August 1, 2023

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

Re: Proposed Priorities for the 2023-2024 Amendment Cycle

Dear Judge Reeves:

The National Association of Defense Lawyers (NACDL) respectfully submits the following comments on the Commission's possible policy priorities for the amendment cycle ending May 1, 2024.

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

I. 2023-24 Proposed Priority No. 2: Alternatives to Incarceration and Diversion Programs

NACDL welcomes the Commission's focus on court-sponsored diversion and alternatives to incarceration (ATI) in the federal system. These programs, long a feature of state criminal legal systems, have been instituted in many federal districts at a grassroots level in recent years with considerable success. The Commission's support of these programs by publicizing them on its website, disseminating foundational documents, and facilitating the exchange of information and ideas through workshops and seminars would be an important step in furthering and enhancing these initiatives. The Commission will thereby be giving ATI its official imprimatur, as well as

setting the stage for a more fulsome engagement by the Commission in instituting, promoting and critically evaluating ATI in the federal system.

The overriding feature of the federal sentencing system since the Sentencing Reform Act has been its punitiveness. Incarceration rates have not only sky-rocketed – sentences have become considerably longer.[1] Contrary to the vision of the SRA drafters,[2] probation is the exception rather than the rule, with only 6.2% of federal defendants receiving a probation-only sentence in FY2021.[3] In response, several districts started diversion and ATI programs, often with no funding and utilizing volunteer hours.[4] Today, at least 52 districts have such programs, and the results are encouraging.[5] As a group of researchers studying these federal programs recently concluded:

Successful completion of an ATI program is associated with more favorable case dispositions and less severe sentences. Participants are more likely to avoid new arrests for criminal behavior, remain employed, and refrain from illegal drug use while their cases are pending in court. Such positive outcomes help defendants place their best foot forward while awaiting sentencing, demonstrating to the judge that they are on the path to rehabilitation, and thus deserving of a more favorable disposition that imposes "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of that provision. 18 U.S.C. § 3553(a).[6]

These results parallel the extensive scholarship conducted at the state level and internationally establishing that ATI and diversionary programs reduce recidivism;[7] decrease racial and

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[1] *See* Federal Bureau of Prisons, Sentences Imposed (March 14, 2023) (indicating that 53.7% of BOP prisoners are serving sentences over ten years), https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

[2] *See* Comments of Federal Defenders on Commission's Proposed Priorities for the 2022–2023 Amendment Cycle (December 1, 2022) at n. 126-28.

[3] FY 2021 Sourcebook, at fig. 6 & tbl. 14.

[4] *See* Laura Baber et al., *A Viable Alternative? Alternatives to Incarceration Across Several Federal Districts*, 83 Fed. Prob. J . 8 (June 2019); *see also* Julian Adler, *"There's Something Happening Here:" On the Tentative Emergence of Federal Alternatives to Incarceration*, 35 Fed. Sent. Rep. 29 (October 2022) (describing the "considerable profess" of "scrappy and ambitious district courts in the federal space" in the context of ATI programs) ("*Something Happening*").

[5] *See* Laura Baber et al., *Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts,* 85 Fed. Prob. 3 (December 2021) ("*Expanding the Analysis*").

[6] *Id.* at 12.

[7] *See*, *e.g.*, James Austin et. al., *A Guidelines Proposal: How Many Americans are Unnecessarily Incarcerated*, 29 Fed. Sent. R. 140, 143 (Dec. 2016 - Feb. 2017) ("Research shows that prison does little to rehabilitate and can increase recidivism in such cases. Treatment, community service, or probation are more effective. For example, of the nearly 66,000 prisoners whose most severe crime is drug possession, the average sentence is over one year; these offenders would be better sentenced to treatment or other alternatives.").

economic disparities;[8] ensure the young and those with mental and physical disabilities get the therapeutic care they need;[9] and keep families together.[10] Thus, it is appropriate for the Commission to show leadership on the issue of encouraging and promoting ATI and diversionary programs.

The Commission proposes that it will promote ATI and diversionary programs "by expanding the availability of information and organic documents pertaining to existing programs . . . through the Commission's website and possible workshops and seminars sharing best practices for developing, implementing, and assessing such programs." Notice at 4. This proposal is consistent with the Commission's educational role and would be an important step to encouraging implementation of ATI programs in districts that do not have them, as well as promoting the informational exchange necessary to identifying best practices.

NACDL urges the Commission to go further: express its wholehearted support for such programs and advocate for widespread implementation across districts. Importantly, such an endorsement from the Commission will encourage extensive mitigation advocacy early on in a case, potentially leading to expeditious, more equitable and more cost-effective outcomes.

In addition, NACDL urges the Commission, as it proposed in the last amendment cycle, to support a new policy statement permitting a downward departure if the defendant industriously participated in the necessary requirements of a court-sponsored or approved ATI program. NACDL supports making this downward departure option as broad as possible, encompassing not only ATI programs run by the district court but also ATI programs run by nonprofit organizations that have been vetted and approved by the district court. In addition, as the Commission suggested last year, the departure should also apply to those defendants who productively participated in any such program even if they did not fulfill all requirements for completion. There are many reasons why a motivated and responsible person cannot fulfill the rigorous requirements of a rehabilitation program, including childcare and elderly care responsibilities, illness, conflicts with work schedules, etc. District courts should have discretion

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[8] For a discussion of the racial disparities in imprisonment, *see generally* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Sentencing Project 2016), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/.

[9] For a discussion on the appalling treatment of individuals with mental illnesses in prison, *see generally* KiDuek Kim, *The Processing & Treatment of Mentally Ill Persons in the Criminal Justice System* (Urban Institute 2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf; for a discussion on the criminogenic impact of prison on young offenders, s*ee generally*, Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model* (National Institute of Justice 2016) at 13, n.56 (("Mounting evidence from the best statistical analyses suggests that incarceration of youth may actually increase the likelihood of recidivism.").

[10] *See* MODEL PENAL CODE: SENT'G § S1.02(2), reporters' note b(3) (Am. Law Institute 2021) (citing sampling of literature on adverse effects of incarceration on families).

to consider partial completion accompanied by committed engagement in granting this downward departure. Importantly, the Commission has the expertise and resources to set forth some evidence-based threshold criteria for approval of these ATI programs. Such requirements would include that the ATI programs (1) do not result in a "net widening" of those subject to federal charges or onerous probationary conditions;[11] (2) focus on those of highest need rather than cherry-picking those most likely to succeed;[12] and (3) are subject to careful monitoring to ensure they do not replicate the racial and economic disparities they are designed, in part, to address.[13]

Finally, we urge the Commission to consider more systemic changes to the guidelines to facilitate and encourage non-custodial sentences, including a presumption of probation for first-time, non-violent offenders,[14] offense-level reductions for first-time offenders; elimination of the zones in the Sentencing Table or at least a large expansion of Zones A and B, where probation-only sentences are authorized.

II. 2023-24 Proposed Priority No. 10(A): Drug Trafficking Offenses Involving Methamphetamine (Actual v. Mixture)

The Commission proposes as a priority the "examination of federal sentencing practices" on issues such as "the prevalence and nature of drug trafficking offenses involving methamphetamine." NACDL welcomes the Commission's focus on methamphetamine cases, which at 48.5% represent the largest percentage by far of sentenced drug cases.[15]

In particular, NACDL urges the Commission to consider eliminating the distinction between "actual" methamphetamine and "mixture" guidelines and, instead, apply the "mixture" guidelines across the board to all methamphetamine cases. This is in accord with a growing number of federal courts, who have taken such action in an effort to reduce the sentencing

[11] *Something Happening* at 30 (noting that "treating lower-risk individuals can 'do harm,' the treatment itself disrupting people's existing routines (e.g., work or school), bringing them into contact with influences from higher-risk peers, and creating recidivism risks that did not previously exist").

[12] *Id.* (noting that in the optimal ATI program, "the level or intensity of intervention offered someone (e.g., treatment, social services, supervision) should correspond to their risk" of recidivism).

[13] *Expanding the Analysis* at 5 (noting state court initiatives and resolutions to identify and eliminate racial disparities).

[14] Such presumption would be consistent with the Congressional directive at 28 U.S.C. §994(j) to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

[15] *See* U.S. Sentencing Comm'n, *Distribution of Primary Drug Type in Federal Drug Cases, Fiscal Year 2022 (Figure D-1), found at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/FigureD1.pdf

disparities resulting from the excessive purity enhancement that is without foundation in either empirical research or fact.

Drug Quantity Table: Tied to Statutory Mandatory Minimums, not Empirical Research

In formulating the United States Sentencing Guidelines, the United States Sentencing Commission developed and used data on past practices and recidivism, conducting statistical analyses on pre-Guidelines sentencing practices and utilizing an empirical approach to establish the base offense levels for each crime. *See* USSG § 1A1.1, intro. comment, pt. A, p. 3; *see also* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, Nov. 2004.

However, that was not the case with the current drug trafficking Guidelines provisions. Following the passage of the 1988 Anti-Drug Abuse Act, later codified at 21 U.S.C. § 841(b)(1), the Commission revised the Drug Quantity Table found in USSG § 2D1.1 and, departing from past practices of using an empirical approach, increased the base offense levels to better equate to the statutory mandatory minimum sentences. *See Gall v. United States,* 552 U.S. 38, 46 n.2 (2007) (following passage of the 1986 Act, the resulting Guidelines ranges for drug trafficking offenses are driven by the quantity of drugs, and keyed to statutory mandatory minimum sentences based on weight).

For methamphetamine, because the statutory mandatory minimum penalties had a 10:1 ratio based on purity, the Commission revised the Drug Quantity Table to distinguish actual/pure methamphetamine from methamphetamine mixtures at the same 10:1 ratio. *See, e.g., United States v. Ferguson,* 2018 U.S. Dist. LEXIS 129802 at *1 (D. Minn. Aug. 2, 2018) (citing *Anti-Drug Abuse Act of 1988,* Pub. L. No. 100-690, § 6470(g)-(h), 102 Stat. 4181, 4378); *see also United States v. Pereda,* 2019 U.S. Dist. LEXIS 19183 at *4 (D. Colo. Feb. 6, 2019).

In 1998 Congress amended the statutory penalties for methamphetamine offenses, cutting in half the amount that triggered the mandatory minimum sentences. *Ferguson* at *4 (citing *Methamphetamine Trafficking Penalty Enhancement Act of 1998, Div. E, § 2, Pub. L. No. 105-277, 112 Stat. 2681, 2681-759*). And, again, the Commission increased the base offense levels for methamphetamine offenses to better align with the mandatory minimum sentences. *Id; see also Pereda* at **4-5.

Historical Premise for Actual-to-Mixture Ratio for Methamphetamine Offenses is No Longer Valid

The Commission sought to justify the 10:1 actual-to-mixture methamphetamine ratio by stating, "[s]ince controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure

narcotics may indicate a prominent role in the criminal enterprise and proximity to the drugs." *See* U.S.S.G. § 2D1.1, note 27(c). Historically, that may have been so; however, as evidenced by the Drug Enforcement Agency's *2020 National Drug Threat Analysis,* the average purity of methamphetamine between 2014 and 2019 was over 95%.[16]

Acknowledging this increase in purity of the methamphetamine being marketed in this country, a growing number of federal courts, from Nebraska to Idaho to Louisiana and more, have recognized that the distinction between actual methamphetamine and methamphetamine mixture is no longer appropriate as it is not based on empirical data, does not serve as an accurate proxy for culpability, and creates unwarranted sentencing disparities between methamphetamine and other drugs. *See, e.g., United States v. Bean,* 371 F. Supp.3d 46, 52-56 (Dist. of N.H. 2019); *United States v. Castillo,* 440 F. Supp.3d 1148, 1154-56 (E.D. Cal. 2020); *United States v. Hartle,* 2017 U.S. Dist. LEXIS 93367 at *7-8 (D. Idaho 2017) (finding that the purity enhancement resulted in arbitrary and irrational distinctions between sentences imposed upon similarly situated defendants); *see also United States v. Celestin,* 2023 U.S. Dist. LEXIS 25406 at **7-14 (E.D. La. Feb. 15, 2023) (noting that at least eleven district courts across the country have deviated from the Guidelines and applied the methamphetamine mixture guidelines to all methamphetamine violations (*see* fn. 47 for survey of courts)).

As recognized by these courts, the high purity of methamphetamine available today at all levels of the distribution chain means that virtually all defendants face enhanced punishment for threshold purity levels, not enhanced punishment based on individualized determinations (e.g., for leadership or "kingpin" roles), making the Guidelines purity enhancement excessive.

Enhanced purity enhancement results in severe sentencing disparities

The enhanced punishment is by no means nominal. Take, for example, a defendant charged with distribution involving 28 grams of methamphetamine. If the court used *actual* methamphetamine, based on the Drug Quantity Table this would result in a Base Offense Level of 26. If, however, the court used the methamphetamine *mixture,* based on the Drug Quantity Table, this would result in a Base Offense Level of 18. This leads to a difference of years – *years*

[16] *See* DEA, *2020 National Drug Threat Assessment,* at 20, https://www.dea.gov/sites/default/files/2021-f02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

– between the advisory ranges across Criminal History Categories. For sentencing purposes, the impact of this distinction is severe.

Accordingly, NACDL urges the Commission to revisit the methamphetamine purity enhancement. Put simply, it does not accurately reflect the culpability of most federally prosecuted drug offenders.

Further, NACDL joins the Federal Defenders in their suggestion to delink the Drug Quantity Table altogether for the reasons set forth in their letter addressing the proposed priorities for the 2023-24 amendment cycle.[17]

III. 2023-2024 Proposed Priority (10)(C): Comparison of Sentences Imposed in Cases Disposed of Through Trial Versus Plea

We strongly urge the Sentencing Commission to compare sentences imposed in cases disposed of through trial versus plea. NACDL's own extensive research on this very question, which used Sentencing Commission data, has shown that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.[18] For some crimes, the prison sentence for a person convicted at trial is as much as eight times greater than for those convicted after a plea. NACDL and many other individuals and organizations refer to this systemic, often massive, and inherently coercive differential as the trial penalty.

Over the last 40 years, the trial penalty has converted the Framers' vision of a system of public jury trials into an assembly line of guilty pleas coerced principally by mandatory minimum sentencing and overuse of pretrial detention. Walk in a courthouse today and you will see guilty plea after guilty plea and virtually no public trials in which the government is put to its proof and prosecutorial power is scrutinized (and limited) by citizens.

The trial penalty not only undermines the Sixth Amendment right to trial; it also undermines every right in the Bill of Rights because plea agreements typically require waivers of rights including bail, discovery, and all the liberties enumerated in the Fourth and Fifth Amendments including the right to be free from unreasonable searches and seizures. For these reasons, a

[17] *See* Defender Annual Letter, dated May 24, 2023, at pp. 3-8 (found at https://src.fd.org/sites/src/files/blog/2023-05/20230524%20Defender%20Annual%20Letter.pdf).

[18] NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

diverse consensus – across the political, ideological, and professional spectrum – has joined NACDL in attempting to eliminate the trial penalty.

This differential is significant and has major impacts on the criminal legal system. As suggested above, the trial penalty has virtually eliminated trials from the federal system. In 2022, over 97% of convictions in the federal system were the result of pleas with less than 3% occurring after trials.[19] In 2021, less than 2% of convictions were the result of trial and there were fewer than one thousand criminal trials in the entire federal system.[20] This is far from what our Constitution's framers, who revered and repeatedly emphasized the importance of the right to trial, would have imagined.[21]

The trial penalty has a major coercive effect, with defendants understandably influenced to accept pleas because of the real threat of a geometrically higher sentence if convicted at trial, even if a defendant has a strong defense. The trial penalty also allows for other coercive tactics including piling on charges, charge bargaining, threats of superseding indictments and sentencing enhancements, and threats to withdraw plea offers if the defendant seeks to assert other constitutional rights under the Fourth or Fifth Amendments. Perhaps most concerningly, the trial penalty in our system is often so severe that it coerces even innocent people into pleading guilty.[22]

Advocacy groups, individuals, and academics from across the political spectrum have recognized the pervasiveness and harm of the trial penalty and have formed a broad cross-ideological

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[19] U.S. Sentencing Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas).

[20] U.S. Sentencing Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

[21] *See, e.g.*, John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000) (calling representative government and trials the "heart and lungs of liberty"); Thomas Jefferson, Letter to Thomas Paine (July 11, 1789), in *The Life and Selected Writings of Thomas Jefferson* (Adrienne Koch & William Peden, eds., 1998) (calling trials "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution"). Note, also, that the right to trial is the only individual right guaranteed in both the Original Text of the Constitution and in the Bill of Rights. U.S. Const. art. III, §2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[22] Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely cleared of the crime they were once convicted of—pleaded guilty. See The National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-

coalition to fight against it. Coalition members include NACDL, Right on Crime, ACLU, leaders at the Cato Institute, The Innocence Project, and Stand Together. Additionally, the Plea Bargain Task Force, a task force of the Criminal Justice Section of the American Bar Association, recently released a report urging major changes to plea bargaining including a reduction in the use of trial penalties to coerce pleas.[23]

We are pleased to see the Sentencing Commission raise this issue as a possible priority for this amendments cycle and strongly urge the Commission to examine this differential and the resultant harmful effects it has on our system.

We recognize that many of the major policy contributors to the trial penalty, such as mandatory minimum sentencing and prosecutorial control of the charging function, are beyond the Sentencing Commission's control and purview. However, there are many smaller, but still important, actions the Commission could take to reduce the trial penalty and its coercive effects.

First, Acceptance of Responsibility: U.S.S.G. § 3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

Second, Obstruction of Justice: U.S.S.G. § 3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Like the right to trial, the right to testify in one's own defense is also constitutionally protected.[24] While Application Note 2 states that the "provision is not intended to punish a defendant for the exercise of a constitutional right," clarification that this includes the right to testify in one's own defense would be welcome.

Third, Acquitted Conduct: U.S.S.G. § 1B1.3 should be amended to prohibit the use of acquitted conduct as relevant conduct. This important issue, discussed in greater detail below, is well known to the Commission and was carefully considered during the Commission's last amendment cycle, although no action was ultimately taken. We urge the Commission to

2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P. For individual stories of innocent defendants who were coerced to plead guilty, *see* https://guiltypleaproblem.org.

[23] American Bar Association, *2023 Plea Bargain Task Force Report*, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

[24] *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

reconsider acquitted conduct sentencing which is unjust on its own but is also a contributor to the trial penalty.

IV. Additional Proposed Priority: The Use of Acquitted Conduct in Sentencing

NACDL urges the Commission to again consider an amendment to the Guidelines that would eliminate the unjust practice of sentencing defendants based on acquitted conduct. The Commission considered amendments on this important issue during the previous amendment cycle, but ultimately took no action. We urge the Commission to consider it again and to amend the Guidelines as described below to end the unjust practice of sentencing people for conduct they have been acquitted of at trial.

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 noted in its proposed priorities for the previous amendments cycle, 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.[25] 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[26]—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's perception of the legitimacy of our legal system. Furthermore, studies show that these types of decisions – subjective decision-making of this nature – are entry points for racial implicit bias in sentencing. Juries, of course, are intended to be diverse, and replacing a jury's judgment with that of a judge,

[25] *United States v. Watts*, 519 U.S. 148, 157 (1997) ("[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.")

[26] *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.").

especially given the racial, socioeconomic, and professional composition of our judiciary, deepens the impact of bias on well-established racial disparities in sentencing.

It is important to note that, since the Commission's last amendments cycle, multiple Supreme Court justices have indicated in published opinions that "the use of acquitted conduct to alter a defendant's [sentence] raises important questions" while adding explicitly that the Supreme Court is awaiting the Sentencing Commission's action on the issue.[27] The time is ripe for Sentencing Commission action. We respectfully urge the Commission to act this cycle to eliminate acquitted conduct sentencing by amending U.S.S.G. § 1B1.3 to prohibit the use of acquitted conduct as relevant conduct.

Respectfully Submitted,

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Co-Chair, NACDL Sentencing Committee

Darlene Comstedt
Member, NACDL Sentencing Committee

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Director, NACDL Economic Crime & Procedural Justice

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[27] *See McClinton v. United States*, 600 U.S. __ (2023), No. 21-1557 (statement of Kavanaugh, J., joined by Gorsuch & Barrett, JJ., respecting the denial of certiorari) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination . . ."); *id.* (statement of Sotomayor, J., respecting the denial of certiorari) ("The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year.").