration of such allegations only in selecting a sentence within the guideline range or in determining whether to depart. Indeed, in the commentary, the Commission gave an example that clearly limited the consideration of uncharged separate crimes only to determine the sentence within the guideline range or possibly to figure in an upward departure under unusual circumstances, not to calculate the guideline range itself:

For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.

Ibid. The Commission also explained that the guideline is based on 18 U.S.C. § 3661, but inexplicably eliminated the statutory language referring to the “conduct of a person convicted of an offense,” replacing it instead with “conduct of the defendant.” To be sure, a person convicted of an offense is a “defendant,” but the slight change in language also happens to remove the grammatical relationship between the person’s conduct and the offense of conviction. As worded in the guideline, the court can consider any information, without limitation, concerning the “conduct of the defendant,” though only in selecting a point within the guideline range or in determining whether to depart. The Commission also added the caveat that such information may not be used, even in choosing a sentence within the guideline range or considering a departure, if it is “otherwise prohibited by law.” This would include factors such as race, sex or religion, *see* 28 U.S.C. § 994(d), and any other information prohibited by the Constitution. *See* Part III, *infra*. As its reason for this amendment to § 1B1.4, the Commission said that it “clarifies the operation of the guidelines.” USSG, App. C, Amend. 4 (Jan. 15, 1988)

In 2000, the Commission amended the background commentary to § 1B1.4 to address a circuit conflict regarding charges dismissed or not charged as part of a plea agreement. Some courts had read the two separate sentences of the robbery example to mean that it would not be appropriate to base a departure on conduct uncharged or dismissed in the context of a plea agreement, while a majority had held otherwise. The new language in the background commentary made clear that the uncharged or dismissed conduct could not only be used to select a sentence within the guideline range, but also to impose an upward departure from the guideline range:

A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for sentencing above the guideline range.

USSG, App. C, Amend. 604 (Nov 1, 2000). With this amendment, the Commission adopted the interpretation of a majority of courts that the sentencing court can consider “for upward departure purposes aggravating conduct that is dismissed or not charged in connection with a plea agreement.” *Id.* The Commission also added a new policy statement at § 5K2.21, telling judges that they “may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.” *Id.* As its reason, the Commission said: “This approach is consistent with the principles that underlie § 1B1.4 and 18 U.S.C. § 3661 and preserves flexibility for the sentencing judge to impose an appropriate sentence within the context of a charge-reduction plea agreement.” *Id.*

C. *Post Hoc* Explanations

1. “Key Compromises” Article

In his 1988 article, then Judge and Commissioner Breyer explained that the guidelines were the result of a series of compromises. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) [“Key Compromises”]. He explained relevant conduct as a “compromise forced” by “the conflict between procedural and substantive fairness.” *Id.* at 9. A pure charge system, he said, would “overlook the fact that particular crimes may be committed in different ways.” *Id.* A pure “real offense” system, on the other hand, would “minimize the importance of the *procedures* that courts must use to determine the existence of the additional harms.” *Id.* at 10 (emphasis in original). If too many facts were found in an informal way, it would threaten fairness, but full-blown procedural rights would threaten “manageability.” *Id.* at 11. Notably, Judge Breyer discounted the only “past practice” argument in favor of “real offense” sentencing -- that judges always did it that way before the guidelines. *Id.* at 11. First, he said, this was “not entirely true,” citing Fed. R. Crim. P. 32(c)(3)(D) and cases applying it. *Id.* at 11 & n.69. That rule, as before the guidelines and now, required the judge, if the defendant alleged a factual inaccuracy in the presentence report, to either make a finding as to the allegation, or determine that the matter would not be taken into account. *See* Fed. R. Crim. P. 32(c)(3)(D) (1987). Second, “it was the unfair, hidden nature of prior sentencing practices that the Guidelines set about to change.” *Key Compromises* at 11.

The “upshot,” Judge Breyer said, “is a need for compromise.” *Id.* He then described the “compromise” as it existed in the 1988 version of the guidelines. In discussing how crimes of conviction can be “committed in different ways,” he referred only to differences in the way a defendant might commit bank robbery, *i.e.*, the defendant’s use of a gun, the amount of money the defendant took, the defendant’s injury of a teller, the defendant acted under duress. *Id.* at 9-10. He stated that the “compromise . . . looks to the offense *charged* to secure the ‘base offense level,’” then “modifies that level in light of several ‘real’ aggravating or mitigating circumstances,” here citing the bank robbery guideline with its incremental punishment for offense characteristics, “several ‘real’ general adjustments,” here citing role in the offense, and “several ‘real’ characteristics of the defendant,” here citing criminal history. *Id.* at 11-12 (emphasis in original).

Not once did Judge Breyer acknowledge that the 1988 version of § 1B1.3(a)(2) and its commentary would require judges to choose the base offense level itself (in drug cases, among others) and specific offense characteristics (in fraud cases, among others) based on separate uncharged and acquitted offenses comprised of their own elements allegedly committed by the defendant. And, of course, Judge Breyer did not mention what later came to pass, that judges would be required to increase the base offense level and specific offender characteristics based on acts and omissions of others in jointly undertaken activity, whether or not charged as a conspiracy, under subsection (a)(1).

Even with this limited description, Judge Breyer acknowledged that “[o]ne can, of course, criticize the Commission for compromising at the wrong point,” and called upon critics to “specify which elements should be added or subtracted, and then explain how the factoring of these elements into sentencing considerations affects the workability of the system without compromising either procedural or substantive fairness.” *Id.* at 12. This was done early and often, but has been ignored by the Commission. *See* Part II.B, *infra*.

2. “Cornerstone” Article

Two years later, in their 1990 article, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990) [“Cornerstone”], Judge William Wilkins, the first Chair of the Sentencing Commission, and John Steer, then-Chief Counsel of the Sentencing Commission, declared relevant conduct to be the “cornerstone” of the guidelines. They claimed, in a footnote and without a shred of empirical support, that “the central feature of the guidelines (*i.e.*, Relevant Conduct) . . . significantly reduces the impact of prosecutorial charge selection and plea bargaining by ensuring that the court will be able to consider the defendant’s real offense behavior in imposing a guideline sentence.” *Id.* at 499 n.27. They discussed the “three dimensions” under USSG § 1B1.3 – the “temporal” dimension, the “accomplice attribution” dimension, and the “same course of conduct or common scheme or plan” dimension. They explained that each dimension required the use of uncharged and dismissed offenses in calculating the guideline range, but failed to explain in any satisfactory way why this should be so. Notably, they made no mention of acquitted conduct. It is worthwhile to examine this article and counter its assertions, as it is sometimes cited by courts in rejecting challenges to the use of relevant conduct.⁸

Temporal dimension. The authors explain that the temporal dimension focuses on “offense conduct as a moving picture that begins with acts in preparation for the offense and, for some purposes such as assessing whether the defendant obstructed justice or accepted responsibility for his or her conduct, extends to the time of sentencing.” *Id.* at 504. The authors offer nothing in the way of a policy rationale for the temporal dimension except to refer to the common pre-guideline practice in which courts would consider, without limit, any information related to the offense or the defendant. *Id.* at 502 & n.45, 504 (citing *United States v. Tucker*, 404 U.S. 443, 446 (1972) and *Williams v. New York*, 337 U.S. 241, 247 (1949)). They do not explain why or how this tenet of the indeterminate pre-guideline system is transferable to the determinate guideline system, or why the Commission decided to require judges to use uncharged and dismissed offenses in calculating the guideline range and to accord the same weight to that conduct as though the defendant had been convicted.⁹

⁸ *See, e.g., United States v. Glass*, 189 Fed. Appx. 788 (10th Cir. 2006); *United States v. Swiney*, 203 F.3d 397, 403-04 (6th Cir. 2000).

⁹ The inapplicability of the rationale of *Williams* to the current advisory guideline system is discussed at length in Part III.A.1.b, *infra*.

Accomplice attribution dimension. The “accomplice attribution dimension” of § 1B1.3(a)(1) requires guideline calculations to be based on an “aiding and abetting” theory as well as jointly undertaken criminal activity. The *Cornerstone* authors make no reference to past sentencing practice or empirical basis for this dimension. Rather, they make an effort to link the concept of liability for the conduct of others to familiar concepts in the area of substantive criminal law. First, they state simply that “the concept is well understood and requires little amplification here.” *Id.* at 507. They further explain that the aiding and abetting provision is “derived from 18 U.S.C. § 2” and “incorporates the portion of 18 U.S.C. § 2 providing that a person is legally accountable as an accomplice if the person encourages or solicits criminal conduct ‘without actually rendering physical aid to the endeavor.’” *Id.* at 507, 508. They cite only to substantive criminal law and the role enhancement under USSG § 3B1.1 for the proposition that “[e]ven if these individuals do not participate in the actual commission of the crime, for purposes of legal accountability and sentencing they ordinarily are sanctioned at least as severely as those who directly participate in the crime.” *Id.* at 508 & nn.71-72 (citing 2 W. LaFare & A. Scott, *Substantive Criminal Law* § 6.7, at 137 (1986); USSG § 3B1.1). In short, the authors describe what the “accomplice attribution” dimension of the guideline does, but do not attempt to justify why this should be so.

The authors source the jointly undertaken criminal activity component of § 1B1.3(a)(1) to the *Pinkerton* rule, *id.* at 509, but again, quite unlike that rule of substantive law, the guideline covers any “criminal activity undertaken in concert with others, *whether or not charged as a conspiracy.*” USSG 1B1.3 comment. (n.1) (1990) (emphasis supplied).¹⁰ The authors explain that “[t]his similar sentencing treatment of jointly-undertaken activity, regardless of whether there is an actual conviction for the crime of conspiracy, is consistent with the statutory instructions given to the Commission.” *Id.* at 509. In a footnote, they cite 28 U.S.C. § 994(l)(2), which instructed the Commission to ensure that the sentencing guidelines reflect the “general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense . . . and for an offense that was the sole object of the conspiracy.” *Id.* at 509 n.75.

Notably, when this provision was promulgated, the Commission did not cite any statutory directive, but simply stated that the purpose of the provision, placed initially in commentary, was to clarify the definition of conduct for which the defendant is “otherwise accountable.” *See* USSG, App. C. Amend. 78 (Nov. 1, 1989). In fact, the statutory instruction cited later in the *Cornerstone* article in no way directs the Commission to increase punishment for an offense of conviction based on offenses committed by others as part of an uncharged conspiracy, and seems to suggest a different course. The statute instructs the Commission to ensure that the sentencing guidelines reflect “the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.” *See* 28 U.S.C. § 994(l)(2). The legislative history of this directive to the Commission and the related directive to the courts does not support the Commission’s action in requiring that charged or uncharged offenses committed by others as part of an uncharged conspiracy be used to increase the guideline range

¹⁰ As recounted above, this language was moved in 1992 from the commentary to the guideline itself, at subsection (a)(1)(B).

for the defendant's offense of conviction. In explaining these provisions, the Senate Report said that individuals *convicted* of a conspiracy with multiple objects and also *convicted* of one or more of those objects should not ordinarily receive consecutive sentences, although the court might, in light of the factors set forth in § 3553(a), impose some incremental punishment based on those *convictions*. See S. Rep. 98-225, 126-28, 176-78 (1983).

The *Cornerstone* authors go on to assert that punishing a defendant for the charged or uncharged crimes of others in an uncharged conspiracy is supported by “current views that conspiratorial criminal conduct is ordinarily of the same serious character as the underlying crime that is the object of the conspiracy.” For this proposition, the authors cite – in tautological form – a concurring opinion by Judge Posner in which he relies in part on *the guidelines* to conclude that “[t]he proper punishment for conspiracy is a function of the gravity of the crime the defendants conspired to commit.” *Id.* at 509 n.76 (citing *United States v. D’Antoni*, 874 F.2d 1214, 1221 (7th Cir. 1989)).

As a further reason for the inclusion of uncharged jointly undertaken criminal activity in calculating the guideline range, the authors state that “[t]reating concerted activity similarly for sentencing purposes, regardless of how it is charged, is consistent with the ‘real offense’ nature of Relevant Conduct and avoids sentencing disparities that otherwise could result from the exercise of prosecutorial charging discretion.” *Cornerstone* at 509. In addition to suffering again from circularity, this rationale has not been borne out in practice, as prosecutorial power over sentencing has increased as a result of the relevant conduct rules. See U.S. Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 50, 86, 92, (2004) [“*Fifteen Year Review*”]; Part II.C.1, *infra*.

Same course of conduct or common scheme or plan dimension. The “same course of conduct or common scheme or plan” dimension of § 1B1.3(a)(2) requires district courts to include uncharged, dismissed, and acquitted offenses when calculating the guideline range for those offenses that are “of a character for which § 3D1.2(d) would require grouping of multiple counts,” such as theft, fraud, drugs, tax offenses, etc. While the explanation is unclear, it eventually becomes apparent that this is not limited to acts during, in preparation for, or in the course of attempting to avoid detection or responsibility for the offense of conviction. *Id.* at 514-16. The authors do not explain how this provision furthers the purposes of sentencing. They say simply that “[i]n such cases ‘the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained,’ is the most appropriate means of assessing the seriousness of the offense behavior.” *Cornerstone* at 514. For this conclusion, they cite a post-guideline case that merely states that the distinction between theft and robbery “reflects the guidelines’ position.” *Id.* at 514 n.102.

As for any link to past practice, the authors first refer to “same course of conduct” and “common scheme or plan” as having “some analog in Federal Rule of Criminal Procedure 8(a), pertaining to Joinder of Offenses.” They acknowledge that the “same course of conduct or common scheme or plan” dimension is broader than Rule 8(a) in that it “does not require a *connection* between the acts in the form of an overall criminal scheme.” *Id.* at 515 (emphasis in original). The authors then move on to state that the courts of appeals have “uniformly upheld

the application of this third dimension of relevant conduct outside the count of conviction.” *Id.* at 516 n.110 (citing cases).

D. Lower Standard of Proof as Justification for Acquitted Conduct

The Sentencing Reform Act does not state a burden of proof for finding guideline facts. Initially, the Commission recognized that the burden of proof to be used at sentencing was a matter to be determined by the courts.¹¹ Indeed, constitutional procedure is solely for the courts, and the Commission is not a court. *See Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989). Nonetheless, after the relevant conduct rules were in place, the Commission instructed courts on its view of the constitutional standard of proof. In a 1991 amendment to the commentary to § 6A1.3, a policy statement which, like commentary, is not subject to congressional review, *Stinson*, 508 U.S. at 41, the Commission stated that it “believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” USSG, App. C, Amend. 387 (Nov. 1, 1991). As the reason, it said: “This amendment expresses the Commission’s approval of the use of a preponderance of the evidence standard in resolving disputes regarding application of the guidelines to the facts of a case.” *Id.* This amendment “approving” a nationwide preponderance standard followed a decision authored by Judge Wilkins, then Chair of the Sentencing Commission, holding that the government bore the burden of establishing aggravating facts by a preponderance of the evidence and rejecting the “clear and convincing” standard suggested by a certain other courts.¹²

Even if the Commission’s purported pronouncement of a minimally sufficient constitutional standard of proof were not inappropriate, it provides no policy justification for the use of acquitted crimes in calculating the guideline range. As Justice Breyer described it, “the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted,” and “[t]o that extent, the Guidelines’ policy rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.” *United States v. Watts*, 519 U.S. 148, 159 (1997) (Breyer, J., concurring). But, as he pointed out, this is merely a description of the Guidelines’ questionable policy, not a justification for it:

This truth of logic, however, is not the only pertinent policy consideration. The Commission in the past has considered whether the Guidelines should contain a specific exception to their ordinary “relevant conduct” rules that would instruct the sentencing judge not to base a sentence enhancement upon acquitted conduct. . . . Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future.

¹¹ See U.S Sentencing Comm’n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 47 & n.79 (1987), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

¹² *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989).

Id. Rather than revisit the matter, the Commission now cites *Watts* as “holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct,” see USSG § 6A1.3, p.s., comment., thus using an inaccurate description of *Watts*, see *Booker*, 543 U.S. at 240 & n.4, to buttress its misguided policy.

E. Statutory Duty to Consider Commission’s Commentary Excised

The SRA does not expressly authorize the Commission to issue commentary, though Congress did refer to commentary in § 3553(b). See *Stinson v. United States*, 508 U.S. 36, 41 (1993).¹³ When the Supreme Court in *Booker* excised § 3553(b)(1) from the SRA,¹⁴ it removed from the Act any reference directing sentencing courts to consider commentary.¹⁵ As a result, sentencing courts are no longer under a statutory duty to consider commentary, either when calculating the guideline range or when determining the appropriate sentence under § 3553(a). See 18 U.S.C. § 3553(a)(4) (referring to guidelines); *id.* § 3553(a)(5) (referring to policy statements).

This is especially significant in the case of uncharged and acquitted conduct. As set forth above, with the single exception of § 1B1.3(a)(1)(B) (including acts of others in an uncharged conspiracy), the only reference to uncharged or acquitted crimes being used to calculate the guideline range appears in commentary.¹⁶ See USSG § 1B1.3, comment. (n.3); *id.*, comment. (backg’d.). The Commission’s belief that a preponderance of the evidence is the appropriate burden of proof also appears in commentary. See USSG § 6A1.3, comment.

The Supreme Court’s interpretation of the Commission’s commentary as a binding interpretation of its own guideline in *Stinson* no longer controls. First, that decision emanated from the mandatory nature of the guideline system before *Booker*. Second, in reaching its conclusion, the Court relied on the reference to commentary in § 3553(b) as the only suggestion that Congress contemplated that the Commission might issue commentary. See *Stinson*, 508 U.S. at 41. That reference has been excised, and judges need no longer consider what is now in effect unauthorized commentary.

¹³ There, Congress directed courts to consider “official commentary” in determining departures, *i.e.*, “whether a circumstance was adequately taken into consideration” by the Sentencing Commission. 18 U.S.C. § 3553(b).

¹⁴ See *United States v. Booker*, 543 U.S. 220, 245 (2005) (excising § 3553(b)(1) and § 3472(e) in order to remedy the Sixth Amendment violation created by the mandatory nature of the guidelines).

¹⁵ Courts have subsequently found that *Booker* excised by implication a similar reference in § 3553(b)(2). See, *e.g.*, *United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (*en banc*).

¹⁶ The language the Supreme Court pointed to in *Watts* as requiring this practice appears in commentary only. See *United States v. Watts*, 519 U.S. 148, 153 (1997) (quoting language of application note to subsection (a)(2) and background commentary discussing subsection (a)(2)).

II. The Relevant Conduct Guideline and its Commentary “Do Not Exemplify the Commission’s Exercise of Its Characteristic Institutional Role.”¹⁷

The Commission characterizes its relevant conduct rules, which were not required, suggested or reviewed by Congress, as “an admitted policy compromise.” *Fifteen Year Review* at 144; *see also Key Compromises* at 9-12. The “compromise” was radical and one-sided at its inception. The untested theory upon which it was based – to prevent prosecutors from controlling sentencing – has proven to have been wrong and indeed has had the opposite effect. Even before the most radical aspects of the relevant conduct rules had taken hold, Justice Breyer acknowledged that the Commission might have drawn the line in the wrong place and asked for suggestions. *Id.* at 12. Congress directed the Commission to “review and revise” the guidelines “in consideration of comments and data coming to its attention.” *See* 28 U.S.C. § 994(o). The Commission received not only expressions of outrage from judges and experts, but carefully considered and well supported proposals for reform. The Commission has nonetheless retained this highly criticized “cornerstone” of the guideline system, affecting the vast majority of sentences imposed in federal court, while never once articulating, either based on past practice or independent expertise, a sound policy reason for doing so.

A. Not Based on Past Practice or National Experience

Congress directed the Commission to examine average time actually served in the pre-guidelines period as a starting point, but to ensure, independent of those average sentences, that the guidelines met the purposes of sentencing set forth in § 3553(a)(2). *See* 28 U.S.C. § 994(m). Congress expected that “for the most part the average time served should be similar to that served today in like cases.” *See* S. Rep. No. 98-225 at 116 (1983). The relevant conduct provisions requiring the use of uncharged and acquitted crimes in calculating the guideline range were not tied to empirical evidence of past practice or national experience. *See Gall*, 128 S. Ct. at 594 & n.2; *Kimbrough*, 128 S. Ct. at 567. In part as a result of these provisions, sentences under the guidelines far exceed past practice.¹⁸

¹⁷ *Kimbrough*, 128 S. Ct. at 575.

¹⁸ “[E]ither on its own initiative or in response to congressional actions, the Commission established guideline ranges that were significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts.” *See Fifteen Year Review* at 47. For example, prison terms in drug cases are “far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.” *Id.* at 49. The Commission initially estimated that the drug guidelines would add only one additional month to prison sentences, but as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties. *Id.* at 54. Similarly, by 2004, average time served for firearms trafficking and illegal firearms possession had doubled independent of mandatory minimums under § 924(c), *id.* at 139, and much of this is due to the use of cross references to uncharged and acquitted more serious offenses. *See Rankin & May, Traps for the Unwary - Cross References and Guideline Sentencing*, *The Champion* (September/October 2006).

Though the Commission said that judges and the Parole Commission took into account many details of offenders' actual conduct in the pre-Guidelines era, *see* USSG, Ch. 1, Pt. A, ¶ 4(a), the Parole Commission refused to take acquitted conduct into account as a general matter,¹⁹ due to the "perceived unfairness" of this approach.²⁰ Further, during the pre-guideline era, judges were not required to impose additional punishment based on uncharged or acquitted conduct, much less at the same rate as convicted conduct. They were free to, and did, reject information about uncharged and acquitted conduct, and to give it little or no effect, because it was unfair, unreliable, illegally-obtained, or for any other reason.²¹

State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. *See* Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent. Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995) ("Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines."). While some state guideline systems permit the use of *some* facts -- in the nature of details *about* the offense of conviction -- within a guideline grid that caps the sentence based on the offense of conviction, the federal guidelines require that separate offenses of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted. *See* USSC, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996).²²

¹⁹ *See* 28 C.F.R. § 2.19(c) (1980) ("[T]he Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent *admission* or other *clear indication* of guilt.)" (emphasis supplied). Thus, the Parole Commission's limited use of acquitted conduct was based on a more reliable standard than the preponderance of the "probabl[y] accurate" hearsay standard recommended by the Commission. USSG § 6A1.3(a), p.s. & comment. (back'd.).

²⁰ *See* 56 Fed. Reg. 16,269 (adoption of the prohibition "in 1979 reflected a concept of procedural fairness in keeping with the Commission's then-current practice").

²¹ *See, e.g.,* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153, 154 (1993) (district court judge for twelve years before the Guidelines asserting that judges typically discounted unreliable evidence); *United States v. Galloway*, 976 F.2d 414, 444 (8th Cir. 1992) (en banc) (Beam, Lay, Bright, McMillan, JJ., dissenting) (describing pre-Guidelines sentencing in which judges refused to consider "allegations of other crimes of the defendant supported by raw investigative material, reports of second-hand conversations with informants eager to please police, and miscellaneous matters extraneous to the conviction or trial" as unreliable and unfair); *United States v. Johnson*, 658 F.2d 1176, 1179 (7th Cir. 1981) (unfairness of sentencing on the basis of offenses for which the defendant was not charged or convicted is "self-evident"); *United States v. Balano*, 813 F. Supp. 1423, 1425 (W.D. Mo. 1993) (before the Guidelines, judge "always tried scrupulously to avoid giving any material weight to acquitted conduct"); *United States v. Clark*, 792 F. Supp. 637, 649 (E.D. Ark. 1992) (before the guidelines, "if a factor important to sentencing was, after discussion, still denied, it simply was omitted from consideration.").

²² Available at <http://www.ussc.gov/SIMPLE/relevant.htm>.

B. Not Revised in Response to Comments and Proposals from Courts, Practitioners, Experts in the Field

Perhaps more than any other aspect of the Guidelines, the requirement that judges use uncharged and acquitted crimes in calculating the guideline range at the same rate as crimes of conviction has been subject to extensive criticism and repeated calls for reform by judges,²³ commentators,²⁴ and practitioners.²⁵

²³See, e.g., *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring specially) (“The use of acquitted conduct in computing an offender’s sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention.”); *United States v. Lanoue*, 71 F.3d 966, 984 (1st Cir. 1995) (“Although it makes no difference in this case, we believe that a defendant’s Fifth and Sixth Amendment right to have a jury determine his guilt beyond a reasonable doubt is trampled when he is imprisoned (for any length of time) on the basis of conduct of which a jury has necessarily acquitted him.”); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) (arguing, based on Sentencing Reform Act and Senate Report that Congress did not intend even incremental penalties for acquitted conduct); *United States v. Hunter*, 19 F.3d 895, 897-99 (4th Cir. 1994) (Hall, J., concurring) (arguing that punishing a defendant for acquitted conduct “mocks the themes of fair trial and fair sentence that resound in the Fifth, Sixth and Eighth Amendments”); *United States v. Wong*, 2 F.3d 927, 930-42 (9th Cir. 1993) (Norris, J., dissenting) (arguing that Sentencing Commission exceeded its statutory rulemaking authority in mandating punishment for uncharged and acquitted conduct); *United States v. Concepcion*, 983 F.2d 369, 393-96 (2d Cir. 1992) (Newman, J., concurring) (arguing that consideration of acquitted conduct permitted in pre-Guidelines era is inappropriate and unfair under the Guidelines, which mandatorily “price” it at the same level of severity as if there was conviction); *United States v. Silverman*, 976 F.2d 1502, 1519-23, 1527 (6th Cir. 1992) (Merritt, C.J., dissenting) (arguing that mandating punishment for uncharged or unconvicted conduct violates the Due Process Clause and exceeds congressional authorization of incremental punishment only for convicted offense); *United States v. Galloway*, 976 F.2d 414, 428-36, 431 nn.4-5 (8th Cir. 1992) (en banc) (Beam, J., dissenting, joined by Lay, Bright & McMillan, JJ.) (arguing that Sentencing Reform Act does not authorize punishment for unconvicted crimes and 28 U.S.C. § 994(I), authorizing incremental punishment only for convicted crimes, precludes it); *id.* at 436-44 (Bright, dissenting, joined by Arnold, C.J., & Lay & McMillan, JJ.) (punishing separate uncharged crimes, as distinguished from sentencing factors attendant to the crime of conviction, found by a preponderance of the evidence deprives the defendant of fair notice, the right to a jury trial, and liberty on an inadequate standard of proof); *id.* at 445 (Lay, J., dissenting) (arguing that sentencing for uncharged conduct was not authorized by Congress and is a “political aberration of our times and repugnant to the basic principles of fair process and procedure traditionally thought to be indigenous to our federal criminal laws”); *United States v. Restrepo*, 946 F.2d 654, 664-78 (9th Cir. 1991) (en banc) (Norris, J., dissenting, joined by Hug, Pregerson & Nelson, JJ.) (sentencing for uncharged crimes, as distinguished from traditional sentencing factors, found by a preponderance of the evidence, violates the Due Process Clause).

²⁴ See Jon O. Newman, *The New Commission's Opportunity*, 8 Fed. Sent. Rep. 8, 8 (1995) (proposing limiting relevant conduct enhancements to one-third to two-thirds of the normal guideline increment, the precise fraction to be selected by the court); Julie O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. Rev. 1342, 1366 n. 102 (1997) (“Guidelines’ reliance upon drug and dollar amounts as the predominant sentencing factor . . . requires refinement.”); Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 163 (1998) (proposing limiting consideration of non-noticed sentencing factors to choosing a sentence within the Guidelines range or deciding whether to depart); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 457-58 (1993).

²⁵ See, e.g., Letter of Jon Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007, at 20-24 (July 19, 2006), http://www.fd.org/pdf_lib/priority%2071906.pdf; Letter of Jon Sands to Hon. Ricardo Hinojosa Re: Follow-Up on Commission Priorities, at 5-6 (November 27, 2006), available at http://www.fd.org/pdf_lib/LetterFollowUponPriorities112706.pdf.

In explaining the important function of the directive to “review and revise” in response to such comments and criticism, 28 U.S.C. § 994(o), the Senate Report stated as follows:

Subsection [(o)] requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. This revision and refinement of the guidelines will represent the bulk of the Commission’s work once the initial guidelines and policy statements are promulgated. This task will be a formidable one because it includes a continuing effort to refine the guidelines to best achieve the purposes of sentencing. It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation. Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight . . . would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

S. Rep. No. 98-225 at 178 (1983).

In 1996, the Sentencing Commission announced as priorities for the 1996-97 amendment cycle: “(1) Clarifying/streamlining the relevant conduct guideline assuming no substantive policy changes; and (2) developing options to limit the use of acquitted conduct at sentencing. Issues of lower priority that may be further explored during future amendment cycles include: (1) Substantively changing the relevant conduct guideline to limit the extent to which unconvicted conduct can affect the sentence; and (2) increasing the burden of proof at sentencing to a ‘clear and convincing’ standard.”²⁶ Commission staff began to look at the “the success of this modified [real offense] system,” and to “investigate ways of incorporating state practices; *e.g.*, using an offense of conviction system for base sentence determination; providing a limited enhancement for conduct beyond the offense of conviction; or limiting acquitted conduct to within the guideline range.” Newton, *supra*, at *3. Proposals to abolish the use of acquitted conduct were published for comment at various times. *See* 62 Fed. Reg. 152,161 (1997); 58 Fed. Reg. 67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992). The Commission never acted on any of these initiatives, for reasons it did not explain.

In 2001, the Federal Criminal Procedure Committee of the American College of Trial Lawyers published an extensive review of the practical and policy failures of the guidelines’ treatment of uncharged and acquitted offenses. *See The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001). This article is a rich source of historical and

²⁶ *See* 61 Fed. Reg. 34,465 (July 2, 1996).

policy information for use in demonstrating the unsoundness of these provisions. It also documents proposals for reform that had been made thus far, and formally proposed the following changes: (1) eliminate the use of acquitted conduct; (2) substantially discount the rate of uncharged and acquitted conduct under subsection (a)(2); (3) revise the definition of relevant conduct to eliminate cross references to more serious offenses; and (4) clarify that sentencing liability for jointly undertaken activity encompasses only those acts “which are in furtherance of the specific conduct and objectives embraced by the defendant’s specific agreement.” As with previous proposals from judges, experts and practitioners, these were ignored.

The Commission also has not acted to stem the improper spread of commentary stating that acquitted and uncharged conduct should be used only in certain cases. Many courts are either unaware of or overlook the fact that the commentary to the relevant conduct guideline requiring the use of acquitted crimes (and uncharged crimes where there is no jointly undertaken activity) in calculating the guideline range is triggered “solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts.” USSG § 1B1.3(a)(2) (emphasis supplied); *id.*, comment. (n.3) (“Application of this provision [§ 1B1.3(a)(2)] does not require the defendant, in fact, to have been convicted of multiple counts.”); *id.*, comment. (backg’d.) (“Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses,” *i.e.*, offenses described in subsection (a)(2)). *See also Watts*, 519 U.S. at 158-59 (Breyer, J., concurring) (recognizing this limitation). As a result, it is contrary to the guideline and its commentary to use acquitted crimes at all, or uncharged crimes absent a finding of jointly undertaken activity, to calculate the guideline range for offenses that are excluded from USSG § 3D1.2(d), such as bank robbery. Although some courts are careful to make the distinction,²⁷ it often goes unnoticed by the court and parties alike. *See, e.g., United States v. White*, 503 F.3d 487 (6th Cir. 2007) (district court calculated guideline for bank robbery based on acquitted offenses, adding 167 months to what would have been a 97-month sentence), *vacated and rehearing en banc granted by United States v. White*, 2007 U.S. App. LEXIS 28902 (6th Cir. Nov. 30, 2007). While the Commission is often quick to “clarify” when the courts err on the side of leniency, it has not acted to correct this error.

²⁷*See, e.g., United States v. Jones*, 313 F.3d 1019, 1023 (7th Cir. 2002) (explaining that where grouping of an offense is specifically excluded from the operation of § 3D1.2(d), § 1B1.3(a)(2)’s relevant-conduct definition is inapplicable); *United States v. Tory*, No. 95- 50335, 1996 WL 477054, at *3 (9th Cir. Aug. 21, 1996) (holding that, because bank robberies are excluded from § 3D1.2(d), uncharged gun conduct related to a dismissed bank robbery count could not be used as relevant conduct under § 1B1.3 to increase offense level for bank robbery conviction); *United States v. Ashburn*, 38 F.3d 803, 806 (5th Cir. 1994) (because “bank robbery is a non-groupable offense . . . dismissed bank robbery counts could not be considered in the offense level calculation under § 1B1.3(a)(2)”); *United States v. Schneider*, No. 93-30430, 1994 WL 681032, at *3 (9th Cir. Dec. 6, 1994) (noting that because bank robbery is not a groupable offense under § 3D1.2(d), conduct committed by co-conspirator is not included in defendant’s relevant conduct under § 1B1.3(a)(2)).

C. Exemplifies Unsound Judgment

1. *Transfers Power to Prosecutors*

When courts calculate guideline ranges based on uncharged or acquitted crimes, prosecutors enjoy the twin benefits of increased punishment based on a lower standard of proof and inadmissible evidence, and increased power to coerce guilty pleas, as they can obtain the same sentence even if no charge is brought or conviction obtained. The Commission's untested theory for its "real offense" approach was that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining. *See* USSG, Ch. 1, Pt. A, ¶ 4(a). Such concerns are not even theoretically implicated with respect to acquitted crimes because an acquitted offense is charged in an indictment and tried to a jury. The Commission first became aware that the "real offense" guidelines transferred power to prosecutors and created hidden and unwarranted disparity in 1990.²⁸ In 2004, it acknowledged that "real offense" sentencing has shifted sentencing power to prosecutors, and that this has created hidden and unwarranted disparities. *See Fifteen Year Review* at 50, 86, 92.

2. *Creates Unwarranted Disparity*

One of the hidden and unwarranted disparities that the Commission recognized in 2004 is that the "untrustworthy" information upon which uncharged conduct is often based, such as cooperating witness testimony, creates disparity and inconsistency. *Id.* at 50. It also acknowledged that the guideline is applied inconsistently because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result."²⁹

In a sample test administered by Commission researchers for the Federal Judicial Center in 1997, probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.³⁰

²⁸ *See* Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) ("We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system."); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact blacks and interfere with the Commission's mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the Guidelines through plea bargaining, while not "necessarily bad," is "hidden and unsystematic," suggests "significant divergence from the statutory purpose" of the Guidelines, and "occurs in a context that forecloses oversight and obscures accountability").

²⁹ *Fifteen Year Review* at 87.

³⁰ *See* Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997).

In a recent case, two presentence reports prepared by different probation officers based on information provided by the same prosecutor and the same informant assigned a guideline range of 151-188 months to one co-defendant and 37-46 months to the other co-defendant. *See United States v. Quinn*, 472 F. Supp. 2d 104 (D. Mass. 2007). As Judge O'Toole noted:

The possibility of inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines' manner of addressing "relevant conduct."

Moreover, because the "relevant conduct" inquiry is adjunct rather than central to the question of criminal culpability, it is possible that it will be pursued by different investigators with different levels of vigor and thoroughness. In other words, the Guidelines are susceptible to the possibility that the effect of "relevant conduct" on the sentencing range can depend on something as impossible to know as how aggressively someone, whether prosecutor or probation officer or perhaps even judge, has probed to learn information about a defendant's past illegal activities. . . .

The essential scandal of the anomaly as it works in this case is that it directly subverts one of the fundamental objectives of the Guidelines: to reduce disparity in sentences given to similarly situated defendants.

Id. at 111 (footnote omitted).

3. Promotes Disrespect for Law

Punishing a defendant for uncharged or acquitted crimes undermines respect for law, contrary to 18 U.S.C. § 3553(a)(2)(A). The Supreme Court has called it an "absurd result" that a person could be sentenced "for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene."³¹ But that is precisely what occurs under the "relevant conduct" guideline and its commentary. The equivalent of conviction is obtained without the basic rudiments of due process assumed to apply in our criminal justice system, based on information that is often unreliable, as the Commission has recognized. In the case of acquitted crimes, the jury's verdict is, as a matter of perception and for all practical purposes, overturned.

This erodes the moral authority of the criminal justice system, is directly contrary to what ordinary citizens take for granted, and promotes contempt for law, as many courts and judges have noted.³² Justice Breyer too has indicated that the Guidelines' treatment of acquitted conduct

³¹ *See Blakely v. Washington*, 542 U.S. 296, 306 (2004).

³² *See United States v. Canania*, ___ F.3d ___, 2008 WL 2717675, at *10-11 (8th Cir. July 14, 2008) (Bright, J., concurring) (referring to "the unfairness perpetuated by the use of 'acquitted conduct'" as "uniquely malevolent" and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v. Settles*, ___ F.3d ___, 2008 WL 2549841, at *2 (D.C. Cir. June 27, 2008) ("we understand why defendants find it unfair [and] [m]any

is an unsound policy, “given the role that juries and acquittals play in our system.” *Watts*, 519 U.S. at 159 (Breyer, J., concurring).

In a letter to a district court judge published in the *Washington Times* on June 29, 2008, Juror #6 complained bitterly that the defendants were later sentenced based on charges of which the jury had acquitted them: “It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that the defendants are being sentenced not on the charges for which they have been found guilty but in the charges for which the [prosecutor’s] office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case.”³³

The D.C. Circuit recently sympathized with a defendant who said at his sentencing, “I just feel as though, you know, that that’s not right. That I should get punished for something that the jury and my peers, they found me not guilty.” *United States v. Settles*, __F.3d__, 2008 WL

judges and commentators have similarly argued that using acquitted conduct to increase a defendant’s sentence undermines respect for the law and the jury system”); *United States v. Lombard*, 103 F.3d 1, 5 (1st Cir. 1996) (“many judges think that the guidelines are manifestly unwise, as a matter of policy, in requiring the use of acquitted conduct;” though a “lawyer can explain the distinction logically,” as a “matter of public perception and acceptance, the result can often invite disrespect for the sentencing process.”); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) (“[T]his justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The ‘law,’ however, has retreated from that standard into its own black hole of abstractions.”); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) (“[T]his is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, ‘Acquittal first, sentence afterwards.’”); *United States v. Hunter*, 19 F.3d 895, 897-98 (4th Cir. 1994) (Hall, J., concurring) (“As regards uncharged ‘relevant’ conduct, this pricing [at exactly the same level of severity as convicted conduct] is at best a poor policy choice; as regards charges on which the jury has acquitted the defendant, it is just wrong.”); *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J., dissenting from denial of petition for rehearing en banc) (a “just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”); *United States v. Boney*, 977 F.2d 624, 647 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) (“[T]his conceptual nicety might be lost on a person who . . . breathes a sigh of relief when the not guilty verdict is announced without realizing that his term of imprisonment may nevertheless be ‘increased’ if, at sentencing, the court finds him responsible for the same misconduct.”); *United States v. Galloway*, 976 F.2d 414, 437 (8th Cir. 1992) (*en banc*) (“If the former Soviet Union or a third world country had permitted [sentencing based on uncharged offenses], human rights observers would condemn those countries.”); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”), *rev’d*, 2008 WL 895660 (4th Cir. Apr. 1, 2008); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (S.D. Ohio 2005) (“A layperson would undoubtedly be revolted by the idea that, for example, a person’s sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.”).

³³ Jim McElhathtton, *A \$600 drug deal, 40 years in prison*, *Washington Times*, June 29, 2008, <http://video1.washingtontimes.com/video/docs/letter.pdf>; see *Canania*, __ F.3d at __, 2008 WL 2717675 at *11 & n.4 (Bright, J., concurring) (quoting the letter from Juror # 6 as evidence that the use of acquitted conduct is perceived as unfair).

2008 WL 2549841 *2 (D.C. Cir. June 27, 2008). Congress was concerned about respect for law from both the public's and the defendant's perspective. In discussing that concern, as elsewhere, the Senate Report tied an offender's respect for law to the offense of which he was convicted:

From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.

S. Rep. 98-225, at 75-76 (1983).

Although as a matter of procedure, district courts may be required to calculate the guideline range using uncharged and acquitted crimes if found by a preponderance of the evidence,³⁴ they are free to vary from the resulting guideline range because this Commission policy promotes disrespect for law. See *Kimbrough*, 128 S. Ct. at 568 (in upholding district court's decision to vary from the 100-to-1 crack-to-powder ratio, quoting the Commission's 2002 report to Congress that the 100-to-1 crack-powder disparity "foster[ed] disrespect for and lack of confidence in the criminal justice system"); see also *id.* at 570; *Settles*, ___ F.3d at ___, 2008 WL 2549841 *3 (judges are allowed to vary downward "when [they] do not find the use of acquitted conduct appropriate").

³⁴ See *United States v. Ibang*, 2008 WL 895660 (4th Cir. Apr. 1, 2008) (holding that, under *Gall*, "the court committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process; vacating and remanding "for resentencing in accordance with the guidance provided by *Gall* and *Kimrough*"); see also *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005) ("[D]istrict courts remain statutorily obliged to calculate Guidelines ranges in the same manner as before *Booker* and to find facts relevant to sentencing by a preponderance of the evidence" and "consistent with that obligation, district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct"; remanding to district court with directions to "consider all facts relevant to sentencing it determines to have been established by a preponderance of the evidence as it did pre-*Booker*, even those relating to acquitted conduct, consistent with its statutory obligation to consider the Guidelines"); *United States v. Zuni*, 506 F. Supp. 2d 663, 681 (D.N.M. 2007) (even though the jury acquitted the defendant of sexual assault, determining that under Tenth Circuit precedent and *Watts*, "[the court] is obligated to consider all the evidence in the record and determine by a preponderance of the evidence whether sexual assault was committed in this case"). But see *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 938-39 (N.D. Iowa 2006) (reading Eighth Circuit precedent and *Watts* to mean that a district court has the discretion not to consider acquitted conduct in calculating the guideline range, but acknowledging in the alternative that it may still be required to do so and departing downward to vitiate its effects); *United States v. Quinn*, 472 F. Supp. 2d 104, 112 (D. Mass. 2007) (rejecting the PSR's correctly calculated guideline range based on uncharged prior offenses where co-defendant's PSR did not include that same conduct, reasoning that the court is not required to follow the guideline's advice when "its acceptance would be unreasonable").

III. CONSTITUTIONAL CHALLENGES

A. Right To Jury Trial

1. *Sentencing Based on Acquitted Crimes Poses a Unique Threat to the Framers' Intent that the Right to Jury Trial Function as Both an Individual Right and a Structural Allocation of Political Power to the People.*

The Framers guaranteed an absolute right to trial by jury in both the original Constitution and the Bill of Rights. *See* U.S. Const. Art. III, § 2, cl. 3, U.S. Const. Amend. 6. As the Supreme Court unanimously explained in *United States v. Gaudin*, 515 U.S. 506 (1995), the “right was designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors . . . as the great bulwark of their civil and political liberties.’” *Id.* at 510-11, quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873). To effectuate the jury’s purpose, “‘the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors.’” *Id.* at 510, quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (“Blackstone”), the jury “‘must unanimously concur in the guilt of the accused before a legal conviction can be had,’” *id.* at 510, quoting 2 J. Story, *Commentaries on the Constitution of the United States* 541, n. 2 (4th ed. 1873), and its “constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.” *Id.* at 514. *Accord* *United States v. Booker*, 543 U.S. 220, 230, 237, 238-39, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-02, 306-07, 313 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

The Framers intended the jury to “stand between the individual and the power of the government.” *Booker*, 543 U.S. at 237. They “knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.” *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). They “understood the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases.” *Booker*, 543 U.S. at 238-39, quoting *The Federalist* No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton). They “carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta.” *Id.* at 239.

Colonial juries played a crucial role in resisting English authority before the Revolution, acquitting and mitigating the fixed punishments then in effect in politically motivated trials. “This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as ‘pious perjury’ on the jurors’ part.” *Jones v. United States*, 526 U.S. 227, 245 (1999), citing 4 Blackstone 238-39. Measures to bar the right to jury trial and to limit opportunities for jury nullification were attempted, resisted, and eventually unsuccessful, leaving juries in control of both the factfinding role and the ultimate verdict by applying law to fact. *Id.* at 247-48.

In this context, the Framers intended the right to jury trial as both an individual right of persons accused of crime, and a structural allocation of political power to the citizenry. To function as intended, the jury was to “confirm the truth of every accusation” and “draw the ultimate conclusion of guilt or innocence,” *Gaudin*, 515 U.S. at 510, 514, and punishment was to be derived from the jury verdict alone. *Blakely*, 542 U.S. at 306; *see also Apprendi*, 530 U.S. at 479-80 & n.5. Only then could the jury “exercise the control that the Framers intended” and “the people’s ultimate control . . . in the judiciary” be assured. *Blakely*, 542 U.S. at 306. “The jury could not function as the circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” *Id.* at 306-07 (emphasis in original).

a. Right to have a jury confirm or reject every accusation

All nine justices in *Booker* agreed that, at least as to elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. 543 U.S. at 239; *id.* at 327-28 (Rehnquist, C.J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, to acquit even in the face of guilt, and to partially acquit to lessen unduly harsh punishment, only to allow an administrative agency, prosecutor and judge to then nullify the jury’s acquittal. Doing so eviscerates the “fundamental reservation of power” in the jury and prevents it from “exercis[ing] the control that the Framers intended.” *Blakely*, 542 U.S. at 306. And doing so by ignoring the “[e]qually well founded ...companion right to ... proof beyond a reasonable doubt” is no answer. *Apprendi*, 530 U.S. at 478. Like other “inroads upon the sacred bulwark of the nation,” the logical possibility that different standards of proof applied by jury and judge might produce different results is “fundamentally opposite to the spirit of our constitution.” *Booker*, 543 U.S. at 244, quoting 4 Blackstone 343-44.

b. Right to a sentence wholly authorized by the jury’s verdict

The Sixth Amendment guarantees a sentence that is wholly authorized by the jury’s verdict. *See Cunningham v. California*, 127 S. Ct. 856, 869 (2007) (“If the jury’s verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied.”); *Blakely*, 542 U.S. at 306 (*Apprendi* “ensures that the judge’s authority to sentence derives wholly from the jury’s verdict”); *Apprendi*, 530 U.S. at 483 n.10 (“The judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.”). The following history demonstrates that the use of acquitted crimes to calculate a defendant’s guideline range violates that guarantee. When a court uses acquitted crimes to calculate a determinate guideline sentence, the court “is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved,” and “they are facts comprising different crimes, each in a different count.” *United States v. Pimental*, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005).

Determinate Jury Factfinding. When the right to jury trial was established in this country, the punishment for a felony was specified by the law defining the offense and the judge simply pronounced judgment without finding facts or exercising discretion; the sentence was thus dictated by the jury's verdict. *Apprendi*, 530 U.S. at 478-81 & n.5 (citing authorities); *Jones*, 526 U.S. at 244 (citing authorities).

Indeterminate Judicial Sentencing. In the 19th century, there was a shift from statutes with fixed-term sentences to statutes allowing complete judicial sentencing discretion within a statutory range. *Apprendi*, 530 U.S. at 481. The aim of such "indeterminate" sentencing was "[r]eformation and rehabilitation."³⁵ *Williams v. New York*, 337 U.S. 241, 248-49 (1949). The judge was not required to find or give any weight to facts in imposing sentence, and could impose sentence "giving no reason at all." *Id.* at 252. In *Williams*, the defendant did not attempt to challenge the accuracy of the allegations or ask the judge to disregard them. *Id.* at 244. In this context, the Supreme Court held that a judge could rely on "out-of-court" sources without offending due process. *Id.* at 248, 252.

Determinate Judicial Factfinding Before *Apprendi*, *Blakely* and *Booker*. The U.S. Sentencing Guidelines created a hybrid system in which facts with both a determinate and mandatory effect were found by a judge, and (according to the Commission) by a preponderance of the evidence. This scheme, and similar state systems,³⁶ operated undisturbed for many years. The Supreme Court then held, based on extensive examination of the historical underpinnings of the rights to jury trial and to proof beyond a reasonable doubt, that a judge may not find facts by a preponderance of the evidence that expose a defendant to punishment that is not wholly authorized by the jury's verdict. *See Apprendi*, 530 U.S. at 482-83 & n.10, 490, 494, 496; *Blakely*, 542 U.S. at 303-04, 305; *Booker*, 543 U.S. at 244.

Before this line of cases, however, the Supreme Court held that the use of uncharged and acquitted crimes to calculate the guideline range did not violate the Double Jeopardy Clause. *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*); *Witte v. United States*, 515 U.S. 389 (1995). In response to the government's argument that these cases precluded the application of *Blakely* to the Guidelines, the majority in *Booker* emphasized that both cases were decided under the Double Jeopardy Clause, that in neither case "was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," that "*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument," and that "[i]t is unsurprising that we failed to consider fully the issues presented to us in these cases." *Booker*, 543 U.S. at 240 & n.4. Indeed, *Watts* could not

³⁵ The judge's function was "similar to that of a social worker or doctor exercising clinical judgment." Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 *Suffolk U. L. Rev.* 419, 425 (1999).

³⁶ No state system required or allowed uncharged or acquitted crimes to be used in calculating the guideline range. *See Part II.A, supra.*

stand under the Supreme Court’s subsequent Fifth and Sixth Amendment jurisprudence.³⁷ Thus, a court would not, as the government commonly contends, be “overruling” Supreme Court precedent in holding that the use of acquitted conduct violates the right to jury trial.

Further, the very premise of *Watts* has now been rejected by the Court. In 1970, Congress codified *Williams v. New York* in 18 U.S.C. § 3577 (“[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider”), then recodified it to 18 U.S.C. § 3661 in the Sentencing Reform Act. The *Watts per curiam* opinion was premised on the notion that § 3661 and *Williams* precluded a prohibition on the use of acquitted conduct in sentencing, even to increase the guideline range, because, it thought, “[t]he Guidelines did not alter this aspect of the sentencing court’s *discretion*,” 519 U.S. at 151-52 (emphasis supplied), an odd choice of words in a case in which the judge was required to increase the sentence by a pre-determined number of months. Justice Stevens maintained that Congress did not authorize, nor did the Constitution allow, the use of acquitted conduct under § 3661’s “no limitation” principle *except* to choose a sentence within the guideline range, the only area where the court had unfettered discretion. *Id.* at 160-62 (Stevens, J., dissenting). Justice Breyer did not believe that § 3661 required the use of acquitted conduct in calculating the guideline range, suggesting that the Commission abolish it. *Id.* at 159 (Breyer, J., concurring).

When the Court later addressed whether determinate sentencing violated the Sixth Amendment, Justice Stevens turned out to have been correct. *Williams*, the Court said, provided no support for judicial factfinding in a determinate guideline system because it “involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record,” and the judge could “giv[e] no reason at all” for the sentence imposed. *Blakely*, 542 U.S. at 305 (internal citations and quotation marks omitted). “Indeterminate sentencing does not . . . infringe[] on the province of the jury” because any facts a judge “may implicitly rule on” in such a system “do not pertain to whether the defendant has a *right* to a lesser [guideline] sentence.” *Id.* at 308-09 (emphasis in original). A “right” to a lesser sentence, the Court explained, meant that “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.” *Blakely*, 542 U.S. at 305 n.8 (emphasis in original). The same applies to a guideline system in which judges are required to use acquitted conduct in calculating a determinate guideline range, as they are today.

³⁷ Justice Breyer’s mention of *Watts* in the course of his description in *Booker* of the Guidelines *before* they were held to violate the Sixth Amendment does not support the government’s usual argument that *Watts* controls the outcome of the Sixth Amendment question. Indeed, his policy rationale for “real offense” sentencing in “tried cases” was that judges should not be deprived “of the ability to use post-verdict-acquired real-conduct information,” or “conduct the prosecutor chose [not] to charge,” *Booker*, 543 U.S. at 256, which does not apply to offenses that were charged, tried, and rejected by the jury. Further, he and three other justices agreed with the other five that a jury must confirm the truth of elements of charged crimes. *Id.* at 327-28 (Rehnquist, C.J., dissenting). In *Watts* itself, even without briefing or argument and three years before *Apprendi*, Justice Breyer recognized that the Guidelines’ treatment of acquitted conduct collides with the right to a jury determination of guilt or innocence. *See Watts*, 519 U.S. at 159 (Commission should revisit the issue “[g]iven the role that juries and acquittals play in our system.”) (Breyer, J., concurring); *see also id.* at 170 (use of acquitted conduct “raise[s] concerns about undercutting the verdict of acquittal”) (Kennedy, J., dissenting).

Determinate Judicial Factfinding After Booker, Rita and Gall. The remedial opinion in *Booker* made the guidelines “advisory,” 543 U.S. 245-46 (as modified, the SRA “requires a sentencing court to consider Guidelines ranges, but it *permits* the court to tailor the sentence in light of [the] other statutory concerns as well”) (emphasis supplied), but factfinding under the guidelines remains determinate. The “district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and “to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 128 S. Ct. 586, 596 (2007). When the judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance,” must give “a more significant justification [for] a major departure . . . than a minor one,” and “must adequately explain the chosen sentence.” *Id.* at 597.

In other words, to “calculate” the guideline range “correctly,” the judge *must* re-examine crimes rejected by the jury under a preponderance standard, and once the judge finds that the defendant committed an acquitted crime under that standard, he *must* assign the number of points the Guidelines require. The judge’s fact finding is determinate; he has no discretion not to “calculate” the guideline range “correctly,” *i.e.*, as the Guidelines require. The judge *must* then use this “calculation” as the “starting point and the initial benchmark,” and *must* justify any “deviation” from it with a sufficiently compelling reason. This authority to “deviate” from the determinate guideline range makes the guidelines “advisory,” but it does not make them indeterminate. Further, the judge’s fact finding necessarily affects sentence length because the guideline range is the only § 3553(a) factor with a number affixed and it is the “benchmark” from which both sentencing and appellate review proceed. *Gall*, at 596-97 (appellate courts review “the degree of variance” and “the extent of a deviation from the Guidelines”).³⁸ By contrast, the “indeterminate-sentencing regime upheld in *Williams* . . . allowed a judge (but did not compel him) to rely on [extra-record] facts,” or “no reason at all.” *Blakely*, 542 U.S. at 305.

When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the offense of conviction, and “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.” *Blakely*, 542 U.S. at 305 n.8 (emphasis in original). *See also Cunningham*, 127 S. Ct. at 863-64 (“under the Sixth Amendment, any fact that *exposes* a defendant to a greater *potential* sentence must be found by a jury, not a judge.”) (emphasis supplied).

³⁸ A study of appellate decisions after *Booker* shows that 98.6% of within-guideline sentences appealed by defendants were affirmed, and 78.3% of below-guideline sentences appealed by the government were reversed. *See Court of Appeals Review 12/1/05-11/30/06* at 2, available at www.fd.org/CourtOfAppealsReview12.1.05-11.30.06.pdf. In the first quarter of 2007, only 11.9% of all sentences were non-government-sponsored below-guideline sentences, 1.5% were above-guideline sentences, and 86.7% were within-guideline or government-sponsored below-guideline sentences. U.S. Sentencing Commission, Preliminary Quarterly Data Report, http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf; *see also Canania*, ___ F.3d at ___, 2008 WL 2717675 at *11 (Bright, J., concurring) (despite the advisory nature of the guidelines, the “reality” is that “federal district court judges are often acting as automatons-mechanically enhancing sentences with ‘acquitted conduct,’ . . . [s]o that, in effect, the Guidelines, with respect to ‘acquitted conduct,’ remain very much mandatory.”).

2. *The Door Is Open to As-Applied Sixth Amendment Challenges to the Use of Uncharged and Acquitted Conduct.*

The *Booker* remedy did not foreclose all Sixth Amendment challenges to the advisory guidelines. While an appellate court may presume a within-Guidelines sentence to be reasonable, *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007), there are cases in which a sentence could not be upheld as reasonable absent a judicial finding of fact not found by the jury, and if so, it violates the Sixth Amendment. See *Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring); *id.* at 2473 (Stevens, J., concurring). “The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.” *Gall*, 128 S. Ct. at 603 (Scalia, J. concurring). In other words, unless the appellate court can say that it would uphold the defendant’s enhanced sentence as reasonable absent the district court’s finding that an uncharged or acquitted crime occurred, the sentence violates the Sixth Amendment.³⁹

3. *Canon of Constitutional Avoidance*

As established in Part I.A, the SRA did not authorize the use of acquitted crimes or uncharged crimes in calculating the guideline range. Even assuming that congressional intent in this regard was somehow ambiguous, the courts should apply the canon of constitutional avoidance to avoid the serious Sixth Amendment problems created by the Commission’s interpretation.

Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court’s duty is to adopt the latter. *Jones v. United States*, 526 U.S. 227, 239 (1999). The avoidance canon “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Martinez v. Clark*, 543 U.S. 371, 381 (2005). It “is a means of giving effect to congressional intent, not of subverting it.” *Id.* at 382.

Applying the avoidance canon to the SRA, the courts should presume that Congress did not intend for the Commission to require the use of acquitted crimes in calculating the guideline range. This is especially so where an agency adopts an interpretation in the “absence of an affirmative intention of Congress clearly expressed.” See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504, 507 (1979); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.*

³⁹ See *United States v. Conatser*, 514 F.3d 508, 530-31 (6th Cir. 2008) (Moore, J., concurring) (recognizing the viability of as-applied Sixth Amendment challenge in the wake of *Rita* and in light of the appellate presumption of reasonableness, but would have upheld the life sentence imposed by the district court even without the factual findings underlying the cross reference to second degree murder guideline).

& *Constr. Trades Council*, 485 U.S. 568, 575 (1988); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002).

In regard to as-applied challenges involving either acquitted or uncharged crimes, the Court in *Rita* recognized the potential application of the doctrine of constitutional avoidance in *Clark v. Martinez* as it debated whether the canon should be applied in that case, since *Rita* itself did not qualify for an as-applied Sixth Amendment challenge, though other cases described by Justice Scalia would. See *Rita v. United States*, 127 S. Ct. 2456, 2466-67 (2007); *id.* at 2473 (Stevens, J., concurring); *id.* at 2478-79 & n.4 (Scalia, J., concurring). A guideline sentence that could not be upheld but for a judicial finding that an acquitted or uncharged separate offense occurred is just the case Justice Scalia foretold.

B. Right to Proof Beyond a Reasonable Doubt

The Sixth Amendment arguments above stand on their own without a Fifth Amendment argument. The courts of appeals have not been receptive to the argument that a higher burden of proof is required, particularly after *Booker* and its progeny. We include the Fifth Amendment argument here nonetheless.

The requirement of proof beyond a reasonable doubt under the Fifth Amendment Due Process Clause protects against factual error whenever a potential loss of liberty is at stake, regardless of the identity of the factfinder or whether the finding results in “conviction” of a “crime.” *In re Winship*, 397 U.S. 358, 363-64, 368 (1970) (beyond a reasonable doubt standard required for fact finding by a judge in a juvenile delinquency adjudication). The Supreme Court has long held that facts to which the reasonable doubt standard applies are not just those that go to guilt or innocence, but those that increase punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975).

The Supreme Court has recently reaffirmed these principles: “Since *Winship*, we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’ This was a primary lesson of *Mullaney*.”⁴⁰ 530 U.S. at 484; see also *Jones*, 526 U.S. at 240-43 & n.6; *Cunningham*, 127 S. Ct. at 863-64 (referring to independent right to proof beyond a reasonable doubt and tracing origins of recent Sixth Amendment jurisprudence to doctrinal discussions of *Winship* and *Mullaney* in *Jones*).

Though the Supreme Court has considered the Fifth Amendment right to proof beyond a reasonable doubt alongside the Sixth Amendment jury trial right, *Apprendi*, 530 U.S. at 478, it remains clear that the Fifth Amendment due process right remains distinct, *id.* at 476-77, and applies equally to judicial factfinding. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (despite the absence of jury factfinding, judge’s use of the reasonable doubt standard assured that accuracy was not seriously diminished). Thus, *Booker*’s resolution of the Sixth Amendment

⁴⁰ The Court has distinguished *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) as involving a finding that resulted in a mandatory minimum sentence but did not expose the defendant to additional punishment, within a range in which judicial discretion was otherwise entirely unfettered. See *Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 242.

issue did not address what standard of proof a *judge* must use under the Fifth Amendment to find facts that expose a defendant to additional loss of liberty. *Texas v. Cobb*, 532 U.S. 162, 169 (2001) (“Constitutional rights are not defined by inferences from opinions which did not address the question at issue.”).

A judicial finding of uncharged or acquitted crimes by a preponderance of the evidence undeniably exposes the defendant to additional loss of liberty. The guideline range is the only § 3553(a) factor with a numerical value. A judge who does not increase that range based on such a finding will be reversed for incorrectly calculating the guideline range. *Gall*, 128 S. Ct. at 596. Absent that finding, moreover, the sentence may be reversed as unreasonably long. *Id.* at 602-03 (Scalia, J., concurring).

The Guidelines require judges to consider uncharged, dismissed and acquitted conduct at a lower standard of proof through the Commission’s 1991 addition to the commentary to a policy statement asserting that “[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements . . . in resolving disputes regarding application of the guidelines to the facts of a case.” USSG § 6A1.3, p.s., comment. (backg’d.). At least according to Justice Thomas, the Commission’s belief is mistaken. *Booker*, 543 U.S. at 319 n.6 (Thomas, J., dissenting).

The Court’s recent decision in *Irizarry v. United States*, ___ U.S. ___, 2008 WL 2369164 (June 12, 2008) should not undermine this argument. There, the Court said that the due process concerns that motivated it to interpret Rule 32 to require notice of the judge’s intention to depart upward – an expectation of a sentence within the guideline range which gave rise to a special need for notice – did not extend to a judge’s intention to sentence outside the guideline range pursuant to a so-called “variance,” because “there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. under § 3553(a).” *Irizarry*, at *4. However, there is still a right to notice of the *factual* basis for a particular sentence, and to fair and accurate resolution of such *facts*, as the Court was careful to note. *Id.* at **5-6 & n.2. Further, it is “significant procedural error” to “select[] a sentence based on clearly erroneous facts.” *Gall*, 128 S. Ct. at 597. Because the risk of factual error when liberty is at stake is what animates the Fifth Amendment beyond a reasonable doubt requirement, the argument remains intact after *Irizarry*.

C. Right to Fair Notice of the Effect of Jury Verdict on Sentence

In a recent concurring opinion, Judge Bright of the Eighth Circuit Court of Appeals suggested that the use of acquitted conduct to enhance a sentence violates the Due Process Clause of the Fifth Amendment due to lack of fair notice of the effect of the jury verdict. *United States v. Canania*, ___ F.3d ___, 2008 WL 2717675, at *10 (8th Cir. July 14, 2008) (Bright, J., concurring). As he explained,

the consideration of “acquitted conduct” undermines the notice requirement that is at the heart of any criminal proceeding. A defendant should have fair notice to know the precise effect a jury’s verdict will have on his punishment. It cannot

possibly satisfy due process to permit the nullification of a jury's not guilty verdict, with respect to any given charge, by allowing a judge to thereafter use the same conduct underlying that charge to enhance a defendant's sentence. It is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no determinative role in his sentencing. Otherwise, a defendant can never reasonably know what his possible punishment will be. In determining guilt or innocence, the jury thus serves not only as a fact-finder but as a means of providing a defendant with notice as to his possible punishment. And a judge's subsequent use of "acquitted conduct" all but eviscerates this latter notice function.

Id.

APPENDIX

Selected Amendment History of USSG §§ 1B1.3 and 1B1.4

I. USSG § 1B1.337
II. USSG § 1B1.459

I. USSG § 1B1.3

There was no relevant conduct guideline as such in the initial set of guidelines sent to Congress in May of 1987. *See* 52 Fed. Reg. 18,046 (May 13, 1987). Rather, it was a general principle contained in Chapter Two, pertaining specifically to offense conduct:

Chapter Two – Offense Conduct

Overview

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level. When a particular offense warrants a more individualized sentence, specific offense characteristics are provided within the guidelines. Certain factors relevant to criminal conduct that are not provided in specific guidelines are set forth in Chapter Three, Part A (Victim-Related Adjustments) and Chapter Five, Part K (Departures). The statutes appearing at the beginning of each part are illustrative and do not necessarily include all the statutes covered by the guidelines in that part.

General Principles Governing Chapter Two

* * *

§ 202. Relevant Conduct

To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken into account.

(a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means:

Acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

(b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

COMMENTARY

Prior to sentencing, a judge should consider all relevant offense and offender characteristics. Relevant offense characteristics are determined in the present chapter; relevant offender characteristics, which may include other similar misconduct, are determined under Chapter Three (Adjustments), and Chapter Four (Criminal History). For purposes of Chapter Two, relevant defendant conduct is restricted to the following:

1. Conduct directed toward preparation for or commission of the offense of conviction, and efforts to avoid detection and responsibility for the offense of conviction;
2. Conduct indicating that the offense of conviction was to some degree part of a broader purpose, scheme, or plan;
3. Conduct that is relevant to the state of mind or motive of the defendant in committing the crime;
4. Conduct that is relevant to the defendant's involvement in crime as a livelihood.

The first three criteria are derived from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes “of the same or similar character,” and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be “relevant to the offense of conviction” under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History) and Chapter Five, Part K (Departures). This construction is consistent with the existing rule that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence,” 18 U.S.C. 3577, so long as the information “has sufficient indicia of reliability to support its probable accuracy.” *United States v. Marshall*, 519 F.Supp.751 (D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983).

The last of these criteria is intended to ensure that a judge may consider at sentencing, information that, although not specifically within other criteria of relevance, indicates that the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. 994(d)(11).

52 Fed. Reg. 18,046 (May 13, 1987) (as sent to Congress).

October 1987

Guideline § 1B1.3 was initially distributed in October 1987 in loose-leaf format as part of “technical and conforming amendments,” *see* 52 Fed. Reg. 44,674 (Nov. 20, 1987). It was identical in substance to the general principle in the overview of Chapter Two, but now appeared in Chapter One, Part B, under the heading “General Application Principles.”

§ 1B1.3. Relevant Conduct

To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken into account.

(a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means:

Acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant’s state of mind or motive in committing the offense of conviction, or (3) indicate the defendant’s degree of dependence upon criminal activity for a livelihood.

(b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

Commentary

Application Note:

1. In sentencing, the court should consider all relevant offense and offender characteristics. For purposes of assessing offense conduct, the relevant conduct and circumstances of the offense of conviction are as follows:

- a. conduct directed toward preparation for or commission of the offense of conviction, and efforts to avoid detection and responsibility for the offense of conviction;
- b. conduct indicating that the offense of conviction was to some degree part of a broader purpose, scheme, or plan;
- c. conduct that is relevant to the state of mind or motive of the defendant in committing the crime;
- d. conduct that is relevant to the defendant’s involvement in crime as a livelihood.

The first three criteria are derived from two sources, *Rule 8(a) of the Federal Rules of Criminal Procedure*, governing joinder of similar or related offenses, and *Rule 404(b) of the Federal Rules of Evidence*, permitting admission of evidence of other crimes to establish motive,

intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes “of the same or similar character,” and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be “relevant to the offense of conviction” under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History and Criminal Livelihood) and Chapter Five, Part H (Specific Offender Characteristics). This construction is consistent with the existing rule that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense * * * for the purpose of imposing an appropriate sentence,” 18 U.S.C. 3577, so long as the information “has sufficient indicia of reliability to support its probable accuracy.” *United States v. Marshall*, 519 F. Supp. 751 (D. Wis. 1981), *aff’d*, 719 F.2d 887 (7th Cir. 1983).

The last of these criteria is intended to ensure that a judge may consider at sentencing, information that, although not specifically within other criteria of relevance, indicates that the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. 994(d)(11).

January 15, 1988
Amendment 3

[This amendment deleted the entire text of § 1B1.3 and replaced it with the following new guideline.]

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) All acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) Solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) All harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;

- (4) The defendant's state of mind, intent, motive and purpose in committing the offense; and
- (5) Any other information specified in the applicable guideline.

(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

Commentary

Application Notes:

1. Conduct "for which the defendant is otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. *18 U.S.C. 2.*) If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. See generally §§ 2X1.1-2X4.1.

2. "Such acts and omissions," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to § 3D1.2(d); multiple convictions are not required.

3. "Harm" includes bodily injury, monetary loss, property damage and any resulting harm.

4. If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., § 2K1.4 (Arson); § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., § 2A2.2 (Assault); § 2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., § 2F1.1 (Fraud); § 2X1.1 (Attempt, Solicitation or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with § 2X1.1 (Attempt, Solicitation or Conspiracy) and the applicable offense guideline.

5. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. E.g., in § 2K2.3, a base offense level of 12 is used "if convicted under *26 U.S.C. 5861.*" Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. Examples of this usage are found in § 2K1.3(b)(4) ("if the defendant was a person prohibited from receiving explosives under *18*

U.S.C. 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under *18 U.S.C. 842(i)*, increase by 10 levels”); and § 2A3.4(b)(2) (“if the abusive contact was accomplished as defined in *18 U.S.C. 2242*, increase by 4 levels”).

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas § 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by § 1B1.2(a)). No such rule of construction is necessary with respect to Chapter Four because the guidelines in that Chapter are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they are part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of

the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent “double counting” of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of the defendant’s “state of mind, intent, motive or purpose in committing the offense.” The defendant’s state of mind is an element of the offense that may constitute a specific offense characteristic. See, e.g., § 2A1.4 (Involuntary Manslaughter) (distinction made between recklessness and criminal negligence). The guidelines also incorporate broader notions of intent or purpose that are not elements of the offense, e.g., whether the offense was committed for profit, or for the purpose of facilitating a more serious offense. Accordingly, such factors must be considered in determining the applicable guideline range.”.

Reason for Amendment: The purpose of this amendment is to clarify the guideline. The amended language restates the intent of § 1B1.3 as originally promulgated.

November 1, 1989
Amendment 76

Section 1B1.3 is amended in subsection (a)(3) by deleting “or risk of harm” immediately following “all harm”, and by deleting “if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk” and inserting in lieu thereof “and all harm”.

Section 1B1.3(a) is amended by deleting:

“(4) the defendant’s state of mind, intent, motive and purpose in committing the offense; and”,

by renumbering subsection (a)(5) as (a)(4), and by inserting “and” at the end of subsection (a)(3) immediately following the semicolon.

The Commentary to § 1B1.3 captioned “Background” is amended by deleting:

“Subsection (a)(4) requires consideration of the defendant’s ‘state of mind, intent, motive or purpose in committing the offense.’ The defendant’s state of mind is an element of the offense that may constitute a specific offense characteristic. See, e.g., § 2A1.4 (Involuntary Manslaughter) (distinction made between recklessness and criminal negligence). The guidelines also incorporate broader notions of intent or purpose that are not elements of the offense, e.g., whether the offense was committed for profit, or for the purpose of facilitating a more serious offense. Accordingly, such factors must be considered in determining the applicable guideline range.”,

and inserting in lieu thereof:

“Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant’s state of mind; § 2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.”.

The purpose of this amendment is to delete language pertaining to “risk of harm” and “state of mind” as unnecessary. Cases in which the guidelines specifically address risk of harm or state of mind are covered in the amended guideline under subsection (a)(4) [formerly subsection (a)(5)]. In addition, the amendment deletes reference to harm committed “intentionally, recklessly, or by criminal negligence” as unnecessary and potentially confusing. The effective date of this amendment is November 1, 1989.

**November 1, 1989
Amendment 77**

Section 1B1.3 is amended by deleting the introductory sentence as follows: “The conduct that is relevant to determining the applicable guideline range includes that set forth below.”

Section 1B1.3(b) is amended by deleting:

“(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.”,

and inserting in lieu thereof:

“(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.”.

The Commentary to § 1B1.3 captioned “Background” is amended in the second paragraph by deleting “Chapter Four” and inserting in lieu thereof “Chapters Four and Five”, and by deleting “that Chapter” and inserting in lieu thereof “those Chapters”.

The purpose of this amendment is to clarify the guideline.

**November 1, 1989
Amendment 78**

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 1 by deleting:

“If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. *See generally* §§ 2X1.1-2X4.1.”,

and inserting in lieu thereof:

“In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant ‘would be otherwise accountable’ also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant’s agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant’s offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant ‘would be otherwise accountable’ includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$ 15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$ 800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$ 15,000 worth of merchandise. Defendant E is

convicted of forging the \$ 800 check. Defendant E is not accountable for the \$ 15,000 because the fraudulent scheme to obtain \$ 15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$ 20,000. Defendant G fraudulently obtains \$ 35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$ 55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$ 55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I (i.e., the importation of the single shipment of marihuana).”.

The purpose of this amendment is to clarify the definition of conduct for which the defendant is “otherwise accountable.”

November 1, 1989

Amendment 303 (technical and conforming amendments)

The Commentary to § 1B1.3 captioned “Application Notes” is amended in the first sentence of Note 1 by deleting “is” and inserting in lieu thereof “would be”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 4 by deleting “(Assault)” and inserting in lieu thereof “(Aggravated Assault)”, and by deleting “(Fraud)” and inserting in lieu thereof “(Fraud and Deceit)”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 5 by deleting “§ 2K2.3” and inserting in lieu thereof “§ 2K2.2”, by deleting “12” and inserting in lieu thereof “16”, by deleting “convicted under” and inserting in lieu thereof “the defendant is convicted under 18 U.S.C. § 922(o) or “, by deleting “§ 2A3.4(b)(2)” and inserting in lieu thereof “§ 2A3.4(a)(2)”, and by deleting “abusive contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels” and inserting in lieu thereof “offense was committed by the means set forth in 18 U.S.C. § 2242”.

The Commentary to § 1B1.3 captioned “Background” is amended in the fourth sentence of the third paragraph by deleting “are part” and inserting in lieu thereof “were part”.

November 1, 1990
Amendment 309

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 2 by deleting:

“This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to § 3D1.2(d); multiple convictions are not required.”,

and inserting in lieu thereof:

“ ‘Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts,’ as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.”.

The Commentary to § 3D1.2 captioned “Application Notes” is amended in Note 4 by renumbering example (4) as (5); and by inserting, immediately before “But:”, the following:

“(4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under § 1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting.”.

This amendment clarifies the intended scope of § 1B1.3(a)(2) in conjunction with Chapter Three, Part D (Multiple Counts) to ensure that the latter is not read to limit the former only to conduct of which the defendant was convicted. The effective date of this amendment is November 1, 1990.

November 1, 1991
Amendment 389

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 2 in the first sentence by inserting “that were part of the same course of conduct or common scheme or plan as the offense of conviction” immediately following “Such acts and omissions”; and by inserting “, that were part of the same course of conduct or common scheme or plan as the offense of conviction” immediately following “otherwise accountable”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 2 by inserting the following additional paragraph at the end:

“As noted above, subsection (a)(2) applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which § 3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.”.

* * *

The Commentary to § 1B1.3 captioned “Application Notes” is amended by inserting the following additional notes:

“6. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$ 800,000 and a completed theft of \$ 30,000), the offense level is to be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under § 2X1.1(c)(1).

7. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state

prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see § 4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).”.

The Commentary to § 1B1.3 captioned “Background” is amended by deleting the last paragraph as follows:

“This guideline and § 1B1.4 clarify the intent underlying § 1B1.3 as originally promulgated.”.

This amendment makes editorial improvements in Application Notes 1 and 2; inserts an additional paragraph in Application Note 2 to clarify that “offenses of a character for which § 3D1.2(d) would require grouping of multiple counts” is not limited to offenses proscribed by the same statutory provision; conforms a reference in Application Note 4 to the correct title of the guideline; conforms examples in Application Note 5 to amended guidelines and clarifies how a direction to apply a particular factor only if the defendant is convicted of a particular statute applies to the offenses of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, and misprision of felony; inserts an additional application note (Note 6) that highlights the provision in § 2X1.1 dealing with cases of partially completed conduct; inserts an additional application note (Note 7) that clarifies the treatment of conduct for which the defendant has previously been sentenced; and deletes a surplus sentence of Background Commentary more appropriately contained in Appendix C in the paragraph describing the reason for amendment 3.

November 1, 1992 Amendment 439

Section 1B1.3(a) is amended by deleting:

“(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and”

and inserting in lieu thereof:

“(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended by renumbering Notes 2-7 as Notes 3-8, respectively; and by deleting Note 1 as follows:

“1. Conduct ‘for which the defendant would be otherwise accountable,’ as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant ‘would be otherwise accountable’ also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant’s agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant’s offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant ‘would be otherwise accountable’ includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$ 15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$ 800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$ 15,000 worth of merchandise. Defendant E is convicted of forging the \$ 800 check. Defendant E is not accountable for the \$ 15,000 because the fraudulent scheme to obtain \$ 15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$ 20,000. Defendant G fraudulently obtains \$ 35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$ 55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$ 55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed

to jointly undertake with Defendants H and I (i.e., the importation of the single shipment of marihuana).”

and inserting in lieu thereof:

“1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. A ‘jointly undertaken criminal activity’ is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

- (i) in furtherance of the jointly undertaken criminal activity; and
- (ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the ‘jointly undertaken criminal activity’) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery)

and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

(1) Defendant C is the getaway driver in an armed bank robbery in which \$ 15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity

(1) Defendant D pays Defendant E a small amount to forge an endorsement on an \$ 800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$ 15,000 worth of merchandise. Defendant E is convicted of forging the \$ 800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$ 15,000 because the fraudulent scheme to obtain \$ 15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the \$ 800 check).

(2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$ 20,000. Defendant G fraudulently obtains \$ 35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$ 55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.

(3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably

foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).

(6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the

distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 3 (formerly Note 2) by deleting the first sentence as follows:

“ ‘Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction,’ as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction.”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 6 (formerly Note 5) in the first paragraph by deleting:

“For example, in § 2K1.5, subsection (b)(1) applies ‘If the defendant is convicted under 49 U.S.C. § 1472(l)(2).’“,

and inserting in lieu thereof:

“For example, in § 2S1.1, subsection (a)(1) applies if the defendant ‘is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).’“;

and in the second paragraph by deleting:

“For example, § 2K1.5(b)(1) (which is applicable only if the defendant is convicted under 49 U.S.C. § 1472(l)(2)) would be applied in determining the offense level under § 2X3.1

(Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 49 U.S.C. § 1472(1)(2).”,

and inserting in lieu thereof:

“For example, § 2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended by inserting the following additional notes:

“9. ‘Common scheme or plan’ and ‘same course of conduct’ are two closely-related concepts.

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses and the time interval between the offenses. The nature of the offenses may also be a relevant consideration (e.g., a defendant’s failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

10. In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.”.

This amendment clarifies and more fully illustrates the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the application of this provision in the commentary is expanded, and additional

examples are inserted. In addition, this amendment provides definitions of the terms “same course of conduct” and “common scheme or plan.” Finally, this amendment conforms an example in Application Note 6 of the Commentary to a revision of a Chapter Two offense guideline.

November 1, 1994 Amendment 503

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 2 by inserting the following additional paragraph as the eighth paragraph:

“A defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant’s offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant’s culpability; in such a case, an upward departure may be warranted.”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 9(B) by deleting “and the time interval between the offenses” and inserting in lieu thereof:

“, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity”.

This amendment clarifies the operation of § 1B1.3 with respect to the defendant’s accountability for the actions of other conspirators prior to the defendant joining the conspiracy. The amendment is in accord with the rule stated in recent caselaw. *See, e.g., United States v. Carreon*, 11 F.3d 1225 (5th Cir. 1994); *United States v. Petty*, 982 F.2d 1374, 1377 (9th Cir. 1993); *United States v. O’Campo*, 973 F.2d 1015, 1026 (1st Cir. 1992). *Cf. United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir. 1991); *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir. 1991)) (applying earlier versions of § 1B1.3). In addition, this amendment adds a well-phrased formulation, developed by the Ninth Circuit in *United States v. Hahn*, 960 F.2d 903 (9th Cir. 1992), addressing the circumstances in which multiple acts constitute the “same course of conduct.”

November 1, 2004

Amendment 674

The Commentary to § 1B1.3 captioned “Application Notes” is amended in Note 5 by striking the fifth sentence as follows:

“When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range.”,

and inserting the following:

“In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted.”.

II. USSG § 1B1.4

January 15, 1988 Amendment 4

Note: This amendment deleted material that is now covered by § 1B1.1 and replaced it with the precursor to the current § 1B1.4, as follows:

§ 1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See 18 U.S.C. § 3661.*

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on *18 U.S.C. 3661*, which recodifies *18 U.S.C. 3577*. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.,* Chapter Five, Part H (Specific Offender Characteristics).”.

The purposes of this amendment are to remove material made redundant by the reorganization of this Part and to replace it with material that clarifies the operation of the guidelines. The material formerly in this section is now covered by § 1B1.1.

November 1, 1989
Amendment 303

The Commentary to § 1B1.4 captioned “Background” is amended by deleting “3557” and inserting in lieu thereof “3577”.

November 1, 2000
Amendment 604

The Commentary to § 1B1.4 captioned “Background” is amended by striking:

“. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.”,

and inserting:

“in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for sentencing above the guideline range.”.

Chapter Five, Part K, Subpart 2, as amended by Amendment 603 (see supra), is further amended by adding at the end the following:

“§ 5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.”.

* * *

The Commentary to § 6B1.2 is amended in the fourth paragraph by adding at the end the following:

“Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.”.

Reason for Amendment: This amendment addresses the circuit conflict regarding whether a court can base an upward departure on conduct that was dismissed or not charged as part of a plea agreement in the case. According to the majority of circuits, the sentencing court, in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, may consider without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* § 1B1.4 (Information to be Used in Imposing Sentence) and 18 U.S.C. § 3661. These courts hold that § 6B1.2 (Standards for Acceptance of Plea Agreements) does not prohibit a court from considering conduct underlying counts dismissed pursuant to a plea agreement. The minority circuit view holds that a departure based on conduct uncharged or dismissed in the context of a plea agreement is inappropriate. Courts holding the minority view emphasize the need to protect the expectations of the parties to the plea agreement. *Compare United States v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); *United States v. Baird*, 109 F.3d 856 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997) (allowing upward departure based on dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct) (citing *United States v. Watts*, 519 U.S. 148 (1997)); *United States v. Barber*, 119 F.2d 276, 283-84 (4th Cir. 1997) (*en banc*); *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997) (allowing upward departure based on dismissed conduct) (citing *Watts*); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994) (allowing upward departure based on dismissed conduct); *United States v. Big Medicine*, 73 F.3d 994 (10th Cir. 1995) (allowing departure based on uncharged conduct), *with United States v. Ruffin*, 997 F.2d 343 (7th Cir. 1993) (error to depart based on counts dismissed as part of plea agreement); *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995) (same); *United States v. Lawton*, 193 F.3d 1087 (9th Cir. 1999) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing).

This amendment allows courts to consider for upward departure purposes aggravating conduct that is dismissed or not charged in connection with a plea agreement. This approach is consistent with the principles that underlie § 1B1.4 and 18 U.S.C. § 3661 and preserves flexibility for the sentencing judge to impose an appropriate sentence within the context of a charge-reduction plea agreement.

November 1, 2004
Amendment 674

The Commentary to § 1B1.4 captioned “Background” is amended in the fifth sentence by striking “sentencing above the guideline range” and inserting “an upward departure”.