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

October 17, 2022

USSC Tentative Priorities for Amendment Cycle Ending May 1, 2023

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on the Commission's tentative priorities for the amendment cycle ending May 1, 2023, with a particular focus on the implementation of the First Step Act of 2018.

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

The First Step Act was one of the most significant pieces of sentencing reform legislation in decades. As the Commission's research reports demonstrate, the implementation of the First Step Act's provision rendering the Fair Sentencing Act of 2010 retroactive resulted in 4,226 sentencing reductions as of September 30, 2021, of which 96% were people of color.[1] In addition, the First Step Act's amendment of 18 U.S.C. § 3582(c)(1)(A), commonly known as the "compassionate release" statute, empowered sentencing courts to release over 4,200 medically vulnerable prisoners in the face of the COVID-19 pandemic from October 1, 2019 through March 31, 2022 – almost 68% of whom were people of color.[2] In this current cycle, NACDL welcomes the Commission's focus on the decarceration focus of the First Step Act, as well as all efforts to reduce the rate of incarceration in federal cases, the size and racial disparities of our

[1] *See* USSC, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report,*(Aug. 2022) at Table 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf.

[2] *See* USSC, *United States Sentencing Commission Compassionate Release Data Report* (Sept. 2022) at Tables 1 and 6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf.

federal incarcerated population, and the guideline rigidity that discourages or limits the recognition of each offender's humanity and redemptive potential.

1. **Possible Amendments to § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement))**

Since the passage of the First Step Act in December 2018 (the "FSA2018"), NACDL has been committed to maximizing relief available to federal prisoners through various FSA2018 initiatives.[3] Our largest projects, however, have focused on the FSA2018's amendments to 18 U.S.C. § 3582(c)(1)(A), commonly known as the "compassionate release" statute.[4] From our experience in this area, we have seen first-hand the FSA2018's significant changes to the federal compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), and related policy statement, U.S.S.G. § 1B1.13. We note that 18 U.S.C. § 3582(c)(1)(A), originally enacted as part of the Comprehensive Crime Control Act of 1984, does not actually contain the words "compassionate release," and while we use the phrase in this letter, it is important to emphasize that Congress's ameliorative goals in enacting this provision were not limited to situations involving medical vulnerability and terminal illness.

18 U.S.C. § 3582(c)(1)(A) authorizes a court to modify a term of imprisonment that has already been imposed.[5] Prior to the FSA2018, from 1984 until December 2018, the Bureau of Prisons ("BOP") acted as the compassionate release gatekeeper because a motion from the BOP was required before the district court could exercise its discretion.[6] BOP, however, failed in this role, hardly ever opening the gate.[7] From 2006-2011, the BOP approved an average of only 24 requests per year in a program that was "poorly managed" and resulted "in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."[8]

Against this backdrop, a bipartisan Congress passed the FSA2018, which sought to "increase[e] the use and transparency of compassionate release."[9] Congress expanded 18 U.S.C.

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[3] First Step Act of 2018, Pub. L. No. 115-391, tit. IV, §§ 401-404, 132 Stat. 5194, 5220-22 (2018); *id.* at tit. VI, § 603(b) ("First Step Act").

[4] Since March 2020, NACDL and our partners have managed the Federal Compassionate Release Clearinghouse, the Excessive Sentence Project, and the Cannabis Justice Initiative. These pro bono projects recruit and train attorneys to file compassionate release motions on behalf eligible federal prisoners. Our work has led to reduced sentences in over 230 cases.

[5] *See* Pub. L. No. 98-473, 98 Stat. 1837, 1998-1999 (1984).

[6] *See* 18 U.S.C. § 3582(c)(1)(A) (2002) ("[T]he court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment.").

[7] Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at i (Apr. 2013), https://oig.justice.gov/reports/2013/e1306.pdf.

[8] *Id.*

[9] First Step Act, at tit. VI, § 603(b) (codified at 18 U.S.C. § 3582(c)(1)(A)).

§ 3582(c)(1)(A) by giving courts the authority to modify a term of imprisonment "upon motion of the defendant" rather than only upon a motion brought by the BOP.[10] A district court can now reduce a prison sentence based upon a defendant-filed motion (after exhaustion of remedies): if 1) "extraordinary and compelling reasons" exist that may "warrant a sentence reduction;" 2) such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and 3) after consideration of any applicable § 3553(a) factors.[11] Congress defined only one limit on what may count as an "extraordinary and compelling" reason: "rehabilitation of the defendant alone."[12]

With the passage of the FSA2018, the policy statement addressing compassionate release, U.S.S.G. § 1B1.13, came into conflict with the revised language of § 3582(c)(1)(A).[13] Because the Commission had been without a quorum since the passage of the FSA2018, § 1B1.13 could not be revised to conform to the amended language of § 3582(c)(1)(A). As a result, nearly every circuit court has found that § 1B1.13 applies only to compassionate release motions initiated by the Director of the BOP, not to defendant-filed motions.[14] In the absence of an applicable policy statement, district courts can make "individualized assessments of each defendant's sentence" upon "full consideration of the defendant's individual circumstances" to determine what constitutes extraordinary and compelling reasons, including, but not limited to the examples outlined in § 1B1.13.[15] Under this rigorous standard, district courts have been able to address many factors unanticipated by § 1B1.13—most notably a global pandemic and its disparate

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[10] 18 U.S.C. § 3582(c)(1)(A) ("[T]he court, upon motion of the Director of the Bureau of prisons, or upon motion of the defendant . . .may reduce the term of imprisonment."

[11] *Id; see also United States v. McGee*, 992 F.3d 1035, 1042 (10th Cir. 2021) ("Under the plain language of the statute, a district court may thus grant a motion for reduction of sentence, whether filed by the Director of the BOP or a defendant, only if three requirements are met. . .").

[12] *See* 28 U.S.C. § 944(t).

[13] Section 3582(c)(1)(A)(i) does not define the "extraordinary and compelling reasons" that might merit compassionate release. However, the application note to § 1B1.13 describes four categories of "extraordinary and compelling reasons." The first three set forth specific circumstances under which such reasons could exist, having to do with a defendant's medical condition, health and age, and family circumstances. *See* U.S.S.G. § 1B1.13 cmt. n.1(A)–(C). The fourth is the so-called "catchall" category, located at Application Note 1(D) and labeled "Other Reasons."

[14] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States* v. *Brooker*, 976 F.3d 228, 235-36; *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180-81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *McGee*, 992 F.3d at 1050; *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021). The Eighth Circuit has not decided the issue.

[15] *See McCoy*, 981 F.3d at 286, 282 n. 7 (observing that U.S.S.G. § 1B1.13 "remains helpful guidance even when motions are filed by defendants").

impact on elderly and chronically ill prisoners.[16] Indeed, without these changes to the compassionate release statute, many medically vulnerable federal prisoners would have had no other recourse as the BOP filed only 1.2% of all granted motions at the height of the pandemic.[17] Moreover, the current standard for defendant-filed motions has allowed courts to distinguish between truly extraordinary and compelling reasons that warrant a reduced sentence and other circumstances that do not warrant a reduction.[18]

Notably, district courts do not currently have more discretion than the BOP has always had. The "catchall provision" of § 1B1.13, comment. (n.1.(D)), has long given BOP the latitude to bring compassionate release motions addressing unforeseen circumstances beyond those described in §1B1.13.[19] By providing "the catchall provision, the Commission recognized that it may be impossible to definitively predict what reasons may qualify as 'extraordinary and compelling'" and "[r]ather than attempt to make a definitive prediction, the Commission covered all of its bases by ensuring that *every motion* to reach the court would have an opportunity to be

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[16] *See, e.g.*, *United States v. Dunlap*, 458 F. Supp. 3d 368, 370 (M.D.N.C. 2020) ("COVID-19 is especially dangerous for both the elderly and those with severe chronic medical conditions . . ."); *United States v. Rainone*, 468 F. Supp. 3d 996, 997, 999 (N.D. Ill. 2020) ("[T]he Court finds that the COVID-19 pandemic, [the defendant's] relatively advanced age [of 65], and other health problems are circumstances that would allow the Court to use its discretion to grant a sentence reduction. [The defendant's] ailments will get worse as time goes on, and if he is infected with COVID-19, his advanced age makes it more likely that he will experience major complications.").

[17] *See* USSC, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, 18 (2022) (during fiscal year 2020, 96% of defendants granted relief filed their own motions; BOP filed only 1.2% of all motions).

[18] *See, e.g., United States v. Pina*, No. 18CR179, 2020 WL 3545514 (S.D.N.Y. June 29, 2020) (grant based on increasingly severe PTSD—including acute depression, anxiety, flashbacks, nightmares, insomnia and irrational fears—as a result of COVID lockdowns); *United States v. Brocoli*, 543 F.Supp.3d 563 (S.D. Ohio 2021) (sexual abuse while incarcerated); *McGee*, 992 F.3d 1035 (grant based on disparity between original sentence and sentence today due to changes in the law); *United States v. Payton*, No. 8:06CR341, ECF No. 109 (D. Md. Mar. 11, 2021) (grant based on co-defendant disparity*); United States v. Vigneau*, 473 F. Supp. 3d 31 (D. R.I. 2020) (grant based in part on changing legal landscape with respect to marijuana since original sentence); *United States v. Kohler*, No. 8:15CR425, 2022 WL 780951 (M.D. Fla. Mar. 15, 2022) and *United States v. Beck*, 425 F. Supp. 3d 573 (M.D.N.C. June 28, 2019) (grants based on BOP's failure to provide adequate medical care); *see also United States v. Bardell*, 6:11CR401, ECR 140 (M.D. Fla. Oct. 4, 2022) (holding warden and BOP in civil contempt for violating district court's compassionate release order; recommending investigation into deceased prisoner's confinement, the failure of the BOP to respond to his medical needs, and the BOP's misrepresentations as to the severity of the prisoner's condition; and retaining jurisdiction to investigate the truthfulness of the government's filings as to the prisoner's health and BOP's ability to provide adequate medical care for him).

[19] The catchall provision provides, "As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." U.S.S.G. § 1B1.13, comment. (n.1(D)). This provision has not been updated or amended since the FSA was passed.

assessed under the flexible catchall provision."[20] The Commission should ensure that district courts have the same level of discretion as the BOP through a catchall provision in determining what constitutes extraordinary and compelling reasons.[21]

Sentencing Commission data reveals that, since the FSA2018 was passed, district courts have demonstrated great restraint in granting compassionate release motions under the current standard. Since October 2019, only 16.7% of compassionate release motions have been granted.[22] In every case, an Article III judge makes an "individual assessment" using a demanding test that requires a finding of extraordinary and compelling reasons and balancing of the § 3553(a) factors, including the nature of the offense, and the need to provide just punishment for the offense, promote respect for the law, and to protect the public.

Given the rigorous requirements that already exist within § 3582(c)(1)(A), the Commission should use its amendment authority to develop a policy statement describing "extraordinary and compelling reasons" in a manner that preserves the level of judicial discretion Congress intended.[23] The Commission should amend subsection (D) of § 1B1.13 to allow district courts the same latitude as the BOP to determine what constitutes extraordinary and compelling reasons. Doing so would resolve the conflict that currently exists between the First Step Act and subsection (D) and also ensures that district courts at least maintain the same level of discretion as the BOP.

While amending the catchall provision will allow district courts the authority to account for unanticipated circumstances, we understand the Commission may be inclined to further describe extraordinary and compelling reasons in the commentary to §1B1.13. In expanding these descriptions, the Commission can look to factors that district courts have already determined constitute extraordinary and compelling reasons.[24] The Sentencing Commission can also look to the factors set forth in NACDL's recent report on Second Look Litigation.[25]

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[20] *United States v. Rodriguez,* 451 F. Supp. 3d 392, 398–99 (E.D. Pa. 2020) (emphasis in the original).

[21] The legislative history of § 3582(c)(1)(A) also supports this level of discretion as Congress, always intended that the provisions of § 3582(c)(1)(A) operate as "safety valves for modification of sentences" allowing for "later review of sentences in particularly compelling situations" *See* S. Rep. No. 98-225, at 55–56, 121 (1983).

[22] *See* USSC, *United States Sentencing Commission Compassionate Release Data Report*, (Sept. 2022) at Table 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf.

[23] *See supra* note 21.

[24] *See supra* note 18.

[25] Murray, et al., *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, National Association of Criminal Defense Lawyers, at 9-13 (2021), https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-turning-the-tide-through-nacdl-s-model-second-look-legislation.pdf (factors to be considered include: age at time of the offense; age at time of the petition; nature of the offense; petitioner's current

Allowing defined criteria along with the flexibility of a catchall provision provides an avenue of relief for the most vulnerable and impacted individuals while also allowing courts the flexibility to address unanticipated developments. Such a policy statement would also satisfy the Commission's purpose of establishing sentencing policies that reflect "the advancement in knowledge of human behavior as it relates to the criminal justice process."[26]

2. Possible Amendments to the Federal Safety Valve Statute

The FSA2018 also made significant changes to the federal safety valve statute, 18 U.S.C. § 3553(f). This statute allows federal judges to sentence a defendant without regard to a mandatory minimum in drug cases if the defendant meets the five criteria set out in § 3553(f). The FSA2018 amended the first of the five criteria, which deals with the criminal history of the defendant.[27]

Section § 5C1.2 of the Sentencing Guidelines also provides that a district court shall impose a sentence in accordance with the Guidelines without regard to the statutory minimum sentence if the court finds the defendant meets the criteria in § 3553(f)(1)-(5), which it lists.[28] Section 2D1.1, the Guideline for drug offenses, further instructs that a court should apply a two-level reduction if a defendant meets the safety-valve criteria in U.S.S.G. § 5C1.2.[29] However, because the Commission previously lacked a quorum since the FSA2018 was passed, § 5C1.2 has not been amended to incorporate the FSA2018's changes to § 3553(f).[30]

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history and characteristics; petitioner's role in the original offense; input from health care professionals; any statement from the victim; whether the original sentence penalized the exercise of constitutional rights; whether the sentence reflects ineffective assistance of counsel; any evidence that the petitioner is innocent; any other relevant information).

[26] *See* 28 U.S.C. § 991(b)(1)(C).

[27] Prior to the FSA, 18 U.S.C. § 3553(f) allowed a district court to impose a sentence below the mandatory minimum only if the defendant did "not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1)(2017). As amended by the FSA, the current version of § 3553(f) bars a defendant from safety valve relief if he has:

> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines.

18 U.S.C. § 3553(f)(1).

[28] U.S.S.G. § 5C1.2.

[29] U.S.S.G. § 2D1.1(b)(18).

[30] *Compare* 18 U.S.C. § 3553(f), *with* U.S.S.G. § 5C1.2 (section 5C1.2 still lists the first criterion for safety-valve eligibility as "the defendant does not have more than 1 criminal history point." U.S.S.G. § 5C1.2(a)(1)).

Congress, in enacting the safety valve statute, directed the Commission to promulgate or amend guidelines and policy statements to "carry out the purposes of [section 3553(f)].[31] Accordingly, as Congress has directed, the Commission should use its authority to revise U.S.S.G. § 5C1.2 to maintain consistency with § 3553(f), as amended by the FSA2018.

3. **Resolution of Circuit Conflict Relating to Acceptance of Responsibility Points**

Pursuant to its authority under 28 U.S.C. § 991(b)(1)(B) and *Braxton v. United States*, 500 U.S. 344 (1991), the Commission should address the circuit conflict concerning whether the government may withhold a motion pursuant to subsection (b) of §3E1.1 (Acceptance of Responsibility) because a defendant moved to suppress evidence. The majority of circuit courts have held that the government may not withhold the third acceptance point because a defendant exercised his or her constitutional right to a suppression hearing.[32] Suppression hearings play a vital role in not only protecting the rights of a particular defendant but also in protecting society as a whole from law enforcement agents acting in violation of the Constitution. There is a marked distinction between a challenge to the legality of police conduct and a challenge to the factual elements of a defendant's conduct. The commentary to § 3E.1.1 supports this distinction, noting that a defendant who proceeds to trial to assert and preserve issues that do not relate to factual guilt may still clearly demonstrate an acceptance of responsibility[33]. A defendant should not have to waive a challenge to the constitutionality of law enforcement's conduct in order to receive a sentence reduction for acceptance of responsibility. Accordingly, the Commission should join with the majority of circuit courts and ensure that criminal defendants in all circuits are allowed to challenge the constitutionality of conduct without risk of being denied a sentence reduction for acceptance of responsibility.

The importance of granting acceptance points in this context – and thus not punishing the exercise of the right to challenge potentially unconstitutionally-obtained evidence – implicates a major policy position of the NACDL, specifically, the eradication of the trial penalty. The trial penalty is a sentence that is disproportionately greater after trial than the likely sentence on a guilty plea. As the NACDL's Trial Penalty Report explains, the trial penalty embodies and drives several troubling factors that undermine the entire criminal justice system, most notably, the "vanishing trial."[34] Since the 1980s when trials occurred in 20% of cases, they now occur in

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[31] Pub. L. No. 103–322, § 80001(b).

[32] *See United States v. Price*, 409 F. 3d 436, 443–44 (D.C. Cir. 2005); *United States v. Marquez*, 337 F.3d 1203, 1211 (10th Cir. 2003) *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994). A minority of courts have reached the opposite conclusion. *See United States v. Longoria*, 958 F.3d 372, 376–79 (5th Cir. 2020), *cert den'd* 141 S. Ct. 978 (Mar. 22, 2021); *United States v. Rogers*, 129 F.3d 76, 80 (2d Cir. 1997) (per curiam), *but see United States v. Vargas*, 961 F.3d 566, 584 (2d Cir. 2020) (finding error when the government withheld the third level because they prepared for a suppression hearing).

[33] *See* U.S.S.G. § 3E1.1, comment. (n. 2).

[34] National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018) at 3, http://www.nacdl.org/trialpenaltyreport.

less than 3% of cases.[35] As a result, society is losing its ultimate check on arbitrary and capricious use of government power as well as the principal process for public participation in the criminal legal system.[36]

Suppression hearings are not a substitute for trials, but they are a mechanism to shed light on the law enforcement decisions and processes that drive prosecutions. Punishing or disincentivizing the exercise of constitutional rights to challenge illegally obtained evidence reinforces the opacity and lack of accountability of a criminal legal system that has produced one of the world's highest incarceration rates.

4. Possible Amendments to the Guidelines to Prohibit the Use of Acquitted Conduct

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to our criminal justice system. However, as the Commission notes in its proposed priorities, current federal law allows judges to override a jury's not-guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury.[37] This is because while a jury must find a defendant's guilt based on the standard of "beyond a reasonable doubt", a judge may apply the relevant conduct factors in the Sentencing Guidelines using the less demanding standard of preponderance of the evidence.

Permitting sentencing based on acquitted conduct undermines due process and subverts the critical function of, and constitutional right to, trial by jury. This practice has been roundly criticized by practitioners, judges—including Supreme Court justices[38]—and scholars. In our experience, lay people and even lawyers who practice in civil rather than criminal cases are shocked when they learn that people may be sentenced to prison time based on conduct they were acquitted of at trial by a jury. Acquitted conduct sentencing harms the public legitimacy of our legal system.

Allowing acquitted conduct to be considered in sentencing also exacerbates the trial penalty, which, as noted above, generally refers to the significant difference in sentence between what a defendant receives via plea bargain and what his or her sentence would be if convicted at trial. This trial penalty has led to widespread coercive plea bargaining and has virtually

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[35] *Id.* at 5.

[36] *Id.*

[37] *United States v. Watts*, 519 U.S. 148, 157("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

[38] *See, e.g.*, *id.* at 170 (Kennedy, J., dissenting) (allowing district judges "to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the r'hrg en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.").

eliminated the constitutional right to a trial in the federal system.[39] It also contributes to the possibility of innocent people pleading guilty, because they fear the much longer sentence they would receive if convicted at trial, even if the chance of conviction is remote.[40] The crucial constitutional protection provided by the right to jury trial is further weakened, and defendants are further incentivized to accept pleas, when a defendant may be sentenced based on conduct even if they have been acquitted of that very conduct by the jury. Permitting sentencing based on acquitted conduct contributes to coercive plea bargaining and to the trial penalty.

We ask the Commission to amend Section 1B1.3 of the Sentencing Guidelines to prohibit the use of acquitted conduct as relevant conduct.

Conclusion

Thank you for giving us this opportunity to comment on the proposed priorities. We hope these issues become concretized in meaningful amendment proposals in the coming amendment cycle and look forward to submitting additional comments on such proposals. We defer to the presentation to the Commission by the Sentencing Resource Counsel of the Federal Defenders on other proposed priorities not addressed in this letter.

Respectfully Submitted,

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[39] *See* Note 32 *supra.*

[40] The concern that innocent people will plead guilty is not merely hypothetical. Data from the National Registry of Exonerations shows that 18% of exonerees pleaded guilty. See Innocence Project, the Guilty Plea Problem, https://www.guiltypleaproblem.org/ (citing data available in National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P).