Before the United States Sentencing Commission
Public Hearing on First Step Act—Drug Offenses and Counterfeit Pills

Statement of Michael Caruso,
Federal Public Defender for the Southern District of Florida
on Behalf of the Federal Public and Community Defenders

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Honorable Chair Reeves, Vice Chairs and Distinguished Commissioners: My name is Michael Caruso, and I am the Federal Public Defender in the Southern District of Florida. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the implementation of the First Step Act's drug offense reforms and counterfeit pills.

I. First Step Act—Drug Offenses

In the First Step Act of 2018 (FSA),[1] Congress began an overdue retreat from the punitive and mandatory sentencing schemes that fueled mass incarceration, entrenched racial disparity, and crippled communities across the country. By expanding safety valve eligibility, reducing mandatory minimum penalties for certain drug offenses, and narrowing some categories of prior convictions that trigger heightened mandatory penalties, Congress took a meaningful step towards a "fairer and smarter" sentencing policy.[2] Defenders appreciate the Commission's efforts to incorporate the FSA's ameliorative policies into the sentencing guidelines.

A. Safety Valve Implementation

In the FSA, Congress expanded the list of statutory offenses for which safety valve relief is available to include 46 U.S.C. §§ 70503 and 70506.[3] Congress also expanded the class of persons eligible for relief from an otherwise applicable mandatory minimum penalty by revising § 3553(f)(1)'s criminal history criteria. Before the FSA, only persons with one criminal

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[1] *See* Pub. L. No. 115-391 §§ 401–02, 132 Stat. 5194 (2018).

[2] 164 Cong. Rec. S7828 (daily ed. Dec. 19, 2018) (statement of Sen. Schumer); *see* 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018).

[3] *See* FSA § 402 (codified at 18 U.S.C. §3553(f) (2018)).

history point or less were eligible for safety valve relief.[4] Now, relief is available for persons who do not have the following:

> (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**
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> (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.][5]

Since the FSA's enactment, a circuit conflict has emerged about the proper interpretation of the statute's criminal history criteria. Specifically, the circuit courts disagree as to whether "and"—as used in § 3553(f)(1)(B)—means "and." Does "and" work, as it ordinarily does, to create a conjunctive list that requires a person to meet all three criminal history criteria to be ineligible for safety valve relief?[6] Or does "and" do the work of "or"—creating a disjunctive list that requires a person to meet only one of the three criteria to be ineligible?[7]

Because this disagreement raises a clear conflict among multiple circuit courts on the same important matter,[8] Defenders and the Department of Justice (DOJ) have asked the Supreme Court to resolve the issue—a

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[4] *See* 18 U.S.C. § 3553(f)(1) (effective through Dec. 20, 2018).

[5] 18 U.S.C. § 3553(f)(1)(A)–(C) (emphasis added).

[6] *See United States v. Jones*, --- F. 4th ---, 2023 WL 2125134, at *1 (4th Cir. Feb. 21, 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) ; *see also United States v. Haynes*, 55 F.4th 1075, 1080 (6th Cir. 2022) (Griffin, C.J., dissenting); *United States v. Palomares*, 52 F.4th 640, 652 (5th Cir. 2022) (Willett, C.J., dissenting); *United States v. Pace*, 48 F.4th 741, 760 (7th Cir. 2022) (Wood, C.J., dissenting in part).

[7] *See Haynes*, 55 F.4th at 1079; *Palomares*, 52 F.4th at 643; *Pace*, 48 F.4th at 754; *United States v. Pulsifer*, 39 F.4th 1018, 1021–22 (8th Cir. 2022).

[8] *See* Sup. Ct. R. 10(a).

request the Supreme Court has just granted.[9] The Commission's most prudent course of action is to update the guidelines to be consistent with § 3553(f)'s amended requirements and revisit the need to promulgate further amendments after the Supreme Court provides guidance on the proper interpretation of § 3553(f)'s criminal history criteria.

1. The Commission should update §5C1.2 to be consistent with § 3553(f)'s statutory requirements.

Defenders agree with the Commission's proposal to amend §5C1.2(a) and the commentary to reflect the language of § 3553(f) as amended by the FSA.[10]

Because Congress expanded safety valve relief to persons outside of Criminal History Category I, Defenders also agree that §5C1.2(b) should be revised.[11] At the time Congress created § 3553(f), it directed the Commission to promulgate guidelines to "call for a guideline range in which the lowest possible term of imprisonment is at least 24 months" for individuals otherwise subject to a mandatory minimum term of five years.[12] Section 5C1.2(b) currently specifies that a person with a mandatory minimum sentence of at least five years who meets the safety valve criteria cannot receive an offense level less than 17—which, combined with Criminal History Category I, yields a guideline range of 24 to 30 months' imprisonment. Because persons in higher criminal history categories are now eligible for safety valve relief and offense level 17 produces a guideline range above 24 to 30 months for persons outside criminal history category I, §5C1.2(b) should

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[9] *See Pulsifer v. United States*, --- S.Ct.---, 2023 WL 2227657 (Feb. 27, 2023) (granting certiorari); *see also* 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"); *Lopez*, 58 F.4th at 1108 (Nelson, C.J., statement regarding denial of reh'g banc) ("[T]his issue warrants Supreme Court review."); Per Curiam Order, *United States v. Holroyd*, No. 20-3083 (D.C. Cir. Jan. 23, 2023) (granting the government's unopposed motion to hold appeal in abeyance pending the Supreme Court's disposition *Pulsifer v. United States*, No. 22-340).

[10] Proposed Amendments, 88 Fed. Reg. 7180, 7188 (proposed Feb. 2, 2023) ("2023 Proposed Amendment").

[11] *Id.*

[12] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 80001(b), 108 Stat. 1796 (codified at 28 U.S.C. § 994 note).

be amended to make clear that the low-end guideline term may be as low as 24 months.

No additional revisions to §5C1.2 are needed to implement the FSA's extension of safety valve relief.

2. The Commission should wait before providing further guidance on the guidelines' safety valve rules.

The Commission seeks comment on whether it should: (1) amend §2D1.1(b)(18) and §2D1.11(b)(6) to ensure that those provisions apply only if a person meets a disjunctive reading of the safety valve criteria; and (2) provide guidance on what constitutes a "1-point," "2-point," or "3-point" offense "as determined under the guidelines" for the purposes of §5C1.2.[13]

The Commission should do neither.

a. The Commission should adopt Option 1 and refrain from making substantive changes to §2D1.1(b)(18) or §2D1.11(b)(6).

The Commission should adopt Option 1 of the proposed amendment and keep the triggering criteria for §2D1.1(b)(18) and §2D1.11(b)(6) the same as the criteria for statutory safety valve relief. Option 2—which would result in some circuits having the disjunctive rule for the guidelines but not for statutory safety valve relief—is problematic for several reasons.

First, Option 2 would exacerbate disparity and confusion. Adopting a disjunctive rule for the guidelines would force courts in my district and at least 32 other federal districts to have to juggle two rules instead of one.[14] In our districts, there would be a group of people, who, despite being deemed by Congress to be safety valve eligible, would be denied offense level reductions under the guidelines. Because most base offense levels under §2D1.1 and §2D1.11 are extrapolated from the statutory mandatory minimum

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[13] 2023 Proposed Amendment, at 7188–89.

[14] *See Circuit Map*, U.S. Courts, https://tinyurl.com/2p8b6hnw (last visited Feb. 27, 2023) (identifying 33 federal districts in the Fourth, Ninth, and Eleventh Circuits). This number would not include the district courts that adopt a conjunctive reading and are in one of the several circuits that have not yet weighed in on this issue.

penalties—meaning that anyone subject to a mandatory minimum would likely have a guideline range at or above that mandatory minimum—without these offense level reductions, some courts may be disinclined to impose a sentence under the mandatory minimum for some safety valve eligible individuals even though Congress explicitly permitted it.[15]

Second, a more restrictive approach is inconsistent with Congress's original instructions to the Commission when it first enacted the statutory safety valve. At that time, Congress instructed the Commission to promulgate amendments that would "carry out the purposes" and "assist in the application" of the then-newly created § 3553(f).[16] The Commission should not attempt to carry out the purpose of the new criminal history requirement until it is sure what that requirement is. It should be particularly reluctant to promulgate an amendment that deviates from § 3553(f)'s text. Imposing a separate and more stringent rule for safety valve relief under the guidelines now, right as the Supreme Court is taking up a deep and entrenched circuit split, would only frustrate § 3553(f)'s purpose. And forcing some courts to have two rules instead of one would make the application of the safety valve—under both the statute and the guidelines—more difficult.

Third, adopting a rule for guidelines' safety valve relief that is more restrictive than what Congress intended would be inconsistent with the spirit of the FSA. Congress intended the FSA's sentencing reforms to be a "first step" to reckoning with our nation's overharsh sentencing policies. Congress sought reforms that would maintain public safety and "allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime."[17]

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[15] *See* USSG, App. C, Amend. 782, Reason for Amendment (Nov. 1, 2014); *see also United States v. Molina-Martinez*, 578 U.S. 189 199–200 (2016) ("In the usual case, the systemic function of the selected Guidelines range will affect a defendant's sentence.").

[16] Violent Crime Control and Law Enforcement Act of 1994 § 80001(b)(1)(i), (ii).

[17] 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson).

By maintaining § 3553(f)'s other offense-based restrictions, Congress's expansion of the criminal history criteria reflects this balanced intent. As Senator Grassley, one of the primary sponsors of the FSA explained:

> if you have committed a nonviolent drug offense without the use of a weapon, and you are willing to cooperate with the government, with the prosecution, you will be eligible to be considered for a lower minimum sentence. . . . No mandate on the judge. It's still up to their discretion [whether to grant relief].[18]

Congress would want the Commission to be faithful to this intent, not frustrate the purposes of the FSA.

Finally—while the Defenders' position is that the Commission should permit litigation over the statutory meaning of § 3553(f) to conclude without weighing in on that litigation by adopting Option 2—if the Commission disagrees with this perspective, it should nonetheless adopt Option 1 because it is the superior reading of § 3553(f). "And" means "and." This interpretation "harmonizes most canons of statutory interpretation and gives effect to the language Congress used."[19]

Congress "says in a statute what it means and means in a statute what it says there."[20] As the Eleventh Circuit, sitting en banc, recognized: the ordinary meaning of "and" is conjunctive.[21] When, like in § 3553(f)(1)(B), "and" connects a series of conditions, "and" means that all those conditions

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[18] Transcript, *Sens. Grassley, Durbin on 'smarter' criminal law, bipartisanship*, PBS News Hour (Dec. 12, 2018), https://tinyurl.com/ymyu6srp; *see also* Senator Mike Lee, *The Truth About the First Step Act*, Nat'l Rev. (Nov. 27, 2018), shorturl.at/eGUZ7 (recognizing that while the FSA would expand safety valve to "allow[ ] trial judges to avoid harsh mandatory minimums in appropriate cases," FSA "maintains important limits" on safety valve relief, including requiring a proffer with law enforcement and barring relief for individuals convicted of offenses involving the possession of a firearm or dangerous weapon and offenses resulting in serious bodily injury or death).

[19] *Haynes*, 55 F.4th at 1081.

[20] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

[21] *See Garcon*, 54 F.4th at 1278.

must be met.[22] This is true even if the list of conditions is preceded by a negative.[23]

While the inquiry ends "[w]hen the words of the statute are clear," the conjunctive meaning of "and" is bolstered by the canon of consistent usage.[24] The word "and" is used conjunctively elsewhere in the same section of the statute. At § 3553(f)(4), Congress used the word "and" to connect each of the five main eligibility criteria for safety valve—requiring all conditions to be met before qualifying for relief.[25] So too in § 3553(f)(1). If Congress intended a disjunctive reading, it knew how to achieve that.[26]

While several circuit courts have interpreted the statute disjunctively, they did so only by ignoring the ordinary meaning of "and" and adopting "a novel reading . . . that appears to have been crafted by the government specifically for this statute to achieve its preferred outcome."[27] The Commission should refrain from following suit.

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[22] *See id.* (citing *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620–21 (2021)).

[23] *See id.*

[24] *See Jones*, 2023 WL 2125134, at *3.

[25] *See id.*; *see also Garcon*, 54 F.4th at 1279.

[26] *See Garcon*, 54 F.4th at 1279 (holding that because Congress used "or" in § 3553(f)(2) and (f)(4) to ensure that any one of the listed conditions would disqualify a person from safety valve eligibility "we [must] presume [that when Congress chose to use "and" in § 3553(f)(1)(B) it intended] a variation in meaning"). Indeed, the Commission's decision to propose Option 2—which would replace Congress's "and" with an "or," ensuring that the guidelines' criteria would operate disjunctively—further supports the conclusion that if Congress wanted the statute to be read disjunctively, it would have written it differently. *See* 2023 Proposed Amendments, at 7189.

[27] *Jones*, 2023 WL 2125134, at *5 (quoting *Garcon*, 54 F.4th at 1280). Several of the circuit courts that have interpreted § 3553(f)(1) disjunctively have claimed not to be adopting a disjunctive interpretation of "and" but rather a "conjunctive distributive" reading. *See, e.g.*, *Garcon*, 54 F.4th at 1280 (collecting cases). But whether it is called "disjunctive" or "conjunctive distributive," the result is the same: these courts are "manufactur[ing] ambiguity" to read "or" for "and." *Palomares*, 52 F.4th at 652 (Willett, C.J., dissenting); *see also Haynes*, 55 F.4th at 1080 (Griffin, C.J., dissenting) ("The majority's conclusion, though couched in other terms, is that 'and' means 'or' in this context."); *Pace*, 48 F.4th at 761 (Wood, C.J., dissenting in

"In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area."[28] But—particularly in this instance, where courts are free to reject safety valve relief, vary, or depart to arrive at an appropriate sentence—"interchanging 'and' and 'or' [would be] a mistake."[29] The Commission should take no action at this time and allow the Supreme Court to resolve the statutory interpretation issue—which will then inform what further guidance, if any, the Commission needs to provide.

b. No additional guidance on the criminal history criteria is necessary at this time.

The Commission seeks comment on whether it should provide further guidance on §5C1.2's criminal history criteria "as determined under the guidelines."[30] The Commission should wait before issuing further guidance on §5C1.2's criminal history criteria for the same reasons it should wait before amending the criminal history criteria used in §2D1.1(b)(18) and §2D1.11(b)(6). The Commission has not yet seen how courts will treat the amended §5C1.2, and it does not have the benefit of Supreme Court guidance on the correct reading of Congress's language.

Further, Defenders are unsure of what additional guidance the Commission could offer. The guidelines themselves already set forth the rules for determining whether a prior sentence is assessed criminal history points and how many points a prior sentence will receive.[31] And Congress already provided the definition of "violent offense," which the proposed amendments incorporate. Even if additional guidance were needed to apply §5C1.2, this guidance would not extend to § 3553(f). The "Commission's interpretations of its guidelines do not bind courts interpreting statutes," even where the

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part) (describing the majority's "distributive reading" as a "disjunctive list in which the final connector must be read as an 'or' even though it says 'and.'").

[28] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

[29] *Palomares*, 52 F.4th at 651 (Willett, C.J., dissenting). Because courts retain the ultimate authority of whether to sentence even safety valve eligible individuals below the mandatory minimum, it makes little difference that more individuals would be eligible under a conjunctive interpretation than a disjunctive interpretation. *See* 2023 Proposed Amendments, at 7189.

[30] 2023 Proposed Amendments, at 7189.

[31] *See* USSG §§4A1.1–4A1.2 and accompanying commentary.

language is similar or identical.[32] The circuit conflicts over the definitions of "1-point," 2-point," and "3-point" concern the meaning of those terms in § 3553(f) and are inseparable from the statutory interpretation question about whether § 3553(f) should be read conjunctively or disjunctively. The Commission should not weigh in on this statutory interpretation matter, especially given its current posture before the Supreme Court.

B. Recidivist Penalties for Drug Offenses

For most drug convictions pursuant to 21 U.S.C. §§ 841 and 960, the statutory penalties are determined by the quantity and type of drug involved in the offense.[33] But Congress provided enhanced mandatory penalties in three discrete cases: (1) if the drug offense resulted in death or serious bodily injury; (2) if the person committed the instant drug conviction after having sustained one or more certain prior convictions; and (3) if death or serious bodily injury resulted and the offense was committed after certain prior convictions. To trigger an enhanced penalty based on a person's prior conviction, the government must file an information pursuant to 21 U.S.C. § 851 that establishes the qualifying prior.

In the FSA, Congress both narrowed and expanded the types of prior convictions that could trigger these enhanced statutory penalties for the top two quantity-based offenses—§§ 841(b)(1)(A) and (b)(1)(B), and 960(b)(1) and (b)(2). It narrowed the types of prior drug convictions that could trigger an enhanced penalty by replacing "felony drug offense" with the more tailored "serious drug felony."[34] And it added a new class of triggering prior convictions: "serious violent felon[ies]."[35] It did not, however, amend the types of prior convictions that trigger enhanced penalties under the least serious provisions of the statutes (such as §§ 841(b)(1)(C) and 960(b)(3))—for those, a "felony drug offense" is still enough.

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[32] *United States v. Lane*, 252 F.3d 905, 907 (7th Cir. 2001) (citing *Neal v. United States*, 516 U.S. 284, 294 (1996)).

[33] *See, e.g.*, *Chapman v. United States*, 500 U.S. 453, 465 (1991) (describing the current statutory penalty scheme as "assign[ing] more severe penalties to the distribution of larger quantities of drugs"); *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (describing the "weight-driven" scheme).

[34] FSA § 404(a)–(b).

[35] *Id.* § 401(a)(1).

Section 2D1.1(a)'s base offense levels generally mimic Congress's statutory penalty scheme. Sentencing courts determine most base offense levels from the type and quantity of drug involved in the offense.[36] However, §2D1.1 currently provides for enhanced base offense levels in two instances: (1) if "the offense of conviction establishes that death or serious bodily injury resulted;"[37] and (2) if "the offense of conviction establishes that death or serious bodily injury resulted;" *and* the individual "committed the offense after one or more prior convictions for a similar offense."[38]

Notably, there is no heightened base offense level for offenses that receive enhanced statutory penalties only for prior convictions. These cases are assigned a base offense level based on the quantity and type of drug involved, and, if, after the normal operation of the guidelines, the advisory range is less than any applicable mandatory minimum, the guideline range is elevated to meet the mandatory minimum.[39]

1. The Commission should delete §2D1.1(a)(1) and (a)(3) and treat all cases with proven § 851 informations the same.

The Commission does not need to promulgate the proposed amendment to account for the new FSA definitions. Instead, the Commission should simply remove the enhanced base offense levels that refer to prior convictions altogether and allow all cases where a triggering prior conviction was statutorily proven to be treated the same:

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[36] *See* USSG §2D1.1(a)(5).

[37] *Id.* §2D1.1(a)(2), (a)(4).

[38] *Id.* §2D1.1(a)(1), (a)(3).

[39] *See id.* §5G1.1(b).

(a) Base Offense Level (Apply the greatest):

~~(1) **43**, if the defendant 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 death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or~~

~~(2)~~ (1) **38**, if the defendant 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 death or serious bodily injury resulted from the use of the substance; or

~~(3) **30**, if the defendant 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 death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or~~

~~(4)~~ (2) **26**, if the defendant 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 death or serious bodily injury resulted from the use of the substance; or

Cases are not assigned to §2D1.1(a)(1) and (a)(3) often—only 107 cases in the last five years.[40] But even for the relatively small number of cases that do exist, maintaining §2D1.1(a)(1) and (a)(3) is unnecessary. In cases where the offense of conviction established that death or serious bodily injury resulted, an enhanced base offense level at §2D1.1(a)(2) or (a)(4) would apply. If, in those cases, the government also established a triggering prior conviction through an § 851 information, then the drug statutes would direct the penalty. For convictions under §§ 841(b)(1)(A)–(C) and 960(b)(1)–(3), that penalty would be mandatory life, making any enhanced base offense level superfluous. For the less common convictions under §§ 841(b)(1)(E) and 960(b)(5), the statute would enhance the maximum penalty to 30 years. If the prior conviction established by the § 851 information does not sufficiently

[40] *See* USSC *Individual Datafiles* FY 2017 – 2021; USSC, *Enhanced Penalties for Federal Drug Trafficking Offenders Datafiles* FY 2017–2021.

increase the guideline range by raising a person's criminal history, a court could depart pursuant to §4A1.3 or vary.

Deleting §2D1.1(a)(1) and (a)(3) would also ensure a more uniform application of the guidelines in cases involving § 851 informations. The Commission deliberately chose the §2D1.1 enhanced base offense levels to be triggered by the "*offense of conviction*,"[41] which the guidelines define as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted."[42] The Commission could have tethered §2D1.1's enhanced base offense levels to "the *offense*"—which includes both "the offense of conviction and all relevant conduct under §1B1.3"[43]—but it did not do so. This choice was deliberate: In 1989, the Commission explained that it chose to use "offense of conviction" so that the enhanced base offense levels "apply only in the case of a conviction under circumstances specified in the statutes cited."[44]

But while §2D1.1 explicitly requires the offense of conviction to justify its enhanced base offense levels, some courts have been assigning §2D1.1(a)(1) and (a)(3)'s enhanced base offense levels even when 21 U.S.C. § 851 informations have not established a prior conviction triggering an enhanced statutory penalty.[45] In fact, of the 107 individuals who were assigned enhanced base offense levels under §2D1.1(a)(1) or (a)(3) in the last five years, only 30 were subject to § 851 informations that the government did not withdraw prior to sentencing—meaning in only 30 cases did the

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[41] USSG §2D1.1(a)(1)–(4).

[42] *Id.* §1B1.2(a).

[43] USSG §1B1.1 cmt. n.1(I).

[44] USSC App. C, Amend. 123, Reason for Amendment (Nov. 1, 1989) (replacing "an offense that results" in §2D1.1(a)(1) and (a)(2) base offense levels with "offense of conviction establishes"); *see* USSC App. C, Amend. 727, Reason for Amendment (Nov. 1, 2009) (adding §2D1.1(a)(3) and (a)(4) base offense levels "that are comparable to the alternative base offense levels at subsections (a)(1) and (a)(2)"); *see also United States v. Lawler*, 818 F.3d 281, 284 (7th Cir. 2016) (explaining that "offense of conviction" does not include "relevant conduct" and collecting cases confirming same).

[45] *See, e.g.*, *United States v. Sica*, 676 F. App'x 81, 86 (2d Cir. 2017) (collecting cases that indicate a split as to whether a person must be subject to an enhanced statutory penalty to be assigned an enhanced base offense level under §2D1.1(a)).

"offense of conviction" establish that the enhanced base offense level was warranted.[46]

Deleting §2D1.1(a)(1) and (a)(3) also avoids incorporating into the guidelines an FSA drafting oddity that produces disproportionate sentences. In the FSA, Congress sought to "restrict" easily triggered mandatory minimum sentences by replacing the all-inclusive "felony drug offense"[47] with "serious drug felony" and "serious violent felony."[48] "Serious drug felony" is much narrower than "felony drug offense." To constitute a "serious drug felony," an offense must have a maximum term of imprisonment of at least 10 years.[49] A person must also have served more than 12 months on the offense and must have been released from imprisonment for the prior conviction within 15 years of commencing the instant offense.[50] Additionally, to qualify as a "serious drug felony," simple possession is not enough—a prior state offense must "involve[ ] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance."[51]

While Congress swapped out "felony drug offense" from the mandatory minimum penalties in 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), 960(b)(1), and 960(b)(2) (the subsections applicable to the most serious trafficking offenses), it failed to do the same in the remainder of these statutes, including in §§ 841(b)(1)(C) and 960(b)(3).[52] There is no rational explanation for this omission, and its consequences are severe: it requires a lesser showing to

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[46] *See* USSC Individual Datafiles, *supra* note 40.

[47] "Felony drug offense" includes any prior drug offense—including simple possession—so long as the offense is punishable by a term of imprisonment exceeding one year and "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44).

[48] FSA § 401(a)–(b) (section entitled "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies").

[49] *See* 21 U.S.C. § 802(57) ("serious drug felony" incorporates definition of serious drug offense "described in [18 U.S.C. § 924(e)(2)]); 18 U.S.C. § 924(e)(2) (offense only qualifies as a "serious drug offense" if it has a maximum term of imprisonment of ten years or more).

[50] *See* 21 U.S.C. § 802(57).

[51] 18 U.S.C. § 924(e)(2)(A)(ii).

[52] *Compare* 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), *and id.* § 960(b)(1), (b)(2), *with id.* § 841(b)(1)(C), *and id.* § 960(b)(3).

trigger mandatory life under §§ 841(b)(1)(C) and 960(b)(3) than it does to trigger mandatory life under the more serious §§ 841(b)(1)(A) and (b)(1)(B) and 960(b)(1) and (2). This anomaly means that a person with a less serious criminal history, who traffics in a lower quantity of drugs, would be subject to a mandatory life penalty, but if that same person was convicted of selling more drugs, the mandatory life penalty would not be triggered.

This irrational scheme invites prosecutors to charge a less serious offense to obtain a steeper penalty. While DOJ has rightfully agreed not to do so,[53] this concession means little if §2D1.1(a)(1)—as currently proposed—prescribes the same enhanced base offense level for persons violating § 841(b)(1)(C) after sustaining a less restrictive "felony drug offense" as it does for persons violating § 841(b)(1)(A) or (b)(1)(B) after sustaining a "serious drug felony."

2. At minimum, the Commission must ensure §2D1.1(a)'s base offense levels are only triggered by the statutory offense.

Removing subsections (a)(1) and (a)(3) from §2D1.1 is the simplest approach to account for the FSA and still ensure uniform and proportionate application of the guideline. If the Commission is unwilling to remove §2D1.1(a)(1) and (a)(3), however, it must ensure that the base offense levels may only be applied if the "offense of conviction" establishes the aggravating facts. Swapping out "similar offense" for the statutory terms—as is currently proposed—is not enough. Instead, the Commission should amend the guideline to make clear that qualifying prior convictions must have been statutorily proven through an § 851 information (and death or serious bodily injury must have been charged and proven beyond a reasonable doubt).

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[53] *See* U.S. Dep't of Justice, *First Step Act Annual Report* 50 (Apr. 2022), https://tinyurl.com/22b4hm6a ("[T]o promote consistency in sentencing under Sections 841(b)(1) and 960(b), the Department has determined as a matter of policy not to seek a mandatory sentence of life imprisonment under Section 841(b)(1)(C) or 960(b)(3) unless a defendant's prior conviction meets the statutory definition of a 'serious drug felony' or 'serious violent felony.'").

II. Counterfeit Pills

The Commission has also proposed an amendment to respond to "concerns expressed by the Drug Enforcement Administration (DEA)" about "illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills."[54] The proposal would add a two-level enhancement to §2D1.1(b)(13) for people who "represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl . . . or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug."[55] The Defenders oppose the addition of this enhancement to §2D1.1(b)(13) for three reasons.

First, in the 2018 amendment cycle (the last full cycle the Commission had a quorum), the Commission examined—and rejected—a similar proposal after undertaking a study involving "extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings."[56] The current proposal, by contrast, is unsupported by any meaningful administrative record. Instead, the sole basis for this proposed amendment appears to be a one-page letter submitted by the DEA and briefly endorsed in the DOJ's own submissions to the Commission. We agree that counterfeit pills pose a significant risk to public safety—but are skeptical that increasing penalties for those substances will either reduce their availability or mitigate an increasingly tainted drug supply.

Second, the proposed amendment lacks an adequate *mens rea* standard, placing it out of step with recent Supreme Court jurisprudence emphasizing that "wrongdoing must be conscious to be criminal."[57] As the Defenders observed in our annual letter, which urged the Commission to "amend the guidelines to specify that provisions which recommend increased punishment require evidence of intent,"[58] provisions with inadequate *mens rea* standards stand "in serious tension with deeply rooted principles of

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[54] 2023 Proposed Amendments, at 7228.

[55] *Id.*

[56] USSG App. C, Amend. 807 (Nov. 1, 2018); USSG §2D1.1(b)(13).

[57] *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022) (cleaned up).

[58] Defenders' Annual Letter to the Sentencing Commission at 9 (Sept. 14, 2022).

justice and responsibility."[59] *Mens rea* requirements help to "separate those who understand the wrongful nature of their act from those who do not."[60] The proposed amendment would undermine this goal and take the guidelines in the wrong direction.

Finally, the amendment is overbroad, as it would likely operate to add a two-level enhancement in every case involving counterfeit pills, regardless of the culpability or role of the person being sentenced.

A. The proposed amendment is not evidence-based or empirically supported and would repeat past mistakes.

During the 2018 amendment cycle, the Commission considered—and rejected—a very similar amendment to the drug guideline to the one the DEA has proposed. That proposed amendment lacked a *mens rea* requirement and would have increased punishment for anyone who misrepresented or mismarketed fentanyl or an analogue as another drug.[61] The Commission rejected this approach and instead, in Amendment 807, added a four-level enhancement for "*knowingly* misrepresenting or *knowingly* marketing" fentanyl or a fentanyl analogue "as another substance."[62] The Commission based its decision on a "multiyear study," which "included extensive data collection, review of scientific literature, multiple public comment periods, and four public hearings."[63] The Commission also explained that it had deliberately included a *mens rea* requirement in this specific offense characteristic "to ensure that only the most culpable offenders are subjected to these increased penalties."[64] Perhaps recognizing that illegal drug use inherently carries risk, the Commission explained that it was particularly

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[59] *Id.* (quoting *United States v. Burwell*, 690 F.3d 500, 530 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting)).

[60] *Id.* (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019)).

[61] *See* USSC, *Notice of Proposed Amendments to Sentencing Guidelines*, 83 Fed. Reg. 3869, 3875 (Jan. 26, 2018) (providing alternative versions of §2D1.1(b)(13)—one with a *mens rea* of knowingly and the other without).

[62] *See* Amend. 807 (emphasis added); *see also* USSG §2D1.1(b)(13).

[63] *See* Amend. 807.

[64] *Id.*

focused on protecting users who were "inexperienced or unaware of what substance he or she is using."[65]

That multiyear study remains the Commission's most recent critical assessment of synthetic drugs. What new information is available to the Commission—*e.g.*, data on emerging trends in how fentanyl and its analogues are produced and distributed—does not support further increasing penalties for fentanyl-related mismarketing. The DEA has explained that "[t]he vast majority of counterfeit pills brought into the United States are produced in Mexico, and China is supplying chemicals for the manufacturing of fentanyl in Mexico."[66] The international origins of counterfeit pills make it unlikely that increasing punishment for domestic mismarketing will be effective. Sentencing trends also counsel against the enhancement. Courts continue to vary downward in more than one-third of fentanyl cases and nearly half of fentanyl-analogue cases,[67] and there is no indication that the few upward variances that occur in these cases—3.5% of variances in fentanyl and 1.7% of variances in fentanyl-analogue cases—are being driven by concerns that §2D1.1(b)(13) is not punitive enough.[68] With sentencing courts varying upward so rarely, the judiciary is not signaling a need for §2D1.1(b)(13) to be modified.[69]

Defenders are also concerned that expanding §2D1.1(b)(13) this cycle would repeat the mistakes of the past. Drug addiction and overdose are unquestionably pressing public health problems in the United States. But there is over thirty years of evidence that enhancing penalties for drug crimes will not reduce the supply of drugs, the incidence of substance-use disorder, or the number of drug-related deaths. Moreover, the overdose crisis, which

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[65] *Id.*

[66] *See, e.g.*, Press Release, DEA, *DEA Issues Public Safety Alert on Sharp Increase in Fake Prescription Pills Containing Fentanyl and Meth* (Sept. 27, 2021), https://tinyurl.com/4f42mzrn.

[67] See USSC, *Quick Facts: Fentanyl Trafficking Offenses* at 2 (2021), https://tinyurl.com/mryxzbxv; USSC, *Quick Facts: Fentanyl Analogue Trafficking Offenses* at 2 (2021), https://tinyurl.com/2s3739u6.

[68] *See Fentanyl Trafficking Offenses*, *supra* note 67 at 2; *Fentanyl Analogue Trafficking Offenses*, *supra* note 67 at 2.

[69] Based on a survey of case law and transcripts, Defenders did not find examples of a court asking the Commission to expand §2D1.1(b)(13).

has run parallel to the War on Drugs for the past three decades,[70] is a clear indictment of the failure of punitive responses to curb drug use.

The War on Drugs started nearly fifty years ago when President Nixon characterized drug abuse as "America's public enemy number one."[71] Fifteen years later, President Reagan warned that "illegal drugs were every bit as much a threat to the United States as enemy planes and missiles."[72] This rhetoric led to hard-hearted, but ultimately soft-headed, criminal legal policies that continue to bedevil the criminal legal system today.[73]

The DEA's effort to expand §2D1.1(b)(13) this amendment cycle is today's version of this message. Whereas President Nixon described drugs in 1971 as "public enemy number one," today fentanyl is, according to the DEA, "the single deadliest drug threat our nation has ever encountered."[74]

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[70] *See* Hawre Jalal, *et al.*, *Changing Dynamics of the Drug Overdose Epidemic in the United States from 1979 through 2016*, Science (Sept. 21, 2018), https://tinyurl.com/yckncdsm.

[71] Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), https://tinyurl.com/5n7wn95f.

[72] Ronald Reagan, *Remarks on Signing the Just Say No to Drugs Week Proclamation*, Ronald Reagan Presidential Library & Museum (May 20, 1986) https://tinyurl.com/3xj9cwb9.

[73] *See, e.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 213 (2019); Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Ctr. for Am. Progress (May 10, 2019), https://tinyurl.com/v38ew5ps; *see also* USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (recognizing unfairness of 100:1 crack/powder disparity); *Hearing on Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 117th Cong. (June 17, 2021) (statement of Kyana Givens, Assistant Federal Public Defender); *Hearing on An Epidemic within a Pandemic: Understanding Substance Use and Misuse in America Before the Subcomm. on Health of the H. Energy & Commerce Comm.*, 117th Cong. (Apr. 14, 2021) (statement of Patricia L. Richman, National Sentencing Resource Counsel, Federal Public & Community Defenders); *Hearing on Fentanyl Analogues: Perspectives on Classwide Scheduling Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. (Jan. 28, 2020) (statement of Keven Butler, Federal Public Defender for the Northern District of Alabama).

[74] DEA, *Fentanyl Awareness*, https://tinyurl.com/32kd85e9 (last visited Feb. 26, 2023).

Whereas, in 1986, "illegal drugs were every bit as much a threat to the United States as enemy planes and missiles," today the DEA calls fentanyl a threat to "national security," and drug warriors seek to have it classified as a "weapon of mass destruction."[75]

The rhetoric of the War on Drugs led to increased penalties that did nothing to address the drug crisis in this country and instead fueled the crisis of mass incarceration. The Commission should take care not to retread that path. Instead of targeting kingpins and managers, the proposed amendment would disproportionately apply to lower-level drug distributors whose knowledge and wherewithal are limited—a far cry from the manufacturers "producing pills in bright rainbow colors to drive addiction and increase sales."[76] It would exacerbate racial disparities in punishment, as people of color comprise over 78% of those sentenced in fentanyl cases and over 86% of those sentenced in fentanyl analogue cases.[77] And there is no reason to believe it would have any meaningful impact on America's addiction and overdose crises.[78]

The Commission carefully considered this topic in 2018 and opted not to take the action the DEA now seeks. Therefore, Defenders believe the Commission should not revisit §2D1.1(b)(13) absent further study.

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[75] *Id.*; *see* Joseph Longley, Regina LaBelle & Shelley Weizman, *Quick Take: Illicitly Manufactured Fentanyl as a Weapon of Mass Destruction: Rhetoric & Reality*, O'Neill Institute, Georgetown Law (Nov. 2022), https://tinyurl.com/4secuvam.

[76] *See* DEA Letter to the Sentencing Commission at 1 (Oct. 17, 2022); *see also* Press Release, DEA, *supra* note 66.

[77] *See* Fentanyl Trafficking Offenses, *supra* note 67 at 1; Fentanyl Analogue Trafficking Offenses, *supra* note 67 at 1.

[78] *See* Bryce Pardo, et al., *The Future of Fentanyl and Other Synthetic Opioids*, Rand Corp. xxvi (2019), https://tinyurl.com/ycy4rwxu ("There is little reason to believe that tougher sentences, including drug-induced homicide laws for low-level retailers and easily replaced functionaries (*e.g.*, couriers) will make a positive difference.").

B. The proposed amendment is inconsistent with basic principles of punishment.

The Defenders are concerned by the lack of an adequate *mens rea* element in the proposed amendment.

In 2018, when the Commission was considering whether to include a *mens rea* requirement in §2D1.1(b)(13), the Defenders pointed to then-recent Supreme Court precedent that supported the inclusion of that element in the guideline.[79] That same observation applies today, as a series of recent Supreme Court cases have stressed that predicating punishment on scienter—knowledge or consciousness of wrongdoing—is a "basic principle that underlies the criminal law."[80] By omitting an appropriate *mens rea* requirement, the proposed amendment contravenes this "basic principle" and risks injecting a "disfavored" form of liability into the guidelines that would stand "in serious tension with deeply rooted principles of justice and responsibility."[81] The Defenders oppose this move away from an appropriately scienter-based system of punishment.

Defenders are also concerned about the workability of the proposed amendment's "reason to believe" standard. Courts have struggled to apply such a standard in various contexts, resulting in multiple circuit splits.[82] These workability concerns underscore that a "reason to believe" standard should not be added into §2D1.1.

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[79] *See* Statement of Kevin Butler Before the U.S. Sentencing Comm'n, Washington D.C., at 33 (Mar. 14, 2018) (citing *McFadden v. United States*, 135 S. Ct. 2298, 2305 (2015)).

[80] *See, e.g.*, *Rehaif*, 139 S. Ct. at 2196; *Ruan*, 142 S. Ct. at 2381 ("[A]s a general matter, our criminal law seeks to punish the vicious will. With few exceptions 'wrongdoing must be conscious to be criminal.'") (cleaned up).

[81] *United States v. Burwell*, 690 F.3d 500, 430 (D.C. Cir. 2012) (Kavanaugh, C.J., dissenting).

[82] *See, e.g.*, *United States v. Maley*, 1 F.4th 816, 820 (10th Cir. 2021) (noting circuit split over standard for determining whether police officer has "reason to believe" the subject of an arrest warrant is in a particular dwelling); *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008) (noting circuit split over meaning of "reasonable cause to believe" in 21 U.S.C. § 841(c)(2)).

C. The proposed amendment is overbroad.

Finally, because the enhancement would be triggered by any "reason to believe" that a substance was not legitimate, it would likely apply in every single counterfeit pill case involving fentanyl and fentanyl analogues. The message that many pills are counterfeit is widespread. The DEA, along with state and local governments, has launched a national public awareness campaign to raise awareness among users.[83] The topic also receives significant attention from federal, state, and local media outlets.[84] We expect prosecutors would point to these headlines and media campaigns to argue that our clients had "reason to believe" the substance they were distributing was not legitimate.

By dint of its broad applicability, the proposed amendment would echo the discredited crack/powder model of punishing identical substances differently—simply because of their form and regardless of the culpability or role of the person being sentenced. It would also extend §2D1.1(b)(13) to apply in cases where all parties to the drug transaction knew the substance contained fentanyl, and even to people who, though they may have negligently misdescribed the drugs they were selling, had no reason to believe they were distributing fentanyl. Thus, unlike §2D1.1(b)(13) as it currently stands—which applies only to individuals who knowingly distribute drugs by means of fraud—the proposed amendment would not effectively distinguish between more and less culpable offenses.

We urge the Commission not to adopt this proposed amendment.

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[83] *See, e.g.*, DEA, *DEA Social Media Communications: "One Pill Can Kill" Social Media Campaign*, https://tinyurl.com/yuh2djhs (last accessed February 24, 2023); Gina Jordan, *Florida's attorney general launches the One Pill Can Kill Website to Combat Fentanyl*, WUSF Public Media (Nov. 4, 2022), https://tinyurl.com/374zy6jt.

[84] *See*, *e.g.*, Jan Hoffman, *Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar*, N.Y. Times (May 19, 2022), https://tinyurl.com/mthxwbak; David Ovalle, *Potent, often disguised: What to know about fentanyl causing overdoses in South Florida*, The Miami Herald (Mar. 14, 2022), https://tinyurl.com/pwue7etd.