FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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March 21, 2024

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

Re: Defender Supplemental Comment on 2024 Proposed Amendments

Dear Judge Reeves:

Thank you for the opportunity to provide comment and witness testimony on this year's proposed amendments to the Sentencing Guidelines. Enclosed are three supplements to Defenders' comment, which address issues raised at the March 6 and 7 Hearings related to proposed amendments regarding acquitted conduct, enhanced drug penalties, and simplification.

The Federal Public and Community Defenders appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders
Supplemental Comment on Acquitted Conduct

(Proposal 3)

March 21, 2024

At the hearing on acquitted conduct, Vice Chair Murray asked Defender witness Michael Holley about defining "acquitted conduct" as conduct underlying a charge of which a person has been acquitted, and raised concerns about the difference between that definition of "acquitted conduct" and its exclusion—that is, "convicted conduct."[1] Ex Officio Commissioner Wroblewski subsequently asked if Defenders agreed that DOJ's proposal permitting judges (as opposed to the jury) to determine what conduct underlies a convicted charge would be a "much more straight forward process" and alleviate Vice Chair Murray's worries.[2]

Our considered response to these issues is below. First, to address Vice Chair Murray's concerns, Defenders propose two small modifications to the Commission's definitions of acquitted and convicted conduct. Second, we address Vice Chair Murray's "drug-free school zone" hypothetical, along with other hypotheticals posed during the hearing, using the new language we suggest. And finally, we discuss DOJ's counterproposal.

I. Potential Modifications to the Definition

In light of Vice Chair Murray's questions, Defenders offer two modifications to Option 1's definition section: one to the affirmative definition of "acquitted conduct" and another to that definition's exclusion, where the Commission clarifies one category of conduct that can never be considered acquitted conduct (the bracketed language).

First, we propose defining acquitted conduct as "conduct underlying an element of" an acquitted charge. While constricting "acquitted conduct" to mean only conduct that "constitutes an element" of an acquitted charge would be problematic, Defenders have no objection to the use of the word "element" to clarify that what matters is the conduct underlying those

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[1] *See* USSC, *Public Hearing on Proposed Amendment on Acquitted Conduct*, U.S. Sent'g Comm 2:22:30–2:25:51 (Mar. 6, 2024,), https://tinyurl.com/yn8p3xua ("*Acquitted Conduct Hearing*"). The proposed exclusionary caveat does not use the term "underlying" and references only conduct that was admitted during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. *See* USSC, *Proposed Amendments to the Sentencing Guidelines* 42 (2023), https://tinyurl.com/2tttp8ey ("2024 Proposed Amendments").

[2] *See Acquitted Conduct Hearing* at 2:27:32–2:27:48.

elements. Defining acquitted conduct as that which underlies an element of a charge grants judges flexibility to consider the conduct that was presented at trial. But it focuses only on conduct that was used to prove the statutory elements of the offense. It is also essentially the same as language DOJ proposed last year.[3]

Second, we suggest mirroring the "underlying an element" language in the exclusionary-caveat section that defines convicted conduct. This would clarify that acquitted conduct could never include conduct underlying an element of a charge of which the defendant has been convicted.

If the Commission implements these changes, along with the other changes we recommend in our original comment, its amendment would read:

(c) ACQUITTED CONDUCT.—

(1) EXCLUSION.—Acquitted conduct is not relevant conduct for purposes of determining the guideline range.

(2) DEFINITION OF ACQUITTED CONDUCT.—"***Acquitted conduct***" means conduct (i.e., any acts or omission) ~~[~~underlying an element of~~]~~ ~~[constituting an element of]~~a charge of which the defendant has been acquitted by the trier of fact ~~in federal court~~ or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

~~[~~"***Acquitted conduct***" does not include conduct underlying an element of a charge of which the defendant has been convicted by the trier of fact or through a plea of guilty, regardless of whether such conduct also underlies an element of a charge of which the defendant has been acquitted. ~~that—~~

~~(A) was admitted by the defendant during a guilty plea colloquy; or~~

~~(B) was found by the trier of fact beyond a reasonable doubt;~~

~~to establish, in whole or in part, the instant offense of conviction[, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted].]~~

[3] *See* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm 16 (Feb. 15, 2023), https://tinyurl.com/yh28knhf.

II. Applying Defenders' Proposed Modifications to the Hypothetical Questions Presented at the Hearing

Vice Chair Murray expressed concerns that "underlying" is too "amorphous," and broader than Option 1's proposed definition of "convicted conduct."[4] She asked Attorney Holley how the "underlying standard" would work in a case involving a two-count indictment for: (1) conspiring to distribute a controlled substance and (2) distributing a controlled substance.[5] The alleged substantive distribution took place within a drug-free school zone, which she said to assume was a guidelines "sentencing factor," but not an element of the crime.[6] The person was convicted of the conspiracy and acquitted of the underlying sale.[7] Could the person be sentenced for the conspiracy based on proximity to a school even if presence in a school zone is not an element of the conspiracy charge "and you are only convicted of elements"?[8] And if the person was acquitted of conspiracy and convicted of the substantive sale, would Defenders argue that proximity to a school "underlies" the acquitted conspiracy?[9]

Under our proposed modified language, if proximity to the school underlies an element of the convicted charge or both charges, the hypothetical enhancement would apply. If proximity underlies an element of the acquitted charge only, the enhancement would not apply.

So, if the person was acquitted of conspiracy and convicted of the substantive sale in a school zone, the hypothetical school-zone enhancement

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[4] *See Acquitted Conduct Hearing* at 2:22:30–2:22:40, 2:25:30–2:25:55.

[5] *See id.* at 2:22:51–2:23:01.

[6] *See id.* at 2:23:01–2:23:14. While we recognize the question was posed as a hypothetical, this precise problem would not arise in practice. There is no SOC in USSG §2D1.1 for distribution within or near a drug-free school zone. Instead, distribution or manufacturing in or near schools is an element of an aggravated drug offense, punished by increased minimum and maximum penalties, c*ompare* 21 U.S.C. § 860 *with* 21 U.S.C. § 841(a)–(b), and covered by a separate guideline: §2D1.2, not §2D1.1.

[7] *See Acquitted Conduct Hearing* at 2:23:14–2:23:20.

[8] *See id.* at 2:23:21–2:23:55.

[9] *See id.* at 2:25:03–2:25:08.

would apply regardless of the acquittal on the conspiracy charge (assuming the language of the hypothetical SOC covered the facts).

If the person was acquitted of the substantive sale in a school zone but convicted of the conspiracy, more information would be needed to determine whether the enhancement would apply. For instance, if the hypothetical school-zone enhancement was phrased like §2D1.1(b)(4),[10] and the government presented evidence that the conspiracy had only one object—distribution at a school—then the enhancement would apply. The convicted conduct would trump the acquitted conduct. But if the "object of the [conspiracy]" was not the distribution in or near a school, or if the conspiracy had multiple objects and the judge understood the jury's verdict to reject the school-related object, the enhancement would not apply. And, depending on how the hypothetical enhancement was worded, the analysis could be impacted by the acts of other participants.[11] The analysis is not complicated, but it would depend on the circumstances of the trial.

The other hypotheticals posed, like most acquitted conduct cases, are similarly straightforward.[12] For instance, Commissioner Wong asked Judge Chang what would happen if a person was acquitted of 18 U.S.C. § 922(n) (receipt of a firearm while under indictment) but convicted of 18 U.S.C. § 924(c), involving the same firearm.[13] No version of the proposed amendment would impact this hypothetical. If a person is convicted of § 924(c) alone, §1B1.3—relevant conduct—is irrelevant. The court looks to §2K2.4(b), which instructs that in the case of a § 924(c) conviction, "whether or not [the person

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[10] That provision reads: "If the *object of the offense* was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels." (emphasis added).

[11] *See* USSG §1B1.3(a)(1)(B).

[12] It is also worth noting that several states have adopted rules prohibiting the use of conduct underlying an acquittal to enhance sentencing ranges, apparently without many conceptual or practical difficulties, as can be discerned by the dearth of published case law struggling to apply these state rules. *See State v. Melvin*, 258 A.3d 1075 (N.J. 2021); *People v. Beck*, 939 N.W.2d 213 (Mich. 2019); *State v. Koch*, 112 P.3d 69 (Haw. 2005); *State v. Marley*, 364 S.E.2d 133 (N.C. 1988); *State v. Cote*, 530 A.2d 775 (N.H. 1987); *McNew v. State*, 391 N.E.2d 607 (Ind. 1979).

[13] *See Acquitted Conduct Hearing* at 28:26–29:27.

is] convicted of another crime . . . the guideline sentence is the minimum term of imprisonment required by statute." So, in the absence of certain specified aggravating factors, the guideline sentence would be either five, seven, or ten years depending on whether the firearm was possessed, brandished, or discharged.[14]

For the same reason, the proposed amendment would not impact the example DOJ witness Rebecca Taibleson provided. She described a case involving a corrections officer who conspired with another corrections officer to assault individuals in a juvenile correctional facility.[15] The officer was convicted of conspiring to violate constitutional rights through excessive force (18 U.S.C. § 241) but acquitted of substantive assaults charged under 18 U.S.C. § 242.[16] Pointing to §2H1.1(a)(1)'s direction to apply the guideline applicable to the underlying offense, Attorney Taibleson claimed it would be impossible under proposed Option 1 to apply the guideline.[17]

As an initial matter, §2H1.1(a) sets forth multiple alternative base offense levels, and only subsection (a)(1) requires the court to determine "the offense level from the offense guideline applicable to any underlying offense."[18] Subsections (a)(2)–(a)(4) do not require courts to look to the offense level from an underlying offense and direct a base offense level of either 12, 10, or 6 depending on the circumstances of the case. Thus, at a minimum,

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[14] *See* USSG §2K2.4(b); 18 U.S.C. § 924(c)(1)(A).

[15] *See Acquitted Conduct Hearing* at 1:54:38–1:55:57. Although Attorney Taibleson did not disclose the case to which she was referring, the facts appear similar to those of *United States v. Terrance Reynolds*, 18-cr-20953 (S.D. Fla.). There, Mr. Reynolds was convicted after a jury trial of conspiring with another corrections officer to "injure, oppress, threaten, and intimidate" three young people detained in the Florida Department of Corrections, in violation of their constitutional right to be free from cruel and unusual punishment, under 18 U.S.C. § 241 (Count 1). ECF No. 81 (Superseding Indictment); *see also* ECF No. 119 (Jury Verdict). However, he was acquitted of two charges of deprivation of rights through assault, under 18 U.S.C. § 242 (Counts 2 and 3).

[16] *See id.* at 1:54:55–1:55:00.

[17] *See Acquitted Conduct Hearing* at 1:55:00–1:55:40.

[18] USSG §2H1.1(a)(1).

under the facts Attorney Taibleson described, the base offense level would be 12—because the offense involved two or more participants—not zero.[19]

But also, the proposed amendment would have no impact on the application of §2H1.1 in this case because §2H1.1(a)(1) already precludes courts from relying on acquitted conduct under §1B1.3's relevant conduct rule—which, again, is the guideline the proposed amendment would amend—to determine the (a)(1) base offense level. Section 2H1.1's commentary expressly restricts the enhanced base offense level to "conduct established by the offense *of conviction*."[20] Therefore, a court would already look at only the conduct established by the conspiracy conviction and determine the base offense level accordingly.

Defenders grant there will be rare cases that are not so straightforward. There may be times when a court must examine the trial record to interpret the scope of the jury's acquittal.[21] But this is nothing new. Far from being "totally inscrutable,"[22] courts must interpret jury findings in the collateral estoppel context to determine which fact issues are foreclosed from future litigation based on a verdict of acquittal.[23] We are confident that

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[19] *See* §2H1.1(a)(2).

[20] *See* §2H1.1 comment. (n. 1) (emphasis added); *see also* §1B1.2(a) ("offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). . ."); §1B1.1 comment. (n. 1(I)) (defining "offense" to include "offense of conviction *and* all relevant conduct under §1B1.3" (emphasis added)).

[21] For instance, as was addressed during the judges' panel, there are guideline enhancements that are similar to, but broader than, statutory language. *See Acquitted Conduct Hearing* at 1:35:35–1:37:22 (discussing § 924(c) versus §2D1.1(b)(1) and "serious bodily injury" as defined by 8 U.S.C. § 1324/18 U.S.C. § 1365 versus §1B1.1 comment. (n. 1(M))). When a jury acquits under the narrower statutory language but convicts on another offense, the court will need to consider the evidence and arguments at trial to decide if the acquittal precludes application of the enhancement to the convicted charge.

[22] *Acquitted Conduct Hearing* at 1:56:47 (Attorney Taibleson).

[23] *See Ashe v. Swenson*, 397 U.S. 436, 443–44 (1970); *see also, e.g.*, Peter Erlinder, *"Doing Time" . . . After the Jury Acquits: Resolving the Post*-Booker *"Acquitted Conduct" Sentencing Dilemma*, 18 S. Cal. Rev. L. & Soc. Just. 79, 108–11 (2008) (suggesting a collateral estoppel-like dividing line in the acquitted-conduct sentencing context that would permit courts to consider at sentencing facts not

district judges, with advocacy from the parties, will be able to faithfully apply the Commission's proposed amendment (with Defenders' suggested modifications) to cases as they arise.

III. Defenders' Concerns with DOJ's Counterproposal

Ex Officio Commissioner Wroblewski suggested that the Commission's proposed exclusionary caveat defining convicted conduct would be easier to apply if the judge could simply determine, on his or her own, what conduct was proven at trial without "ask[ing] judges to figure out what the jury has found[.]"[24]

Along those same lines, in its written comment, DOJ proposed the following definitions for acquitted and convicted conduct:

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

(2) DEFINITION OF ACQUITTED CONDUCT. For the purposes of this guideline, "***acquitted conduct***" means conduct (*i.e.*, any acts or omissions) constituting an element of a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

"***Acquitted conduct***" does not include any conduct (*i.e.*, any acts or omissions) that—

A) was admitted by the defendant under oath ~~during a guilty plea colloquy;~~ or

B) was determined by the court to have been established at trial beyond a reasonable doubt ~~was found by the trier of fact~~;[14]

~~to establish~~, and relates, in whole or in part, to the instant offense of conviction, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted.

"Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771.

directly related to the proof on elements of the acquitted offense, while protecting the integrity of the verdict of acquittal by foreclosing consideration of facts actually decided by the jury, or decided by implication, that are inherent in the proof on the elements of the acquitted offense).

[24] *See Acquitted Conduct Hearing* at 2:27:28–2:27:30.

Defenders have serious concerns with this counterproposal. Beyond its most glaring problem—that it would continue to allow the court to veto the jury's verdict, undermining the many significant policy reasons to eliminate acquitted-conduct sentencing,[25] for the sake of ease—Defenders have four objections. First, it defines acquitted conduct as narrowly as possible while defining the exclusion (convicted conduct) as broadly as possible. Second, DOJ's proposal excludes state, local, and tribal acquittals from the definition of "acquitted conduct," along with acquittals unrelated to the "substantive evidence."[26] Third, DOJ's proposal excludes conduct "admitted by the defendant under oath," regardless of the circumstance or type of hearing and without any limitations whatsoever. Lastly, DOJ proposes to add language to the amendment that a person is a "victim" who has the right to be heard at sentencing if "at any time" during the prosecution, they were considered a victim. The Commission does not need to, and should not, give judges advice on how to read 18 U.S.C. § 3771.

The government presents its proposal as a simpler option. Defenders grant that it may be easier, in some cases, for a judge to substitute her judgment for that of the jury's; but what is easier is not always right. And while we understand that separating conduct that underlies a jury's acquittal from that which underlies that jury's conviction will not *always* be simple and straightforward, it will be straightforward in most acquitted-conduct cases—of which there are exceedingly few.[27]

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[25] *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2024 Acquitted Conduct Proposed Amendments, at 6–22 (Feb. 22, 2024), https://tinyurl.com/33thwwj6 (discussing policy reasons to exclude conduct underlying an acquittal from the guideline determination).

[26] *See id.* at 27–31, 33–34 (explaining Defenders' position on these acquittals).

[27] In Fiscal year 2022, only 286 individuals, representing just 0.4 percent of all sentenced individuals, were acquitted at trial of at least one offense or found guilty on only a lesser-included offense. *See* 2024 Proposed Amendments at 40.

Federal Public and Community Defenders Supplemental Comment on Enhanced Penalties for Certain Drug Offenses (Proposal 5(E))

March 21, 2024

At the hearing, Defender witness Deirdre von Dornum explained that we support Option 1 of the proposed amendment with additional language permitting party stipulations. Attorney von Dornum was asked if Defenders would also support the language POAG proposed to clarify that base offense levels §2D1.1(a)(1) and (3) should not apply, absent a stipulation, if a § 851 information was filed but later withdrawn.

We agree that it would be helpful to clarify this point. But we think the clearest way to accomplish this would be to use the phrase "as established under 21 U.S.C. § 851," instead of the Commission's proposed language: "as established by the information filed by the government pursuant to 21 U.S.C. § 851." Section 851 governs the entire process for imposing an enhanced sentence based on prior offenses, not only the initial filing of the information. And there is no reason to focus on the information. By requiring that the prior convictions be "established under § 851," §2D1.1(a)(1) and (a)(3) would clarify that the § 851 information must have been filed and sustained.

For ease of reference, our suggested language permitting party stipulations and also clarifying the § 851 issue is incorporated into Option 1 below:

(1) **43**, if—

(A) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2)~~, and the offense of conviction establishes that~~; and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and ~~that~~(II) the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony, as established under 21 U.S.C. § 851; or

(B) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3)~~ and the offense of conviction establishes that~~; and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and ~~that~~(II) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established under 21 U.S.C. § 851; or

(C) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3); and (ii) the parties stipulate that this base offense level applies; or

(2) **38**, if—

(A) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3)~~, and the offense of conviction establishes that~~; and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or

(B) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3); and (ii) the parties stipulate that this base offense level applies; or

(3) **30**, if—

(A) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5)~~, and the offense of conviction establishes that~~; and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and ~~that~~(II) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established under 21 U.S.C. § 851; or

(B) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) and (ii) the parties stipulate that this base offense level applies; or

(4) **26**, if—

(A) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5)~~, and the offense of conviction establishes that~~; and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or

(B) the defendant (i) is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5); and (ii) the parties stipulate that this base offense level applies; or

Supplemental Comment on Simplification of Three-Step Process (Proposal 7)

March 21, 2024

Regarding the Commission's Simplification proposal, Defenders follow up on one matter. At the hearing, Ex Officio Commissioner Wroblewski suggested that deleting policy statements regarding departures (presumably those in Chapter 5, Parts H and K2), could conflict with the Sentencing Reform Act's references to "policy statements." For example, during the judges' panel, Ex Officio Commissioner Wroblewski questioned Hon. Robert Pratt as follows:

> The Sentencing Reform Act contemplates something called 'policy statements' . . . Congress seems to contemplate that the Commission has some sort of role beyond the guidelines—that the guidelines are there and that there's something additional called policy statements. . . . And it seems like what you're saying is that we should just forget about all of that. And I understand how it's simpler for the system and simpler for the judges, but I'm curious if you think that I'm right that Congress seemed to indicate that there's a role for the Commission to play in these areas that you're suggesting that we just wipe away clean.[1]

This concern is misplaced. Even if the Commission adopts the Defenders' proposal to delete nearly all departure provisions outright, including all of 5H and 5K2—which most stakeholders agree with—there would be myriad "policy statements" still in effect, including (but not limited to) much of Chapter 1 and all of Chapters 6 and 7.

Indeed, while the Sentencing Reform Act refers to "policy statements," this is not about departures.[2] For example, 28 U.S.C. § 994(a)(2) obligates the Sentencing Commission to promulgate policy statements regarding application of the guidelines or any other aspect of sentencing that, in the Commission's view, would further the purposes of sentencing, and then lists the following as examples of topics that may warrant policy statements:

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[1] USSC, *Public Hearing on Proposed Amendment on Simplification*, U.S. Sent'g Comm (March 6, 2023), https://youtu.be/OEyQuyCU9oI (starting at 4:13:13).

[2] *See generally* Sentencing Reform Act of 1984, Pub. L. 98–473, 98 Stat. 1837, Ch. II.

- sanctions,
- conditions of probation and supervised release,
- sentence modification,
- fines,
- courts' authority over plea agreements, and
- certain matters related to BOP placement.

The Commission has carried out this duty by promulgating policy statements that are scattered throughout the Guidelines Manual, including at USSG §§1B1.10 & 1B1.13 (sentence modification),[3] §5D1.3(c)–(e) (conditions of supervised release), and Chapter 6 (plea agreements). None of these are impacted by the Commission's Simplification proposal or the Defenders' suggestion that the Commission delete outright most departure provisions, including Chapter 5, Parts H and K2.

As another example, § 3553(e) refers to "policy statements" regarding the imposition of a sentence below a statutory minimum based on substantial assistance. The Commission has created such a policy statement at §5K1.1 but this, too, would remain in place under any proposal on the table.

In closing, we take this opportunity to emphasize that Defenders stand ready and willing to sit down with the Commission and/or its staff, with or without other stakeholders, to discuss the Simplification proposal and any additional concerns or ideas that may arise after the hearing.

[3] These provisions relate also to 18 U.S.C. § 3582(c)(1)(A) and (c)(2), which refer to policy statements regarding sentence modification, along with § 994(t), which refers to policy statements specifically regarding § 3582(c)(1)(A) motions.