Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

November 6, 2017

via E-mail: Public_Comment@ussc.gov
The Honorable William H. Pryor, Jr.
Acting Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Pryor:

The Innocence Project, Inc. (the "Innocence Project") submits this letter in reply to the public comments responding to the proposed amendment to U.S.S.G. Section 3E1.1 (Acceptance of Responsibility), dated August 25, 2017.[1] For the reasons set forth herein, the Innocence Project supports the removal of references to "relevant conduct" in Section 3E1.1, or the implementation of Option 2 proposed by the Commission ("a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact"). This letter responds to the submissions of the Federal Defender Sentencing Guidelines Committee, the Practitioners Advisory Group, the Department of Justice, the Probation Officers Advisory Group and the Victims Advisory Group to the United States Sentencing Commission.

The Innocence Project is a not-for-profit organization providing pro bono legal services and other resources to indigent prisoners whose innocence may be established through post-conviction DNA testing. To date, the work of the Innocence Project and similar organizations has led to the exoneration of 351 wrongfully convicted people through post-conviction DNA testing. The Innocence Project is dedicated to preventing future miscarriages of justice by researching the causes of wrongful convictions and pursuing legislative, judicial and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

The Innocence Project's analysis of the 351 known DNA exonerations has identified the leading contributing evidentiary causes of wrongful conviction: eyewitness misidentification, present in 71

[1] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N, Proposed Amendment, Aug. 25, 2017), 82 Fed. Reg. 40651, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

percent of DNA exonerations; misapplication of forensic science, present in 45 percent of DNA exonerations; false confessions, present in 28 percent of DNA exonerations; and incentivized informants, present in 17 percent of DNA exonerations.[2] The National Registry of Exonerations, which publishes data about wrongful convictions established through DNA and through other means, has identified 2,117 wrongful conviction cases. Many of the same evidentiary errors contributed to these wrongful convictions: perjury or false accusation (56%), official misconduct (51%), eyewitness misidentification (29%), false confession (12%), and false or misleading forensic evidence (24%).[3] Data collected by both the Innocence Project and the National Registry of Exonerations has also highlighted the problem of innocent defendants pleading guilty. Ten percent of those exonerated by DNA pleaded guilty,[4] while 390 of the 2,117 people exonerated by DNA and other means pleaded guilty.[5]

These evidentiary errors and their terrible consequences emphasize the importance of the trial judge's role in ensuring that evidence relied upon by fact finders is not only legally obtained but is also fundamentally reliable.[6] This is true whether that evidence is offered to establish guilt or to determine an appropriate sentence that meets the goals of punishment articulated elsewhere in the Guidelines.[7] Indeed, given the lower standard of proof required for evidence used for sentencing purposes only, judicial scrutiny into the reliability of evidence used for that purpose and challenged by a defendant is of critical importance.

The Innocence Project is particularly concerned about the use of relevant conduct evidence in sentencing because it is often the product of the very kinds of evidence known to frequently contribute to wrongful convictions: a defendant's incriminating statements made during a high stakes interview or interrogation with law enforcement or allegations by an incentivized witness. Our cases and the relevant research teach that interviews or interrogations with law enforcement can lead to false inculpatory statements (particularly when the interview or interrogation is coercive) and that, while incriminating statements or statements of incentivized witnesses can be unreliable, they are nevertheless highly persuasive to fact finders. It is our experience with these types of evidence that animates our call for caution in their use and careful scrutiny by fact finders of their reliability when defendants challenge their accuracy.

Wrongful conviction cases involving false confessions or admissions, together with decades of peer-reviewed social science research, have identified personal and situational risk factors for eliciting false inculpatory statements in interviews with and interrogations by law enforcement. Personal risk factors

---

[2] THE INNOCENCE PROJECT, *DNA Exonerations in the United States: Fast Facts*, available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Nov. 6, 2017).
[3] NAT'L REGISTRY OF EXONERATIONS, *% Exonerations by Contributing Factor* (Nov. 6, 2017), http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.
[4] INNOCENCE PROJECT, *Featured Cases: Guilty Plea*, https://www.innocenceproject.org/all-cases/#plead-yes,exonerated-by-dna (last visited Nov. 6, 2017).
[5] *Exoneration Cases With Guilty Plea*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (click "Tags" column in chart and select "P" for Guilty Plea cases) (last visited Nov. 6, 2017).
[6] *See* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L. J. ANN. REV. CRIM. PROC. iii, xxxiii (2015) ("In criminal cases, judges have an affirmative duty to ensure fairness and justice, because they are the only ones who can force prosecutors and their investigators and experts to comply with due process.")
[7] 18 U.S.C.A § 3553(a)(2) (West 2010).

that make a person more likely to falsely confess or falsely admit to criminal conduct can include a suspect's age, intellectual capacity, mental illness, suggestibility and a history of drug or alcohol abuse, while situational risk factors can include isolation, lengthy interrogations, explicit or implicit promises of leniency, the use of deception (e.g., lies about the existence of inculpatory evidence or the cooperation of others) or threats (e.g., that more serious penalties will follow if a person does not confess).[8] In the sentencing context, evidence of relevant conduct elicited in an interview with or interrogation of a suspect by law enforcement—particularly statements that lack any independent corroborating evidence[9]—should be carefully scrutinized when challenged because many criminal defendants have personal characteristics that may place them at greater risk for making false statements.[10] Post-arrest interviews and interrogations often use the very techniques that scientific research has identified as creating a risk of eliciting false inculpatory statements, making them highly coercive.[11] Indeed, most interviews or interrogations by law enforcement are premised on the notion (echoed in the Acceptance of Responsibility Guideline itself) that a defendant who "comes clean" will face a more lenient sentence while one who does not bears a significant risk of a much harsher penalty. While this premise may be justified by important policy concerns, it is an explicit promise of leniency/threat of more serious consequences tied to the defendant's behavior, which both courts[12] and researchers[13] have found to increase the risk of false inculpatory statements. Regardless of the policy merits of cooperation agreements, their inherent quid pro quo will be experienced by many defendants as coercive. These defendants may respond to this coercion by falsely inculpating themselves in other criminal conduct or by telling investigators what they believe the investigator wants to hear or what

---

[8] *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions, Risk Factors, and Recommendations: Looking Ahead*, 34 J. L. & HUM BEHAV. 49 (2010). Indeed, many of these factors have been incorporated into the due process analysis for evaluating the voluntariness of a challenged confession. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (discussing totality of the circumstances approach).

[9] Scholars have suggested that, in the confession context, courts should consider certain indicia of reliability: whether the confession (1) contains nonpublic information that can be independently verified as existing only within the knowledge of the true assailant; (2) leads police to new evidence about the crime; and (3) "fits" with the specific and mundane existing facts and evidence. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WISC. L. REV. 479 (2006). A similar analysis could be employed in the sentencing context where a defendant challenges as false inculpatory statements made during an interview or interrogation where those statements are uncorroborated by independent evidence.

[10] While it is impossible to know the precise number of defendants with any of the personal risk factors described above, the example of those with intellectual disabilities or mental illness is instructive. A recent systematic review of relevant literature suggests a prevalence of all prisoners worldwide with intellectual disability between 7 and 10 percent (versus 2 to 3 percent of the general population). M. Hellenbach et al., *Intellectual Disabilities Among Prisoners: Prevalence and Mental and Physical Health Comorbidities*, 30 J. APPLIED RES. IN INTELLECTUAL DISABILITIES 230 (2017). A 2006 report by the Bureau of Justice Statistics found that 45 percent of federal prisoners had a mental health problem (versus 4 to 20 percent of the general population). Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2006), available at https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

[11] The Honorable Jed Rakoff, in his acclaimed essay *Why Innocent People Plead Guilty*, observed that "the guidelines, like the mandatory minimums, provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains" and that "[t]he Supreme Court's suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth: it is much more like a 'contract of adhesion' in which one party can effectively force its will on the other party." Hon. Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), available at http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

[12] *See, e.g., Leyra v. Denno*, 347 U.S. 556 (1954); *Lynumn v. Illinois*, 372 U.S. 528 (1963).

[13] *See, e.g.*, Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POLICY INSIGHTS FROM THE BEHAV. & BRAIN SCI. 112 (2014).

they think will best serve their interests. For example, some defendants may mistakenly believe that they must exaggerate past criminal conduct in order to be seen as valuable enough to warrant a cooperation agreement and a 5K1.1 letter urging leniency in sentencing.[14] Nor do the cautions against lying fully mitigate the risks of false incriminating statements made by those who are either personally vulnerable or who are subject to coercive interview or interrogation methods. This is because, as the research shows, many defendants—even those advised by competent counsel—are unable to understand such warnings and because individuals who make false statements are responding to stimuli in ways that are not entirely rational or do not fully take into account the consequences of making those statements.[15] Defendants who have made false inculpatory statements about relevant conduct in interviews or interrogations with law enforcement should therefore have a full and fair opportunity to litigate the truth of these statements before an impartial judge tasked with assessing the reliability of the evidence. The guidelines should not punish defendants from challenging these statements, even where a judge finds the challenge unpersuasive.

As with false inculpatory statements and confessions, the Innocence Project's experience has taught that informant testimony is inherently unreliable, having contributed to 17% of DNA exonerations.[16] The statistics are even more stark when non-DNA exonerations are included: research shows that incentivized testimony from informants played a role in 45.9% of death row exonerations between 1970 and 2004, making it the leading cause of wrongful convictions in capital cases.[17] Other studies have shown that more than 50% of wrongful murder convictions involved perjury by someone, typically a "jailhouse snitch or another witness who stood to gain from the false testimony."[18] As the Supreme Court itself has repeatedly observed, "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952); *see also Banks v. Dretke*, 540 U.S.

---

[14] *See, e.g., United States v. Baker*, 445 F.3d 987, 990 (7th Cir. 2006) (affirming below guidelines sentence where court gave defendant the "benefit of a doubt" that his claims to law enforcement that he had had sex with two 13-year-old boys were false, where he later recanted and there was no evidence that he was not merely "puffing"); *United States v. Martinez-Villegas*, 993 F. Supp. 766, 789 (C.D. Cal. 1998), *aff'd*, 5 F. App'x 696 (9th Cir. 2001) (defendants were entitled to three-point reduction for acceptance of responsibility for drug-trafficking conspiracy and attempted possession of cocaine with intent to distribute, even though they went to trial on defense of coercion and entrapment, told undercover agent that they had experience transporting drugs, but later told government that they lacked experience; claim of experience was "puffing" to take advantage of government's lucrative offer, and they voluntarily made truthful admissions and cooperated with government).

[15] *See generally* Laura Smalarz et al., *Miranda at 50: A Psychological Analysis*, 25 CURRENT DIRECTIONS IN PSYCHOL. SCI. 455 (2016) (summarizing obstacles to *Miranda* comprehension identified in the psychological literature, including intellectual disability, mental illness, stress, reading comprehension and innocence, all of which may likewise impair understandings of warnings concerning truthfulness during a proffer). *See also* Rakoff, *supra* note 11 ("Although research into false guilty pleas is far less developed [than research into false confessions], it may be hypothesized that similar pressures, less immediate but more prolonged, may be in effect when a defendant is told, often by his own lawyer, that there is a strong case against him, that his likelihood of acquittal is low, and that he faces a mandatory minimum of five or ten years in prison if convicted and a guidelines range of considerably more—but that, if he acts swiftly, he can get a plea bargain to a lesser offense that will reduce his prison time by many years.").

[16] *See* INNOCENCE PROJECT, *supra* note 2.

[17] NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2005), available at http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf.

[18] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543-44 (2005).

668, 701 (2004) (noting the Supreme Court has "long recognized the 'serious questions of credibility' informers pose."). In light of these reliability concerns, courts and legislatures alike have recognized the need for the careful examination of the reliability of informant testimony.[19] However, despite the fact that courts have long accepted that informant testimony is inherently unreliable, that testimony nevertheless can carry significant persuasive weight.[20]

As the letters of the Federal Defender Sentencing Guidelines Committee and the Practitioners Advisory Group make clear, as currently written, Section 3E1.1 discourages many defendants from challenging relevant conduct evidence for fear of losing the reduction for acceptance of responsibility by simply raising the challenge. Obstacles to the full and fair adjudication of the accuracy of relevant conduct evidence should be removed and defendants should be able to challenge evidence that is inaccurate or unreliable without penalty. The Innocence Project believes that the best way to do this is by removing references to relevant conduct in Section 3E1.1 and reference only the offense of conviction. In so doing, the Commission will ensure that the Acceptance of Responsibility reduction will be based on evidence that has been subject to judicial scrutiny (because it is evidence of the charged offense).[21] Should the Commission decline this course of action, the Innocence Project prefers the adoption of Option 2 proposed by the Commission ("a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact") over Option 1 ("a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction"). This is because we believe that whether a challenge has "an arguable basis either in law or in fact" is a standard that has greater objectivity and predictability than whether a challenge is "non-frivolous." As a result, defendants who have a reason to challenge relevant conduct evidence will be more likely to do so under the "arguable basis" standard than under the "non-frivolous" standard because they will be able to evaluate, confidently and ex ante, any risks of raising challenges. Likewise, courts will be able to make determinations based on record evidence, rather than on a subjective evaluation of the frivolity of a claim. Thus, Option 2 would do a better job of ensuring that evidence on which a defendant is sentenced is sufficiently reliable while achieving the important goals of transparency, uniformity and proportionality in sentencing. If the Commission elects to adopt Option 2 or Option 1, it should also incorporate commentary expressing the importance of the court's role in evaluating the reliability of evidence used to enhance a defendant's sentence and making clear that the failure of a defendant's challenge—without more—cannot constitute a basis to deny the Acceptance of Responsibility reduction.

---

[19] Many states, including Illinois, Oklahoma, and Nevada have undertaken reforms, either legislatively or through courts, to try to limit the risk of a wrongful conviction resulting from informant testimony. *See* 725 Ill. Comp. Stat. Ann. 5/115-21 (requiring reliability hearings before jailhouse informant testimony can be admitted in a capital case)*; Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (requiring prosecutors to make substantial disclosures regarding any benefits received by jailhouse informants and other information relating to their credibility, as well as a cautionary jury instruction); *D'Agostino v. State*, 107 Nev. 1001, 1003 (1991) (requiring reliability hearings prior to admission of informant testimony in capital cases, noting that "[a] legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case"); *see also* Robert J. Norris et. al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1346 (2011) (noting that "[e]ight states have reformed the use of criminal informants in some way that it has been suggested will increase the accuracy of such evidence").

[20] *See, e.g.*, J.S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV., 137 (2008).

[21] To this end, the Innocence Project agrees with the recommended changes to the Section 3E1.1 commentary, notes 1(A), 3, and 4, as suggested by the Defenders at pp. 22-23 of their submission.

Ensuring the accuracy and reliability of evidence that can affect a defendant's sentence must trump the concerns expressed by the Department of Justice and the Victims Advisory Group to the United States Sentencing Commission that a change to Section 3E1.1 will result in more litigation, contrary to the purpose of Section 3E1.1, and may require the testimony of a victim to rebut challenges to relevant conduct evidence. Assuming that either or both of these concerns will result from one of the proposed changes to Section 3E1.1, the balance here must favor complete and objective fact finding over economy, efficiency, or even protecting victims from the burden of testifying. Many of our clients were prevented at trial from fully challenging the reliability of the erroneous evidence used against them and were wrongly convicted as a result. Concerns over efficiency, limited resources and finality were the oft-cited reasons for limiting trial challenges and for later limiting judicial review of convictions. Our clients' cases demonstrate the cost of privileging efficiency, economy and finality over those of accuracy and reliability. To the extent that the Commission must choose between these goals, the Innocence Project urges it to choose accuracy and reliability.

The Innocence Project appreciates the opportunity to submit comments on the Commission's proposed amendment to Section 3E1.1 (Acceptance of Responsibility) and in response to the comments submitted by others.

Very truly yours,
/s/ Karen A. Newirth
Karen A. Newirth
Senior Staff Attorney
The Innocence Project, Inc.