March 14, 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 Amendments To The Sentencing Guidelines, Policy Statements, And Official Commentary

Dear Judge Reeves:

Thank you for the opportunity to present our comments on these important proposed amendments. We note that we have joined as signatories in the letter submitted by FAMM on the proposed career offender and criminal history amendments. On all other issues in the proposed amendment cycle not addressed in this letter, we join in the position letters filed by the Federal Defenders.

First Step Act—Reduction In Term Of Imprisonment Under 18 U.S.C. § 3582(C)(1)(A)

NACDL supports the Commission's proposed amendment to §1B1.13, with some suggested modifications, and supports Option 3 to (b)(6).[1] After reviewing the Commission's recent hearings on this proposed amendment as well as the submitted written testimony, NACDL focuses its comments on proposals (b)(5), (b)(6), and (b)(4).

The Commission has requested comment as to whether proposed subsection (b)(5) and (b)(6) would exceed the Commission's authority or the authority of any other provision of federal law. (Comment 1). The statutory text of §3582(c)(1)(A) as well as the legislative history of this statute make clear that the Commission has the authority to enact these changes. The Commission has also requested comment on proposed (b)(4) relating to defendants who are victims of sexual assault and abuse. (Comment 4). NACDL supports the enactment of this factor

[1] U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines (Preliminary),* 1-9 (Jan. 12, 2023), *available at* https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines ("Proposed Amendments").

and encourages the Commission to expand this amendment to victims of sexual assault committed by another inmate.

I. NACDL Supports the Enactment of Proposed (b)(5).

NACDL has been on the forefront of the issues surrounding proposed (b)(5). In 2021, NACDL launched the Excessive Sentence Project, which recruits and trains *pro bono* attorneys to file sentence reduction motions for individuals serving sentences that would be much lower today in light of changes in the law.[2] While we have celebrated many successes, NACDL has also been forced to turn away deserving people because of the circuit split that has developed in this area. Due only to where their cases originated, these individuals have been deprived of the opportunity to seek relief from sentences Congress has now deemed to be unfairly harsh.

The disparities generated by the circuit split on whether excessive sentences can constitute extraordinary and compelling reasons for sentencing reductions is starkly represented in the cases of Lamar Redfern and George Austin. In 2021, our Excessive Sentence Project trained and secured *pro bono* counsel for Mr. Redfern, who was convicted in Charlotte, North Carolina, along with other co-defendants, of a string of robberies at the age of 21.[3] After conviction at trial, he was sentenced to 58 years in prison. At about the same time, our Project assigned attorneys to represent George Austin, who, at the age of 18, also committed several robberies with a group of co-defendants, lost at trial, and was sentenced to 286 years in prison.[4] The extraordinarily high sentences of both men were driven by the stacked §924(c) sentences of which they had been convicted. After the passage of the First Step Act of 2018 (FSA2018), with its significant changes to these mandatory minimum penalties, both men would have drastically lower sentences today. Given their young ages at the time of the offenses, their excellent records of rehabilitation, and the length of time they had served, they both presented strong arguments for compassionate release. While their stories seemed similar, there was one critical difference: Mr. Redfern was sentenced in a district in the Fourth Circuit while Mr. Austin was sentenced in a district in the Third Circuit. As counsel was preparing to file Mr. Austin's motion, the Third Circuit foreclosed Mr. Austin's ability to argue "changes in the law" in his compassionate release motion.[5] Mr. Redfern, who was sentenced in a circuit that allows such arguments, was able to argue that changes in the law were an extraordinary and compelling reason.[6]

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[2] NACDL's other compassionate release projects include the Federal Compassionate Release Clearinghouse, which focuses on sick and elderly individuals, the Cannabis Justice Initiative, which provides relief for those sentenced for marijuana offenses, and the D.C. Compassionate Release Project. For these pro bono projects, NACDL and its partners recruit and train attorneys to file compassionate release motions on behalf eligible federal prisoners. Our work has led to reduced sentences in 272 cases.

[3] *United States v. Redfern*, No. 3:01CR151, 2022 WL 3593775 (W.D.N.C. July 20, 2022).

[4] *United States v. Austin*, No. 2:05CR280, ECF No. 155 (E.D. Pa. Mar. 9, 2006).

[5] *United States v. Andrews*, 12 F.4th 255 (3rd Cir. 2021).

[6] *United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020).

In a few months, Mr. Redfern's motion was granted.[7] He is now home with his family and recently obtained a full-time job working at Federal Express. Mr. Austin is still incarcerated, as he has been since the age of 18, with a release date of 2249.[8]

From our experience in the trenches on this issue, we have borne witness to the inherent unfairness that has been created by the circuit split on "changes in the law." Through no other reason than an accident of geography, Mr. Redfern was able to come home while Mr. Austin languishes in prison. The Commission can change this. NACDL strongly supports the proposal under (b)(5) to allow sentences found to be inequitable in light of changes in the law to be an extraordinary and compelling reason. The statutory text and legislative history of §3582(c)(1)(1) support the Commission's addition of this factor. And because the Commission has the legal authority to enact this amendment, the circuit split that was created in the absence of an applicable policy statement can be resolved.

A. Compassionate release and the First Step Act of 2018.

Colloquially known as "compassionate release," 18 U.S.C. §3582(c)(1)(A) authorizes a court to modify a term of imprisonment that has already been imposed if certain conditions are met. After recognizing that BOP had failed in its role as the compassionate release gatekeeper from 1984 until December 2018,[9] a bipartisan Congress passed the FSA2018, which sought to "increase[e] the use and transparency of compassionate release."[10] Congress expanded §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.[11] 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) the court has considered any applicable §3553(a) factors. Congress defined only one limit on what may count as an "extraordinary and compelling" reason: "rehabilitation of the defendant alone."[12]

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[7] *Redfern*, 2022 WL 3593775, at *2.

[8] *See* Fed. Bureau of Prisons, https://www.bop.gov/inmateloc/ (last visited March 8, 2023).

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

[10] First Step Act, at tit. VI, §603(b) (codified at 18 U.S.C. §3582(c)(1)(A)) ("FSA2018").

[11] 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.")

[12] *See* 28 U.S.C. §944(t).

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 made "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, including a global pandemic,[16] the sexual victimization of prisoners in custody,[17] inadequate medical care in prison,[18] as well as changes in the law as applied to the individual defendants.[19]

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[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 (2d Cir. 2020); *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, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (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); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *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).

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

[16] *United States v. Royster*, 506 F. Supp. 3d 349, 354-54 (M.D.N.C. Dec. 10, 2020) (holding that medical risk factors combined with the COVID-19 pandemic constitute extraordinary and compelling reasons).

[17] *United States v. Broccoli*, 543 F. Supp. 3d 563, 568-69 (S.D. Ohio. 2021) (finding that severe abuse, victimization, and attempted rape constituted extraordinary and compelling reasons)

[18] *United States v. Kohler*, No. 8:15CR425, 2022 WL 780951, at *4 (M.D. Fla. Mar. 15, 2022) (finding that defendant's medical issues and the "numerous inadequacies" of his medical care in BOP that put his life at serious risk support compassionate release.)

[19] *United States v. Vaughn*, No. 4:00CR126, ECF No. 1284 at 3 (N.D. Okla. July 9, 2021) (determining that the significant sentencing disparity created by the First Step Act, which lower mandatory minimum penalties in drug cases, constituted an extraordinary and compelling reason along with other factors);

Whether a change in the law, as applied to the individual defendant, can constitute an extraordinary and compelling reason has created a deep circuit split nationally.[20] The divide centers on whether the FSA2018's non-retroactive changes reducing certain gun and drug mandatory minimum penalties can be an extraordinary and compelling reason if there exists a significant disparity between the individual's original sentence and the sentence Congress now deems appropriate.[21] Importantly, courts have made clear that this sentencing disparity can be considered an extraordinary and compelling reasons as long as it also includes a "full consideration of the defendants' individual circumstances."[22]

B. The Commission has the authority to enact proposed (b)(5).

1. *The statutory text directs Congress to describe extraordinary and compelling reasons with only one limitation: rehabilitation alone.*

"The starting point in discerning congressional intent is the existing statutory text[.]"[23] Here, the text of the relevant statute is unambiguous. Section 3582(c)(1)(A) authorizes a court to reduce a prison sentence after two principal showings (beyond exhaustion of remedies): first, that "extraordinary and compelling reasons" exist that may "warrant such a reduction;" and second, that a review of "the factors set forth in section 3553(a)" support that outcome.

Through 28 U.S.C. §994(a)(2)(C), Congress requires the Commission to set forth "general policy statements regarding application of the guidelines or any other aspect of sentencing . . . including . . . the sentence modification provisions set forth in section[ ] . . . 3582(c)."[24] And in 28 U.S.C. §994(t), Congress not only authorized, but required the Commission to explain what should be considered extraordinary and compelling reasons. Section 994(t) states:

United States v. Curry, No. 1:05CR282, 2021 WL 2644298, at *4, *6 (M.D.N.C. June 25, 2021) (the "unjust lengthy sentence" and "gross disparity" between actual stacked §924(c) sentence and sentence the defendant would receive today for the same offenses, combined with his extensive rehabilitation while incarcerated constitutes extraordinary and compelling reasons).

[20] *United States v. Chen*, 48 F. 4th 1092, 1096-98 (9th Cir. 2022) (outlining circuit split).

[21] *See McCoy*, 981 F.3d at 286.

[22] *See McGee,* 992 F.3d at 1048 (concluding that changes in the law can constitute an extraordinary and compelling reason combined with the defendant's "unique circumstances"); *Ruvalcaba*, 26 F.4th at 24 (observing that the Fourth and Tenth circuit "concluded that there is enough play in the joints for a district court to consider the FSA's non-retroactive changes in sentencing law (in combination with other factors) and find an extraordinary and compelling reason, in a particular case, without doing violence to Congress's views on the prospective effect of the FSA's amendments.").

[23] *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citation omitted).

[24] 28 U.S.C. §994(a)(2)(C).

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, ***shall describe*** what should be considered extraordinary and compelling reasons for sentence reduction.[25]

Congress placed only one limit on what may count as an "extraordinary and compelling" reason: "rehabilitation of the defendant alone."[26] Congress included no other categorical limits on what may qualify. The limitation makes clear that Congress knew how to constrain the definition of extraordinary and compelling reasons but nonetheless chose to restrict it to only one category. Had Congress intended to carve out any additional categorical exceptions—such as "changes in the law"—from the meaning of extraordinary and compelling reasons, it would have done so as it did with "rehabilitation alone." As the Supreme Court recently noted in the context of another sentencing modification statute, "(d)rawing meaning from silence is particularly inappropriate" in the sentencing context, "for Congress has shown that it knows how to direct sentencing practices in express terms."[27]

2. *Legislative history supports the addition of proposal (b)(5)*

The broader trajectory of Congress's work in this field bolsters the Commission's authority to add (b)(5). The federal compassionate release statute was originally enacted as part of the Parole Reorganization Act of 1976.[28] Even with this early version of compassionate release, it was clear that a sentence reduction under §4205(g) was not limited to just medical issues.[29] Instead, district courts began using this sentencing reduction mechanism for reasons such as co-defendant disparity and extraordinary rehabilitation.[30]

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[25] 28 U.S.C. §994(t) (emphasis added).

[26] *Id*. *See* Shon Hopwood, *Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 118 (2019). ("Congress no doubt limited the ability of rehabilitation *alone* to constitute extraordinary circumstances, so that sentencing courts could not use it as a full and direct substitute for the abolished parole system.").

[27] *United States v. Concepcion*, 142 S. Ct. 2839, 2402 (2022) (citing *Kimbrough v. United States*, 552 U.S. 85, 103 (2007).

[28] *See* 18 U.S.C. §4205(g) (repealed 1984) ("At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.").

[29] *See* Hopwood, *supra* note 26, at 83.

[30] *See United States. v. Diaco*, 457 F. Supp. 371, 372 (D. N.J. 1978) (motion filed to reduce sentence in light of unwarranted disparity among co-defendants); *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (sentence reduced because of exceptional adjustment in prison).

Building upon this history,[31] the Sentencing Reform Act of 1984 (SRA), in large part, was passed to replace the slow and unreliable pardon process.[32] Instead of a parole commission reviewing every case, with the focus solely on the individual's rehabilitation, Congress created a new mechanism to ensure courts could decide, in individual cases, "whether there was a justification for reducing a term of imprisonment."[33]

The Senate Judiciary Committee's detailed and authoritative report on the Sentencing Reform Act of 1984 makes clear that, by enacting this statute, Congress had no intent to cabin what courts could consider extraordinary and compelling reasons in sentence modification motions:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, ***cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence***, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment . . .[34]

Congress's own words are clear. It always intended the provisions of §3582(c)(1)(A) to operate as "safety valves for modification of sentences," allowing for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence."[35] By adding (b)(5), the Commission simply allows courts to provide relief in individual cases presenting the types of extraordinary and compelling circumstances Congress anticipated when it originally passed §3582(c)(1)(A).

C. By enacting proposal (b)(5), the Commission can resolve the circuit split.

By enacting proposed (b)(5), we believe the Commission can resolve the circuit split on whether changes in the law can constitute an extraordinary and compelling reason for a sentence reduction. This circuit split developed during a period when there was no applicable policy

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[31] Hopwood, *supra* note 26, at 102 (2019) ("When statutory language is obviously transplanted from . . . other legislation, courts usually have reason to think it bring the old soil with it.") (citation omitted).

[32] *See* Practitioners Advisory Group's Written Testimony before the Commission, 3 n.3 (Feb. 17, 2016) *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/PAG.pdf; *see also* Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984).

[33] Hopwood, *supra* note 26, at 117 (citing S. Rep. No. 98-225, at 56 (1983) (quotation marks and citation omitted).

[34] S. Rep. No. 98-225, at 55 (1983)

[35] *See* S. Rep No. 98-225, at 55–56, 121.

statement for defendant-filed motions.[36] Without a policy statement on §1B1.13, courts have been required, on their own, to effectively fill in the blanks to determine what constitutes extraordinary and compelling reasons. The Fourth Circuit pointed out that "where the Commission fails to act, then courts make their own independent determinations of what constitutes an 'extraordinary and compelling reason."[37] Even the government has acknowledged the Commission's ability to resolve this circuit split in its opposition to the Supreme Court's review of whether non-retroactive sentencing changes can be an extraordinary and compelling reason, stating that "the Sentencing Commission could promulgate a new policy statement that deprives a decision by this Court of any practical significance."[38] The Supreme Court, in denying several certiorari petitions, also appears to be waiting for the Commission to weigh in and resolve the circuit split.[39] The district courts, the government, and the Supreme Court are all correct: the Commission's enactment of (b)(5) can resolve this fracture.

As noted above, Congress's only limit on extraordinary and compelling reasons is rehabilitation alone.[40] Because Congress could have added "changes in the law" as a limitation on §3582(c)(1)(A), but chose not to, Congress has made clear that rehabilitation alone is the only true categorical restriction to compassionate release. As the Supreme Court has noted, "Congress is not shy about placing such limits where it deems them appropriate."[41] Accordingly, it is incorrect to read any extratextual limitation—such as "changes in the law"—to the text of §3582(c)(1)(A). The fact that the other amendments to the FSA2018 were made prospective and not retroactive does not change this analysis. The same Congress that elected against full retroactivity used the very same statute to create the current version of §3582(c)(1)(A). The FSA2018 created a different (and narrower) mechanism for potential relief by amending §3582(c)(1)(A) to afford individual defendants direct access to courts in seeking sentence reductions based on extraordinary and compelling reasons like "changes in the law." Were the

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[36] *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *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, 392–93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1108 (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); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *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).

[37] *McCoy*, 981 F.3d at 284 (quotation marks omitted); *see also United States v. Thacker*, 4 F.4th 569, 573-74 (7th Cir. 2021) ("[U]ntil the Sentencing Commission updates its policy statement to reflect prisoner-initiated compassionate release motions, district courts have broad discretion to determine what else may constitute "extraordinary and compelling reasons" warranting a sentence reduction."

[38] *Thacker v. United States*, No. 21-877, Br. for the United States in Opp'n of Cert. at 2 (Feb. 2022).

[39] *See Andrews v. United States*, 142 S. Ct. 1446 (2022) (denying cert); *Jarvis v. United States*, 142 S. Ct. 760 (2022) (denying cert); *Crandall v. United States*, 142 S. Ct. 2781 (2022) (denying cert); *Thacker v. United States*, 142 S. Ct. 1363 (2022) (denying cert).

[40] *See supra* Part I.B.1.

[41] *Concepcion*, 142 S. Ct. at 2400.

Commission to enact proposed (b)(5), it does not mean that all defendants convicted under federal statutes that were not made retroactive will receive new sentences. Rather, courts will simply be able to "relieve some defendants of those sentences on a case-by-case basis."[42] The relevant case law makes clear that these determinations must be individualized and not granted *en masse*, as "[t]here is a salient difference between automatic vacatur and resentencing of an entire class of sentences" . . . "and allowing for the provision of individual relief in the most grievous cases."[43]

D. Section 3553(a) acts as a robust guardrail to §3582(c)(1)(A).

Before a compassionate release reduction can take place, many conditions must be met. The defendant must meet the administrative exhaustion requirements, must show extraordinary and compelling reasons exists, the release must be consistent with the Commission's applicable policy statement, and, finally, any reduction must be consistent with the §3553(a) factors.[44] Even if a defendant successfully establishes "extraordinary and compelling" reasons, he or she still may not be released until this final burden is satisfied. Courts take this guardrail seriously and have used it robustly since the FSA2018 was passed. In fact, according to the Commission, in Fiscal Year 2021, the most likely basis for a court to deny a compassionate release motion was on §3553(a) grounds.[45]

Moreover, if the Commission adds the proposed language of §1B1.13(a)(2), this will provide yet another guardrail for sentence reduction motions. Section 1B1.13(a)(2) provides that "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. §3142(g)."[46] Notably, even though this standard is part of the outdated §1B1.13 and has been found inapplicable to defendant-filed motions by almost all courts, this factor was invoked in over 20% of all denials of compassionate release motions.[47] Courts will no doubt use this guardrail even more if it is included in the updated policy statement.

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[42] *McCoy*, 981 F.3d at 287 (citation omitted). *See also McCoy* at 286 ("The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under §3582(c)(1)(A)(i).").

[43] *Ruvalcaba*, 26 F.4th at 27 (quotation marks and citation omitted).

[44] 18 U.S.C. §3582(c)(1)(A).

[45] U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Years 2020-2022*, at Table 13 (Dec. 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf (31% of motions denied on basis of §3553(a) factors).

[46] U.S.S.G. §1B1.13(a)(2).

[47] U.S. Sent'g Comm'n, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic*, at 41 (Mar. 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

E. The Government's concerns are unfounded.

The government, in its written testimony, expresses concern that the sentencing principals of "finality" will be affected if (b)(5) is enacted.[48] The government misses the point. Section 3582(c)(1) is an *express exception* to the general rule to finality. It was always the intent of Congress that the provisions of §3582(c)(1)(A) would operate as "safety valves for modification of sentences," allowing for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence."[49] Nothing in the FSA2018 changed that exception to finality. In fact, the FSA2018 *expanded* compassionate release by removing the BOP as gatekeeper and allowing defendants to file motions themselves while making no other changes to §3582(c)(1)(A).

The government also complains that the addition of (b)(5) to §1B1.13 will prompt a "flood of motions."[50] This argument ignores that Congress intended to increase the number of applications and grants of compassionate release. In fact, the FSA2018 titled section 603, the amendment to §3582(c)(1)(A), "Increasing the Use and Transparency of Compassionate Release."[51] Congress included the compassionate release modifications in the FSA2018 because BOP was not seeking the relief often enough. The First Step Act was thus meant to bring relief to more imprisoned people.

Moreover, the government's floodgates concern does not comport with current statistics. Compassionate release motions were at their highest number during the COVID-19 pandemic and have exponentially decreased since that time. According to the Commission, the number of filed compassionate release motions (over 2000) reached their peak in September 2020 at the height of the pandemic and during the development of current compassionate release law in the absence of an applicable policy statement.[52] By September 2022, however, that number had significantly dropped to under 300 motions nationally.[53] Given the reduced number of filed motions as of September 2022, which includes motions filed in districts where changes in the law can currently be argued, the government's concerns of catastrophic consequences if (b)(5) is enacted is unreasonable.

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[48] *See* Dep't of Justice's Comment on Proposed Amendment to Compassionate Release, 7 (Feb. 15, 2023) *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf ("DOJ Comment").

[49] *See* S. Rep. No. 98-225, at 55–56, 121.

[50] *See* DOJ Comment, *supra* note 48, at 7-8.

[51] *See* First Step Act §603(b).

[52] U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Years 2020-2022*, at Fig. 1 (Dec. 2022), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf.

[53] *Id.*

The government also incorrectly contends that, if enacted, proposed (b)(5) will lead to "widespread sentencing disparities" because it will "exacerbate the conflict among the courts of appeals."[54] To be sure, the Commission has an obligation to remedy unwarranted sentencing disparities.[55] However, the government gets it wrong. As discussed above, enacting (b)(5) will ***resolve*** the circuit split not widen it. Moreover, the government fails to recognize that the true disparities are the geographic and temporal disparities between similarly situated defendants. The geographic disparity between those, like Mr. Redfern, who had the opportunity to argue changes in the law in his §3582(c)(1)(A) motion, and those like Mr. Austin, who could not. And, more fundamentally, (b)(5) allows courts to consider, on an individualized basis, the temporal disparity between defendants who happened to be sentenced before the FSA2018 and those who would be sentenced today.[56]

F. Proposed Modifications to (b)(5)

The current version of (b)(5) sufficiently conveys that more than just a change in the law is required to constitute an extraordinary and compelling reason. That is, the court must also find that the sentence the defendant is currently serving is now "inequitable" or unfair in light of that change in the law.[57] Such a finding necessarily requires the court to determine if the sentence as to that particular individual is unfair or unjust.

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[54] *See* DOJ Comment, *supra* note 48, at 8.

[55] 28 U.S.C. §991(b)(1)(B) ("The purposes of the United States Sentencing Commission are to . . . Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.").

[56] *United States v. Lii*, 528 F. Supp. 3d 1153, 1164 (D. Haw. 2021) ("[W]hen undertaking an "individualized assessment" as to a defendant's circumstances, courts may properly consider both the "sheer and unusual length" of a sentence given under the former sentencing regime and the "gross disparity" between that sentence and the sentence "Congress now believes to be an appropriate penalty for the defendants' conduct.") (quotation marks and citation omitted); *see also United States v. Urkevich*, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) ("A reduction in [defendant's] sentence [may be] warranted by ... the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed.").

[57] "*Inequitable*," Merriam-Webster.com Dictionary, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/inequitable (accessed Mar. 8, 2023) (defined as "not equitable; unfair"); *see also Taniguchi v. Kan Pac. Saipan, Ltd*, 132 S. Ct. 1997, 2002 (2012) (an undefined term is given its "ordinary meaning.")

However, to make clear that the proposed amendment applies "changes in the law" in an individualized manner, and not to all defendants *en masse*, we recommend that the language be modified slightly to track the case law in this area.[58]

> [(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.][59]
>
> To
>
> [(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law after full consideration of the defendant's individualized circumstances.]

By making this change, the Commission can satisfy Congress's intent that §3582(c)(1)(A) will be employed on an individualized basis to correct fundamentally unfair sentences that present extraordinary and compelling circumstances.[60]

Finally, should the Commission wish, it could add more commentary describing potential circumstances that can be considered along with changes in the law to meet the extraordinary and compelling reasons standard. If so, we urge the Commission to consider NACDL's Second Look Legislation Report.[61] However, it is important to take into consideration that individual circumstances are likely to be so varied and idiosyncratic that examples and descriptions may be too limiting.

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[58] *See McCoy*, 981 F.3d at 286 (finding that extraordinary and compelling reasons can be based on non-retroactive legislative changes along with "full consideration of the defendants' individual circumstances."); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) ("[T]he district court's decision indicates that its finding of 'extraordinary and compelling reasons' was based on its individualized review of all the circumstances of Maumau's case and its conclusion "that a combination of factors" warranted relief[.]"); *Ruvalcaba*, 26 F 4th at 28 (finding that district courts can consider "any complex of circumstances raised by a defendant" including non-retroactive changes in the law "on a case-by-case basis grounded in a defendant's individualized circumstances to find an extraordinary and compelling reason warranting compassionate release.").

[59] Proposed Amendments, *supra* note 1, at 6.

[60] *See* Hopwood, *supra* note 26, at 117.

[61] JaneAnne 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) *available at* https://nacdl.org/SecondLook (factors to be considered include: age at time of the offense; age at time of the petition; nature of the offense; petitioner's current 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).

II. NACDL Supports Option 3 for (b)(6)

A. The Commission has authority to enact proposed (b)(6).

With only one Congressional limit on the definition of extraordinary and compelling—rehabilitation alone—the Commission has provided a flexible catch-all category since 2006, when it first created a policy statement for §3582(c)(1)(A).[62] Congress, through its directives, also did not restrict the Commission's ability to create a catch-all category. Section 994(t) requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[63] Circuit courts, interpreting this requirement, have made clear that this language does not direct the Commission to create "an *exhaustive* list of examples" but allows courts to retain some of their own discretion in identifying extraordinary and compelling reasons.[64]

As the gatekeeper of compassionate release motions for almost two decades, the BOP has long had the latitude to use the catch-all provision of the current §1B1.13 policy statement to determine if unforeseen circumstances beyond those enumerated can constitute extraordinary and compelling reasons. During that time, there has been no objection to this use. Congress could have limited this authority when it passed the FSA2018 or through its directives to the Commission but chose not to. Instead, Congress widened the availability of compassionate release by removing BOP as the gatekeeper to "increase[] the use" of compassionate release.[65]

B. A catch-all provision allows courts the discretion to provide relief in unforeseen circumstances.

Congress directed the Commission to establish sentencing policies that reflect "the advancement in knowledge of human behavior as it relates to the criminal justice process."[66] A flexible catch-all category will allow judicial discretion to address such advancement in knowledge as well as unforeseen circumstances. The past four years have taught us that the enumerated factors in the outdated §1B1.13 policy statement cannot sufficiently anticipate all potential extraordinary and compelling reasons. The best evidence of this is the Commission's proposed amendments, which have added the following categories: two medical condition subcategories for defendants with long-term medical care needs not being met in BOP and defendants who demonstrate an increased risk of harm or death due to an infectious disease

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[62] *See* U.S. Sent'g Comm'n, Amendment 683, *available at* https://guidelines.ussc.gov/ac/683.

[63] 28 U.S.C. §994(t).

[64] *See United States v. Jones*, 980 F.3d 1098, 1111 n.18 (6th Cir. 2020) (emphasis in original); *see also McGee*, 992 F.3d at 1045 ("[W]e conclude that Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase extraordinary and compelling reasons") (quotation marks omitted).

[65] First Step Act §603(b).

[66] *See* 28 U.S.C. § 991(b)(1)(C).

outbreak; expanded family circumstances; victims of assault; and changes in the law.[67] It is important to note that these proposed amendments exist because courts have had the broad sentencing discretion to characterize these circumstances as extraordinary and compelling over the past four years.[68] The Commission should continue to allow courts to use that needed discretion when unique circumstances arise by establishing a flexible catch-all provision. While we cannot predict what we do not know, recent case law does provide examples of idiosyncratic circumstances that depend on the flexibility of a catch-all provision, such as unwarranted co-defendant disparities,[69] changing social norms as to marijuana,[70] and CARES Act halfway house restrictions that prevented a defendant from obtaining needed medical care.[71] Because "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," a flexible catch-all provision is necessary.[72]

C. Option 3 is the best choice.

Option 3, which closely tracks the current catch-all provision of the §1B1.13 policy statement, is the best choice. It states:

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[67] Proposed Amendments, *supra* note 1, at 5-6.

[68] *See e.g., United States v. Hodge*, No. 6:17CR051, 2021 WL 1169896 (E.D. Ky. Mar. 26, 2021) (significant health conditions that make defendant among the most vulnerable to COVID-19 infection in BOP was an extraordinary and compelling reason); *United States v. Beck*, 425 F. Supp. 3d 573 (BOP's gross mismanagement of defendant's invasive breast cancer constituted an extraordinary and compelling reason); *United States v. Gibson*, No. 18-20091, 2021 WL 5578553, at *2 (D. Kan. Nov. 30, 2021) (extraordinary and compelling reasons exists for defendant who is sole caretaker for adult son with schizophrenia, depression, and anxiety); *United States v. Brice*, No. 13-CR-206-2, 2022 WL 17721031, at *6–9 (E.D. Penn. Dec. 15, 2022) (sexual abuse by corrections officer met extraordinary and compelling reason requirement); *United States v. Vaughn*, No. 4:00CR126, ECF No. 1284, at 3 (N.D. Okla. July 9, 2021) (mandatory life sentence in drug case that would not apply today constituted extraordinary and compelling reasons along with other factors).

[69] *United States v. Conley*, No. 11 CR 779, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021) (defendant was one of the least culpable members of conspiracy but received a sentence twice as long due to disreputable law enforcement tactics").

[70] *See, e.g.*, *United States v. Scarmazzo*, No. 1:06-CR-000342, 2023 WL 1830792, at *14 (Feb. 2, 2023) (changing legal landscape as to marijuana in combination with other factors constituted extraordinary and compelling reasons); *United States v. Vigneau*, 473 F. Supp. 3d 31 (D.R.I. 2020) (recognizing that changing societal attitudes towards marijuana justify imposition of a lower sentence today).

[71] *United States v. Donnes*, No. CR16-12, 2021 WL 4290670, at *1-2 (D. Mont. Sept 21, 2021) (finding the "sheer difficulty of maintaining prescriptions and coordinating medical appoints and tests through BOP" was extraordinary and compelling).

[72] *United States v. Rodriguez,* 451 F. Supp. 3d 392, 398–99 (E.D. Pa. 2020) (quotation marks omitted).

> **Option 3**: (6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].[73]

This option will allow courts to consider unforeseen and unexpected circumstances and also leaves room for courts to apply their own discretion in determining what constitutes extraordinary and compelling reasons.

We strongly encourage the Commission not to enact Option 1, which is far too limiting. Option 1 states:

> Option 1: (6) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].[74]

This option will restrict courts to circumstances similar to the enumerated factors. "Similar" is defined as "having characteristic in common; strictly comparable" or "alike in substance or essentials."[75] This definition suggests that, under Option 1, the only factors that could be considered extraordinary and compelling reasons are ones closely tracking the already enumerated factors. Such a standard would almost certainly foreclose relief for many of the cases listed above as well as those noted by other Commentators.[76] Also, by creating a catch-all that tracks the enumerated factors so closely, the Commission runs the risk of rendering the catch-all meaningless. As a result, Option 1 would likely sow confusion and create litigation.

Option 3 provides the best vehicle for district courts to determine what constitutes extraordinary and compelling reasons in matters that are distinct from, but equally as extraordinary and compelling, as the enumerated factors. This option also leaves room for courts to make reasoned judgments based on the unique factual scenarios that will come before them. Helpfully, this language mirrors the familiar "catch-all" language in the current Application Note 1(D) that the Sentencing Commission enacted in 2007 and which has existed, without protest, for over 15 years.[77] Like other Commentators, we also request the Commission, either in the text or commentary, make clear "that a totality of different circumstances can together constitute

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[73] Proposed Amendments, *supra* note 1, at 6.

[74] *Id.*

[75] "*Similar*," Merriam-Webster.com Dictionary, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/similar (accessed Mar. 9, 2023).

[76] *See supra* notes 69-71; *see also* Statement of Kelly Barrett on Behalf of the Federal Public and Community Defenders, 11-14 (Feb. 23, 2023) *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FPD1.pdf (outlining cases where courts determined unforeseen and unique circumstances constituted extraordinary and compelling reasons) ("Defender Comment").

[77] U.S.S.G. §1B1.13 cmt. n.1(A)(iv) (2007).

extraordinary and compelling reasons" in the catch-all provision, and courts should not be limited to identifying just one extraordinary and compelling reason for a sentence reduction." [78]

Finally, NACDL does not object to Option 2 (including the language both inside and outside of the brackets) as long as the language in Application Note 2 of the current §1B1.13 Commentary remains.[79] However, we believe Option 3 is preferable given the discretion it allows courts and because it tracks the previous catch-all provision that applied only to BOP-filed motions and therefore will be familiar to courts and practitioners.

III. The Commission Should Enact Proposed (b)(4).

As a partner in the Compassionate Release Clearinghouse Dublin Project, which provides pro bono attorneys for individuals subject to rampant abuse at FCI Dublin,[80] we have seen first-hand the damaging effects of sexual violence on incarcerated people. In light of the increased public awareness of this crisis, the federal government recently initiated and published a report detailing the abuse at FCI Dublin and other women's prisons.[81] The growing recognition of this abuse and the significant harm it causes support the addition of proposed (b)(4). It states:

> [(4) VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.]

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[78] *See* Statement of Erika Zunkel, University of Chicago Law School's Federal Criminal Justice Clinic, on Proposed Amendment to Compassionate Release, 27 (Feb. 23, 2023) *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf ("Zunkel Comment"); *see also United States v. Bethea*, 54 F.4th 826, 832 (4th Cir. 2022) (circumstances constituting an extraordinary and compelling reason are "complex and not easily summarized" and the inquiry is "multifaceted and must account for the totality of the relevant circumstances.") (quotation marks and citation omitted).

[79] *See infra* Part IV.

[80] Richard Winton, *Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars*, L.A. TIMES, Dec. 8, 2022, *available at* https://www.latimes.com/california/story/2022-12-08/ex-warden-at-female-prison-guilty-of-sexually-abusing-inmates. *See also* Testimony of Mary Price, General Counsel of FAMM on Compassionate Release, 9 (Feb. 23, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf ("FAMM Comment") (discussing the Compassionate Release Clearinghouse Dublin Project).

[81] *See* Staff Report of Permanent S. Subcomm. on Investigations, 117th Cong., Rep. on Sexual Abuse of Female Inmates in Federal Prisons (Dec. 13, 2022) *available at* https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf ("Report on Sexual Abuse").

While we support the proposed amendment, we suggest revisions and express our concern that the amendment does not reach far enough to encompass all potential victims and conduct.

First, we note that the language of the proposed amendment is ambiguous as to whether "serious bodily injury" qualifies only the phrase "physical abuse," or whether it also extends to "sexual assault." As written, courts may require defendants who are victims of sexual assault to also make a showing of "serious bodily injury" which, given the current definition and the nature of many sexual assaults, would likely bar many deserving victims from relief. Accordingly, we request that the Commission resolve this grammatical uncertainty.

The Commission should also reconsider the use of the term "sexual assault." We, along with other commentators, share the concern that this term will not encompass the full range of potential sexual abuse that a prisoner might experience, including emotional damage and psychological harm, as well as other forms of sexual abuse that do not require the perpetrator to commit an overt act.[82] Accordingly, we encourage the Commission to consider a wider range of sexual violence conduct in this proposed amendment.[83]

As to the Commission's request for comment on whether this provision should be expanded to include sexual violence by other inmates (Comment 4), we believe that it should. As noted by the Defenders, "sexual and physical abuse are life-changing no matter who the assaulter is: a federal employee or contractor, a state or local correction officers, or a fellow inmate."[84] The harm inflicted on the individual, not the identity of the perpetrator, should determine whether relief is warranted.[85] Moreover, through the passage of PREA, Congress has recognized that the prison environment creates increased opportunities for sexual assault and abuse, and, as a result, prisons bear responsibility when an individual is sexually assaulted in prison by another prisoner.[86]

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[82] *See* Zunkel Comment, *supra* note 78, at 32; *see also* FAMM Comment, *supra* note 80, at 9.

[83] *See, e.g.,* National Institute of Justice, *Overview of Rape and Sexual Violence* (October 25, 2010), available at https://nij.ojp.gov/topics/articles/overview-rape-and-sexual-violence#noteReferrer1 (defining and describing various forms of sexual violence, specifically "rape," "sexual assault," and "sexual harassment").

[84] Defender Comment, *supra* note 76, at 9.

[85] *See United States v. Broccoli*, 543 F. Supp. 3d 563, 568-69 (S.D. Ohio. 2021) (finding it extraordinary and compelling that defendant was subjected to an attempted rape while in BOP custody *inter alia*).

[86] Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003); *see also* Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. Legis. & Pub. Pol'y 801, 804–05 (2014) ("PREA addresses not just forcible rape but also other forms of sexual abuse, whether perpetrated by prisoners or staff . . . and "also addresses sexual abuse that takes place in forms of detention other than prisons, including jails, police lockups, juvenile detention facilities, and immigration detention facilities."); *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.") (citation omitted).

Finally, we object to the government's recommendation that courts can only reduce sentences under §3582(c)(1)(A) if the sexual misconduct has been "independently substantiated."[87] While the government agrees that compassionate release "may be appropriate, in certain circumstances[,] for individuals who are the victims of sexual misconduct," it then seeks to drastically reduce this safety valve by limiting the power of courts to reduce sentences unless there has been "a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case."[88]

The Commission should reject this recommendation because it would significantly and unjustly delay relief for victims. Federal criminal cases commonly take several years to resolve. For example, in one Dublin sexual assault case, the victim first reported the correction officer's sexual abuse in June 2020.[89] But the correctional officer is not scheduled for trial until the summer of 2023—three years after the sexual misconduct was first reported.[90] The government's proposal would unfairly require victims, such as this, to wait several years before relief could be granted under this proposed amendment. Administrative proceedings are equally lengthy.[91] These delays could particularly impact female prisoners who typically have shorter sentences than their male counterparts.[92]

Moreover, the government's fears as to whether (b)(4) motions can be "fairly adjudicated" ignores the fact that judges are experts in factfinding.[93] District courts oversee sentencing hearings, suppression hearings, and bench trials where they regularly make similar fact-based determinations.[94] As a result, district courts have unsurprisingly been adept in handling hearings in sexual abuse compassionate release cases. For example, in *United States v. Brice*, the district court held a hearing where the defendant testified about her sexual assault by two corrections officers, only one of whom was prosecuted.[95] The court ultimately determined that this abuse, in addition to other factors, constituted extraordinary and compelling reasons and

[87] DOJ Comment, *supra* note 48, at 6.

[88] *Id.*

[89] Report on Sexual Abuse, *supra* note 81, at 16.

[90] *Id.*

[91] *See* Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. On Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 n.2 (2022) (BOP's Office of the Internal Affairs had a backlog of 8,000 internal affairs cases, which include hundreds of sexual abuse cases.").

[92] *See* U.S. Sent'g Comm'n, *Quick Facts on Women in the Federal Offender Population*, 1 (July 2022) (In fiscal year 2021, "[t]he average sentence for female offenders was 32 months, compared to 52 months for male offenders.")

[93] DOJ Comment, *supra* note 48, at 6.

[94] *United States v. KT Burgee*, 988 F.3d 1054, 1060 (8th Cir. 2021) ("District courts regularly perform factfinding are well equipped to assess evidence admissibility.")

[95] *Brice*, 2022 WL 17721031, at *2, *1 n. 1.

warranted a reduction in her sentence.[96] In another NACDL Excessive Sentence Project case, the defendant suffered significant sexual abuse in prison after being exposed as a cooperator because the BOP failed to enter a separation order on his behalf.[97] The district court held an evidentiary hearing where the defendant testified as to the extent of that abuse. The "court found his testimony credible," and, taking into consideration the abuse and other factors in the case, granted the motion.

IV. The Commission Should Retain the Language from §1B1.13 Application Note 2.

Relevant to all aspects of the proposed amendment, the Commission should retain the clarification from the current §1B1.13 commentary, which states:

> **Foreseeability of Extraordinary and Compelling Reasons.—**For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.[98]

The Defenders suggest that "[t]he Commission appears to have deleted this commentary as an accident . . . not as a substantive policy choice."[99] Whether inadvertently or intentionally deleted, we encourage the Commission to retain the language of this application note in either the text or the commentary of §1B1.13. In our various compassionate release projects, we regularly encounter individuals with medical issues or family circumstances issues known at the time of sentencing that worsened over the years while in prison. It is imperative that the language in §1B1.13 remains so individuals in these circumstances can continue to have the opportunity to seek relief.

First Step Act—Drug Offenses; (A) Safety Valve

The Commission should adopt Option 1 for the proposed amendment to the safety valve guideline. In the past 40 years, Congress has controversially enacted various mandatory-minimum sentencing provisions, including increased penalties for drug-trafficking offenses.[100]

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[96] *Id*. at *5-6.

[97] Because the client in this case is still in custody serving the reminder of his sentence and all documents have been filed under seal, the documents cannot be shared. If the Commission has additional question about this matter, NACDL is happy to answer them upon request.

[98] U.S.S.G. §1B1.13 cmt. n. 2.

[99] Defender Comment, *supra* note 76, at 17.

[100] *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(B). *See also* David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46, J. LEGAL STUD. 93 (2017) ("One of the most prominent and controversial components of the US federal judicial system is section 841 of US Code, title 21, which prescribes

To provide an element of relief from these extremely harsh penalties, Congress has "refine[d]" the operation of those mandatory-minimum provisions for "the least culpable participants" in federal drug-trafficking offenses by creating an exception to mandatory-minimum sentences, known as the safety valve, which applies when defendants meet certain criteria.[101]

At Congress's direction, the Commission inserted the statutory safety valve provision into the guidelines.[102] Under §3553(f), if a defendant meets all the criteria in the safety valve statute, he can be sentenced below the mandatory minimum sentence. Under the guidelines, if a defendant meets all the criteria of the safety valve guidelines, then he is eligible for a two-level reduction. The qualifying criteria for the safety valve guideline are presented in §5C1.2, while the two-level reductions are set forth §2D1.1(b)(18) and §2D1.11(b)(6), the guidelines for drug trafficking offenses. Until 2018, the safety valve guideline had mirrored the safety valve statute.[103] However, with the passage of the FSA2018, significant changes were made to §3553(f). Specifically, the FSA2018 amended the first of five criteria a defendant must meet to be eligible for the statutory safety valve.[104] As amended by the FSA2018, the current version of §3553(f)(1)(A)-(C) 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.[105]

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mandatory minimum sentences for defendants convicted of trafficking in quantities of illegal drugs over certain thresholds."); Alison Siegler, *End Mandatory Minimums*, BRENNAN CENTER FOR JUSTICE, *available at* https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums (Oct. 18, 2021) ("Prosecutors' use of mandatory minimums in over half of all federal cases disproportionately impacts poor people of color and has driven the exponential growth in the federal prison population in recent decades.")

[101] *See* H.R. Rep. No. 103-460, at 3 (1994), reprinted at 1994 WL 107571 (Mar. 24, 1994); *see also United States v. Pena-Sarabia*, 297 F.3d 983, 988 (10th Cir. 2002) ("The basic purpose of the safety valve was to permit courts to sentence less culpable defendants to sentences under the guidelines, instead of imposing mandatory minimum sentences." (quotation marks omitted).

[102] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001(b), 108 Stat. 1796 (1994); *see also* U.S.S.G. §5C1.2, cmt. background.

[103] Compare U.S.S.G. §5C1.2 with 18 U.S.C. §3553(e) (2017).

[104] 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).

[105] 18 U.S.C. §3553(f)(1) (2018).

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)].[106] Accordingly, under normal circumstances, the Commission would have amended the safety valve guideline in light of the FSA2018's amendments to §3553(f). However, because the Commission had previously lacked a quorum since the FSA2018 was passed, §5C1.2 has not been amended to incorporate the FSA2018's changes. During that time, a circuit split has developed regarding the interpretation of the criminal history criteria outlined above in §3553(f)(1)(A)-(C). Some courts read "and" as being in the conjunctive.[107] In these circuits, "and" means "and;" therefore, a person is safety valve eligible unless they meet the criminal history criteria in (a); (b); and (c). Other courts read "and" in the disjunctive.[108] That is, in these circuits, "and" means "or." As such, if a defendant meets just one of the criteria in (a), (b), or (c), then he is ineligible for safety valve relief. Given the divide over the interpretation of this statutory language, both the government and the defense asked the Supreme Court to grant certiorari. On February 27, 2023, the Court agreed and granted certiorari in *United States v. Pulsifier*.[109]

The Commission is currently considering two options for amending §5C1.2. In Option 1, the Commission would make no substantive changes to the text of §2D1.1(b)(18) and §2D1.11(b)(6), "allowing their 2-level reductions to automatically apply to any defendant who meets the revised criteria of §5C1.2."[110] Because this option would "closely track" the current language of §3553(f)(1)(A)-(C), the Commission would not resolve the current circuit split.[111] Option 2, on the other hand, would "incorporate into [§2D1.1(b)(18) and §2D1.11(b)(6)] the same criminal history criteria from revised §5C1.2(a)(1)," but would "set forth the criteria disjunctively, consistent with the approach of the Fifth, Sixth, Seventh, and Eight Circuits."[112] As

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[106] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001(b).

[107] *See United States v. Jones*, 60 F.4th 230, 232 (4th Cir. 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc); *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), *reh'g denied*, 58 F.4th 1108 (9th Cir. 2023).

[108] *United States v. Haynes*, 55 F.4th 1075, 1080 (6th Cir. 2022); *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 760 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

[109] *See Pulsifer v. United States*, --- S.Ct.---, 2023 WL 2227657 (Feb. 27, 2023) (granting certiorari; Brief for the United States, at 7, *Pulsifer v. United States*, No. 22-340 (Jan. 13, 2023) (agreeing with petitioner that certiorari to resolve this circuit conflict is "warranted")

[110] U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines (Preliminary),* 12 (Jan. 12, 2023), *available at* https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines ("Proposed Amendments").

[111] *See id.*

[112] *Id.*

a result, a defendant who presents "*any* of the disqualifying conditions relating to criminal history" would not be eligible for the 2-level reduction.[113]

The Commission should adopt Option 1. The United States Supreme Court appears poised to resolve the circuit split soon and provide the definitive answer to the meaning of the word "and" as used in §3553(f)(1)(A)-(C). If the Commission were to adopt Option 2, which sets forth the criteria in the disjunctive, and the Supreme Court were to rule that "and" means "and," the Guidelines would then be in direct contravention to the statute. Such a result would create great confusion as judges and practitioners would be required to perform two different safety valve analyses—one based on the statute and another based on the guidelines. The Commission should accordingly adopt Option 1 and allow the Supreme Court to resolve the statutory interpretation issue. That resolution will determine what further guidance, if any, the Commission needs to provide.

Acquitted Conduct

NACDL is pleased that the U.S. Sentencing Commission's Proposed Amendments to the Federal Sentencing Guidelines include changes to partially address the unfair practice of allowing acquitted conduct to be considered as relevant conduct under Sentencing Guideline §1B1.3. As detailed in our comments on the Commission's priorities for this amendment cycle, permitting the use of sentencing based on acquitted conduct violates defendants' due process rights, subverts the crucial role of juries in protecting constitutional rights, and contributes to the trial penalty, which—as the Commission's own statistics[114]prove—has virtually eliminated jury trials in our criminal legal system. Unsurprisingly, acquitted conduct sentencing has been roundly criticized by groups across the political spectrum[115] and is a perennial topic of Supreme Court *certiorari* petitions[116] as defendants seek to challenge this unfair, but sadly persistent, practice.

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[113] *Id* (emphasis in original)

[114] Proposed Amendments, *supra* note 1, at 212 (noting that only 1.7% of federal criminal convictions for fiscal year 2021 were due to guilty verdicts at trial while the other 98.3% were the result of pleas).

[115] *E.g.*, Am. Bar Ass's, *Not Guilty but Might as Well Be: Ending Acquitted Conduct Sentencing*, https://www.americanbar.org/groups/litigation/committees/criminal/articles/2015/fall2015-0915-not-guilty-but-might-well-be-ending-acquitted-conduct-sentencing/ (Sept. 17, 2015); Ams. for Prosperity, *Diverse coalition urges Supreme Court to end acquitted conduct sentencing* (July 9, 2021); Cato Institute, *Addressing the Gross Injustice of Acquitted Conduct Sentencing*, https://www.cato.org/blog/addressing-gross-injustice-acquitted-conduct-sentencing (Sept. 26, 2019); Nat'l Ass'n of Crim. Defense Lawyers, https://www.nacdl.org/search?term=*&activefilter=Acquitted%20Conduct (collecting letters, amicus briefs, and other resources in opposition to acquitted conduct sentencing) (last visited Feb. 6, 2023).

[116] *See*, e.g., *McClinton v. United States*, No. 21-1557 (2023) (pending); *Osby v. United States*, 142 S. Ct. 97, No. 20-1693, *cert. denied* (2021); *Asaro v. United States*, 140 S. Ct. 1104, No. 19-107, *cert. denied* (2020).

Punishing a defendant for acquitted conduct undermines the essential role of the jury and violates the defendant's Sixth Amendment rights. The right to jury trial was sacrosanct to our nation's Framers and was considered among the most important constitutional bulwarks against tyranny. John Adams said that "[r]epresentative government and trial by jury are the heart and lungs of liberty."[117] The right to trial holds a vaunted place in the Constitution itself; it is the only right established and guaranteed in both the Constitution's original text and in the Bill of Rights.[118] Permitting the judge to override or nullify a jury's acquittal by sentencing a defendant based on conduct they were acquitted of undermines this crucial constitutional right.

The right to jury trial is not just important for the defendant. It is also an important part of public oversight of the legal system. Jury participation is a civic obligation and it acts as a community check on the power of the government.[119] Sentencing based on acquitted conduct also undermines the legitimacy and public respect for the legal system.[120] It conveys the message to jurors that their carefully considered decision was wrong and that their jury service was inconsequential. It communicates to the jury, the defendant, and the public that the courts are skewed in favor of the prosecution and that verdicts in favor of the accused need not be respected. This understandable sense of unfairness and loss in public confidence is particularly felt in impacted communities.[121]

As detailed in the written testimony of both NACDL President-Elect Michael P. Heiskell and Melody Brannon, Federal Public Defender for the District of Kansas, acquitted conduct sentencing is also a major contributor to the trial penalty. The trial penalty is broadly defined as the massive difference between the severe sentence a defendant typically receives if convicted at trial versus the much lower sentence a defendant typically receives after a plea. The huge delta between post-trial and post-plea sentencing has virtually eliminated trials from the federal

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[117] John Adams, *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000).

[118] 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 . . .").

[119] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 10 (2018), https://nacdl.org/TrialPenaltyReport [hereinafter, NACDL Trial Penalty Report]; *see also* Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Emp. L. Studies 973, 974 (2004) ("In its political aspect, the jury is a 'republican' body that 'places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.").

[120] *See R. v Sussex Justices ex p. McCarthy*, 1 K.B. 256, 259 (1923) (Eng.) (Lord Hewart, C.J.). The use of acquitted conduct in sentencing, however, is perhaps an even easier case than what was before Lord Hewart. Its use does not merely *seem* unjust; it *is* unjust.

[121] *See* Tom Tyler, *Why People Obey the Law* (2006) (arguing that the perception that the law is fair is critical to engendering respect for the law, thus promoting public safety).

criminal system, with less than 2% of federal convictions resulting from trials in 2021 according to the Sentencing Commission's own statistics.[122] Acquitted conduct sentencing worsens the trial penalty by disincentivizing a defendant from exercising their right to trial because they may be sentenced based on conduct of which they are acquitted. Amending §1B1.3 to prohibit the use of acquitted conduct as relevant conduct was the very first recommendation of the NACDL Trial Penalty Recommendation Task Force in its 2018 report.[123]

Perhaps unsurprisingly, the use of acquitted conduct sentencing has come under increasing scrutiny. It is vehemently opposed by a wide variety of prominent advocacy groups from across the political spectrum, including NACDL, Americans for Prosperity, the Cato Institute, FAMM, Niskanen Center, Right on Crime, R Street Institute, and the Sentencing Project.[124] As mentioned in NACDL's earlier comments and in Mr. Heiskell's written testimony, the practice has been widely criticized by Supreme Court Justices as well.

Even district judges are skeptical about the use of acquitted conduct in sentencing. A 2010 survey of over 600 District Judges conducted by the Sentencing Commission found that only 16% believed that acquitted conduct should be considered relevant conduct.[125] This is important for two reasons. First, it indicates widespread judicial concern and opposition to this practice; a vast majority of roughly five out of six district judges oppose the use of acquitted conduct in sentencing. But secondly, the fact that many district judges would still sentence using acquitted conduct while many more will not contributes to the likelihood of unfair disparities in sentencing that sentencing judges are required by federal statute to seek to avoid.

NACDL wants to address a misconception stated during the oral testimony before the Commission on this topic on February 24, 2023, namely, that barring the use of acquitted conduct in sentencing will affect a large and unknown number of federal prosecutions. The truth is that very few federal cases present the possibility of acquitted conduct being used in sentencing. To begin, less than 2% of federal criminal convictions, just 963 in fiscal year 2021, result from guilty verdicts at trial.[126] Of those 963 trials, just 16% of them (157) also included an

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[122] U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics, at 56, table 11 (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

[123] *See* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 12 (2018), https://nacdl.org/TrialPenaltyReport.

[124] Brief of Amici Curiae Ams. for Prosperity Found., Dream Corps Justice, Nat'l Ass'n of Crim. Defense Lawyers, Niskanen Ctr., Right on Crime, R Street Inst. & Sent'g Proj. in Support of Pet'r., *McClinton v. United States*, No. 21-1557 (June 30, 2022); Brief of Cato Inst. As Amicus Curiae Supporting Pet'r, *McClinton v. United States*, No. 21-1557 (July 14, 2022); Brief of Nat'l Ass'n of Fed. Defenders & FAMM Supporting Pet'r, *McClinton v. United States*, No. 21-1557 (July 14, 2022).

[125] U.S. Sentencing Comm'n, Results of Survey of U.S. District Judges Jan. 2010 to March 2010, at Question 6 (June 2010), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

[126] Proposed Amendments, *supra* note 1, at 212.

acquittal on at least one offense.[127] Thus, it is clear that this issue comes up in a very limited number of cases. However infrequent, this issue is of great importance to those defendants and the negative impact on the public legitimacy of the system is very real.

While NACDL is pleased to see the Sentencing Commission's interest in addressing the use of acquitted conduct as relevant conduct, we are concerned by the limited scope of the Commission's proposed amendment. The Commission has proposed amending §1B1.3(c) to bar the use of acquitted conduct as relevant conduct for purposes of determining the guideline range.[128] The Commission acknowledges that this would still permit the consideration of acquitted conduct "in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted."[129]

This change is far too narrow. Given the myriad harms inflicted by the use of acquitted conduct in sentencing—its fundamental unfairness to the defendants, its rejection of the constitutional rights to due process and trial by jury, its rejection of jury verdicts, its subversion of the jury's crucial role in our legal system, its undermining of public respect and legitimacy for our legal system—it is concerning to see the Commission seek to limit its use in such a narrow and, potentially, ineffectual way. Even with this amendment, acquitted conduct may still be relied upon to unfairly sentence defendants, either within the guidelines range or through upward departures. The harms caused by its use will remain.

While the rationale for this proposed amendment is unstated, if the Commission finds the use of acquitted conduct to be unfair in certain circumstances, it is unclear why that same rationale would not apply in other circumstances. That is, if it is unfair to use acquitted conduct to determine the guidelines range, why is it not also unfair to consider it to determine a sentence within the range or to impose an upward departure?

For the same reason, NACDL opposes the proposed limitations on the prohibition of using acquitted conduct at sentencing. First, we oppose the limitation that would permit use of acquitted conduct which "was found by the trier of fact beyond a reasonable doubt."[130] Where there is overlapping conduct involving acquitted and convicted counts, the principle of not sentencing on acquitted conduct dictates that the benefit should go to the defendant. To hold otherwise creates a back-door mechanism to countermand the impact of the acquittal. Where the task of carving out acquitted conduct from convicted conduct is complex in an individual case, the Commission should trust the district judges to do a careful analysis in light of the prohibition contained in this guideline. And, consistent with its traditional role, the Commission can always revisit the guideline and its commentary in the future in light of experience and feedback.

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[127] *Id.*

[128] *Id.* at 213.

[129] *Id.* at 224.

[130] *Id*. at 242.

Second, NACDL opposes any exception for acquittals on the basis of jurisdiction, venue, or statute of limitations. As an initial matter, we disagree with the suggestion that acquittals on these bases are somehow merely procedural or less valid. We respectfully disagree with the characterization that an acquittal on the basis of an expired statute of limitations is "unrelated to the substantive evidence," as decades of jurisprudence makes clear that statutes of limitations, particularly in criminal cases, are intended to avoid wrongful convictions by the bringing of cases where evidence is unreliable or missing.[131] Acquittals based on jurisdiction or venue are also acquittals. It is part of the government's burden to prove that the United States has jurisdiction over the charged conduct and the charged person. For some federal crimes, jurisdiction is even an element that must be proven to the jury beyond a reasonable doubt.[132] In any event, an acquittal on these grounds is still an acquittal, in the eyes of the jury, the defendant and the public. Additionally, a bright line rule disallowing the use of acquitted conduct in sentencing regardless of the manner of acquittal provides much clearer guidance to prosecutors, defendants, and the public and will be easier for district judges to apply.

Finally, we oppose use of acquitted conduct that "was admitted by the defendant during a guilty plea colloquy."[133] To the extent this refers to the rare situation where a defendant accepted responsibility for some federal charges but elected to proceed to trial on others, we reiterate our position set forth above that where there is overlapping conduct involving acquitted and convicted counts, the benefit should go to the defendant. The proposed clause could also apply to the more common situation where an individual had pled guilty to related conduct in a state court. Defendant's statements during a guilty plea colloquy, which unlike a written plea agreement may not have a full opportunity for vetting and review, could be misspoken, misstated, or misinterpreted. This is especially true of guilty pleas made hurriedly in state courts

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[131] *Id.* at 224 (Feb. 2, 2023). Rather, the primary rationale of statutes of limitations is to ensure that fresh evidence is reliable and available. Criminal statutes of limitations, therefore, prevent wrongful convictions. *See* Wayne LaFave et al., 5 Crim. Proc. § 18.5(a) (4th ed. Nov. 2022 Update) (calling preventing wrongful convictions the "foremost" purpose of statutes of limitations); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348–49 (1944) (statutes of limitations prevent cases where "has been lost, memories have faded, and witnesses have disappeared."). https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf. Rather, the primary rationale of statutes of limitations is to ensure that fresh evidence is reliable and available. Criminal statutes of limitations, therefore, prevent wrongful convictions. *See* Wayne LaFave et al., 5 Crim. Proc. § 18.5(a) (4th ed. Nov. 2022 Update) (calling preventing wrongful convictions the "foremost" purpose of statutes of limitations); *see also Ord. of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348–49 (1944) (statutes of limitations prevent cases where "has been lost, memories have faded, and witnesses have disappeared.").

[132] *E.g.*, *Taylor v. United States*, 579 U.S. 301, 309 (2016) (stating that the government must prove Hobbs Act element of affecting ""commerce over which the United States has jurisdiction" beyond a reasonable doubt); *United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) ("The existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), which must be proved to the jury beyond a reasonable doubt.");

[133] Proposed Amendments, *supra* note 1, at 242

laboring under heavy dockets. For these reasons, statements during a plea colloquy should not override an acquittal.

The only way that the unfair practice of acquitted conduct sentencing can be fully addressed and the harms it has caused in our system can be diminished is by disallowing it entirely. NACDL asks the Commission to amend §1B1.3 to prohibit the consideration of acquitted conduct as relevant conduct for any purpose. This would be fair to defendants and would ensure restored respect for the jury and its role within our system.

Impact of Simple Possession of Marijuana Offenses

NACDL supports the proposed amendment to §4A1.3(C) to create a downward departure option where a prior conviction for possession of marijuana increases an individual's criminal history score. NACDL also urges the Commission to make this change retroactive.

As part of its mission to reform the criminal legal system, NACDL runs the Return to Freedom Project, which encompasses several post-conviction programs including the Cannabis Justice Initiative (CJI). The CJI pursues multiple avenues of relief for those directly impacted by a marijuana conviction; the CJI, primarily through pro bono attorneys, files clemency petitions and compassionate release motions on behalf of persons convicted of federal marijuana crimes who are incarcerated in prisons across the United States.

While the number of federal offenders sentenced for simple possession or marijuana is relatively small and has been declining steadily since 2014,[134] defendants in the federal system continue to receive criminal history points under the Sentencing Guidelines for prior marijuana possession sentences.[135] The criminal history points assigned under the federal sentencing guidelines for prior marijuana possession resulted in a higher criminal history category for 40.1% of offenders.[136] And there is a racial disparity in who receives criminal history points: of the offenders whose criminal history category was impacted by a prior marijuana sentence, 41.7% were Black and 40.1% were Hispanic.[137] Indeed, it is well-established that marijuana arrests disproportionately impact communities of color.[138] Thus, the amendment would have an important ameliorative effect on this racial inequity, with negligible impact on safety from these nonviolent crimes.

Over the last several decades, laws and policies regarding marijuana possession have changed across the states and in the federal system. As of today, 37 states allow for the medical

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[134] *See* U.S. Sentencing Comm'n, *Weighing the Impact of Simple Possession of Marijuana* 1 (2023), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY20.pdf ("Weighing Marijuana")

[135] *Id*.

[136] *Id*.

[137] *Id.*

[138] American Civil Liberties Union (ACLU), *Marijuana Arrests by the Numbers* (2020).

use of marijuana products, and 21 states and the District of Columbia have legalized or decriminalized marijuana possession or sales in some form. The states that prohibit possession are steadily decreasing.[139] Nearly all, or 97%, of the prior marijuana possession sentences were for state convictions, some from states that have changed their laws to decriminalize or legalize marijuana possession, a patently unfair result.[140]

In an important step towards marijuana decriminalization at the federal level, President Biden recently encouraged reconsidering the rescheduling of marijuana from its status as a schedule I substance and issued pardons for U.S. citizens with prior possession of marijuana convictions.[141] The MORE Act, which passed the House of Representatives, would also make sweeping changes to existing federal marijuana prohibitions, including descheduling cannabis from the Controlled Substances Act and enacting reforms like establishing a process to expunge federal cannabis convictions, among others.[142] Congress has also passed spending limitations to preclude marijuana businesses from being subject to any federal prosecutions. The Department of Justice has refrained from prosecution in deference to state decision-making on marijuana legalization,[143] and U.S. Attorney General Merrick Garland has emphasized that simple possession of marijuana is not a DOJ priority.[144]

In the judicial context, several courts considering compassionate release motions have also recognized that "changing societal attitudes" towards marijuana, as illustrated by changes in law and policy, demonstrate that extraordinary and compelling circumstances exist for an individual's early release.[145] One court cited to changes in marijuana law and policy in considering the Section 3553(a) factors, stating that under those circumstances, "particularly in light of the non-violent nature of the offence, a substantial reduction would be consistent with the purposes of sentencing, including to reflect the seriousness of the offense, to promote respect for

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[139] Nat'l Conf. of State Legislatures, *State Medical Cannabis Laws* (Nov. 9, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[140] *See* Weighing Marijuana, *supra* note 134, at 1.

[141] The White House, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana* (Oct. 6, 2022).

[142] *See* H.R. 3884 – 116TH CONGRESS, *The Marijuana Opportunity Reinvestment and Expungement Act of 2020* (2019-2020); Rebecca Shabad, *House Passes Landmark Marijuana Legalization Bill,* NBC NEWS (Apr. 1, 2022). In the past Congress, NACDL fully supported passage of the MORE Act.

[143] *Id.*

[144] *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be the United States Att'y Gen*. 22-23 (Feb. 28, 2021).

[145] *See, e.g.*, *United States v. Scarmazzo*, No. 1:06-CR-000342, 22, ECF #508 (Feb. 2, 2023); *United States v. Hernandez*, No. 10-30081, 2021 WL 3192161, at *4 (C.D. Ill. July 28, 2021); *United States v. Orozco*, 2021 WL 2325011, at *1 (E.D. Wash. June 7, 2021). *See also United States v. Vigneau*, 473 F. Supp. 3d 31 (D.R.I. 2020) (recognizing that changing societal attitudes towards marijuana justify imposition of a lower sentence today).

law, and provide just punishment."[146] Even Supreme Court Justice Clarence Thomas has acknowledged the monumental changes that have occurred throughout the nation in the attitudes and laws governing marijuana which, he stated, "strains basic principles of federalism and conceals traps for the unwary."[147] It thus appears that federally and at the state level there is a chorus of agreement that our country's draconian stance towards marijuana prohibition is behind us.

In light of the above, it is apparent that applying criminal history points to individuals for their prior marijuana possession convictions is unfair, unwise, and goes against the tide of history. An amendment enabling judges, in the exercise of their already broad discretion, to depart downward in these cases will bring the guidelines more in line with trends at the federal and state levels and create a more just system.

NACDL also urges the Commission to make this amendment retroactive under §1B1.10. Retroactivity strengthens the purpose of the amendment, which is to reduce disparities in sentences, because all individuals, whether sentenced before or after these revisions, will be afforded the benefit of the amendments. As noted above, the impact of this amendment on sentenced individuals is not insignificant – the criminal history points assigned under the federal sentencing guidelines for prior marijuana possession resulted in a higher criminal history category for 40.1% of offenders.[148] In fiscal year 2021, 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marijuana possession sentences.[149] In addition, there are approximately 2,175 persons incarcerated in federal prisons for marijuana offenses (including the trafficking of marijuana), who are, in our experience, the most likely recipients of a higher criminal history score because of prior marijuana possession crimes.[150] Administration of a retroactive benefit of this size is one our federal courts have

[146] *United States v. Taylor*, 2021 WL 243195, at *3 (D. Md. Jan. 25, 2021).

[147] *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021) (J. Thomas, dissent).

[148] *See* U.S. Sentencing Comm'n, *Weighing the Impact of Simple Possession of Marijuana* 1 (2023), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY20.pdf

[149] *See* U.S. Sentencing Comm'n, *Weighing the Impact of Simple Possession of Marijuana,* at 3.

[150] U.S. Sentencing Comm'n, Quick Facts: Federal Offenders in Prison January 2022 1 (2022) (indicating that there are 63,994 persons incarcerated in federal prisons for drug trafficking, and 3.4% are in prison for marijuana crimes). In 2021, the average sentence length for marijuana trafficking offenses with a Criminal History Category of I was 22 months; of marijuana trafficking offenses with a Criminal History Category of II was 37 months; of marijuana trafficking offenses with a Criminal History Category of III was 35 months; of marijuana trafficking offenses with Criminal History Category IV was 48 months; of marijuana trafficking offenses with Criminal History Category V was 50 months; and marijuana trafficking offenses with Criminal History Category VI was 85 months. *See* U.S. SENT'G COMM'N, *Interactive Data Analyzer,* available at: https://ida.ussc.gov/analytics/saw.dll?Dashboard (2021).

proved to be adept at handling.[151] Notably, of course, any grant of retroactive relief would be subject to an individualized review subject to 18 U.S.C. § 3553(a).[152] Without allowing for retroactive application of the proposed amendment, thousands of incarcerated individuals, and especially incarcerated people of color, will continue to serve longer sentences than necessary based upon a criminal history category calculation that incudes now-legal conduct.

Alternatives-To-Incarceration 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, are finally being instituted across the federal system at a grassroots level in recent years with considerable success. It is time for the Commission to give these programs its official imprimatur and subject them to its analytical expertise. We urge the Commission not to defer this issue for further research and study but rather to amend the guidelines this cycle with a robust and fulsome statement of support for diversion and ATI programs.

The overriding feature of the federal sentencing system since the Sentencing Reform Act has been its punitiveness. Incarceration rates have not only skyrocketed; sentences have become considerably longer.[153] Contrary to the vision of the SRA drafters,[154] probation is the exception rather than the rule, with only 6.2% of federal defendants receiving a probation-only sentence in FY 2021.[155] In response, several districts started diversion and ATI programs, often with no funding and utilizing volunteer hours.[156] Today, at least 52 districts have such programs, and the

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[151] *See* Caryn Davis, *Lessons Learned from Retroactivity Resentencing after Johnson and Amendment 782*, 10 Fed. Cts. L. Rev. 39, 71, 74 (2018) (empirical study of the 782 implementation process conlcudes that stakeholders reported it was "for the most part, smooth and orderly," with judges often working with "probation officers and representatives from the U.S. Attorney's Office and federal defender organizations in order to create expedited sentencing processes").

[152] *See* 18 U.S.C. § 3582(c)(2) (requiring that sentencing reductions based on sentencing ranges subsequently lowered by the Sentencing Commission can only occur "after considering the factors set forth in section 3553(a) to the extent that they are applicable").

[153] *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.

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

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

[156] *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*").

results are encouraging.[157] 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 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).[158]

These results parallel the extensive scholarship conducted at the state level and internationally establishing that ATI and diversionary programs reduce recidivism,[159] decrease racial and economic disparities,[160] ensure the young and those with mental and physical disabilities get the therapeutic care they need,[161] and keep families together.[162] Thus, it is time

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

[158] *Id.* at 12.

[159] *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.").

[160] 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/.

[161] 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.").

[162] *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).

for the Commission to show leadership on the issue of encouraging and promoting ATI and diversionary programs.

The Commission asks how it should amend the Guidelines Manual to address court-sponsored diversion and ATI programs.

First, the Commission should 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 One NACDL member told us of a case involving an 18-year-old client—a first-time offender accused of a relatively minor and short-lived (two-week) role in a check-cashing fraud case where the victim was a bank. The loss associated with this individual's offense was less than $50,000. The individual, who cooperated fully upon arrest, was also consumed with guilt by their conduct and by their gullibility to the much older masterminds of the operation. The individual attempted suicide shortly after arrest. Counsel approached the prosecutor with a request for diversion. The response was that there is no such program in this district because such programs are not necessary: "if your client is an appropriate candidate for diversion, we would not have charged them in the first place." The prosecutor knew nothing about the suicide attempt, the client's all-consuming and immobilizing guilt, and several other matters related to this person's background that mitigated their participation in the offense. In the absence of any diversionary program, the client pled guilty to bank fraud. In the absence of any ATI program in that district, the client was sentenced to one year in custody. Little was served by this punitive and expensive response to one teenager's momentary lapse in judgment.[163]

Second, NACDL supports 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 suggests in its amendment proposal, 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 to consider partial completion accompanied by committed engagement in granting this downward departure.

Third, the Commission should set forth some threshold criteria for approval of these ATI programs, including the requirement that they do not result in a "net widening" of those subject

[163] In deference to this individual's privacy, no identifying details have been revealed in this description. NACDL vouches for the accuracy of this information and can reveal additional information to the Commission on request.

to federal charges or onerous probationary conditions,[164] they focus on those of highest need rather than cherry-picking those most likely to succeed,[165] and are subject to careful monitoring to ensure they do not replicate the racial and economic disparities they are designed, in part, to address.[166]

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,[167] 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.

Respectfully submitted,

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[164] *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").

[165] *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).

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

[167] 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."