# Before the United States Sentencing Commission
# Public Hearing on Acceptance of Responsibility and Controlled Substance Offenses

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

March 7, 2023

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My name is Michael Caruso, and I am the Federal Public Defender in the Southern District of Florida. I am also the Chair of the Federal Defender Sentencing Guidelines Committee. 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 acceptance of responsibility and controlled substance offenses.

## I. Acceptance of Responsibility

To better ensure that §3E1.1(b) operates as Congress and the Commission intended—that is, to reward a person who timely notifies the government of his intent to plead guilty thereby permitting the government to avoid preparing for trial and allowing the government and the court to allocate resources efficiently—the Commission should clarify two aspects of the guideline.

First, Defenders agree that the Commission should clarify the term "preparing for trial." Because the progression of a case is impacted by a host of unique factors including the pace of each district's docket, "preparing for trial" should focus on the nature and purpose of the government's work, as opposed to when that work is performed. Second, the Commission should revise the existing commentary in Application Note 6 to clarify that the government should not withhold a motion for interests not identified in §3E1.1(b).

For better or worse, our criminal legal system is "a system of pleas, not a system of trials."[1] Last year, 98.3 percent of all persons sentenced in federal

[1] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)) (recognizing that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system").

court pled guilty.[2] In my district, that number was even higher—99.3 percent.[3]

The decision to plead guilty is one of the few decisions that belongs solely to our clients.[4] It is not an easy one. When a person pleads guilty, he "forgoes not only a fair trial, but also other accompanying constitutional guarantees," like the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers.[5] If he pleads pursuant to a plea agreement, the government often demands that he waive numerous other rights including the right to ask for a sentence below the calculated guideline range, the right to appeal, the right to collaterally attack his sentence, and even the right to file an extraordinary-and compelling motion under § 3582(c)(1)(A).[6]

In exchange for a plea of guilty, a person may generally expect a lower sentence than if he had chosen to proceed to trial.[7] Indeed, the guidelines embrace this expectation. When reporting on the original sentencing guidelines, the Commission recognized that "merely pleading guilty has been recognized as a factor that legitimately may result in a sentence reduction."[8] The Commission created §3E1.1—which originally provided for a two-level

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[2] *See* USSC, *Sourcebook of Federal Sentencing Statistics* 56–58 tbl. 11 (2021), https://bityl.co/HN2k.

[3] *See id*. at 58, tbl. 11.

[4] *See* Model Rules of Pro. Conduct r. 1.2, (Am. Bar Ass'n 2020). ("[A] lawyer shall abide by the client's decision. . . as to a plea to be entered. . . .").

[5] *Class v. United States*, 138 S. Ct. 798, 805 (2018) (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002)).

[6] In March 2022, the Department of Justice directed prosecutors to not "as a general matter" require individuals to waive "the general right" to file or appeal a compassionate release motion and to decline to enforce such waivers. However, the Department still permits "a narrower form of waiver" in select instances, and Defenders do not know the status of DOJ's implementation of its new policy. *See* Memorandum from the Deputy Attorney General on Department Policy on Compassionate Release Waivers in Plea Agreements 1–2 (Mar. 11, 2022), https://bityl.co/HN3X.

[7] *See, e.g.*, Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 20–21 fig. 1 (2018), https://bityl.co/HN4K ("NACDL Trial Penalty").

[8] USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 50 (1987) (citations omitted), https://tinyurl.com/45t4fres.

reduction for acceptance of responsibility—as "the only adjustment that the guidelines recognize for pleas."[9]

Today, §3E1.1 provides up to three offense levels off for acceptance of responsibility. Pursuant to §3E1.1(a), a two-level reduction is awarded to people who clearly accept responsibility for the offense. For people who get the two-level reduction and who have an offense level of 16 or greater, §3E1.1(b) provides for an additional third-level reduction "upon motion of the government." As recently recognized by Justices Sotomayor and Gorsuch, the impact of §3E1.1(b)'s one-level reduction "can be substantial"—and can "even make the difference between a fixed-term and life sentence."[10]

The stated purpose of §3E1.1(b)'s reduction is to reward a person who "timely notif[ies] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently."[11] Despite this clear purpose, some courts continue to permit prosecutors to withhold this third level for reasons other than preparing for trial, like litigating a suppression motion or when a person who has pled guilty raises challenges at sentencing.[12] In order to "ensure that §3E1.1(b) is applied fairly and uniformly,"[13] the Commission should clarify that the proper interpretation of §3E1.1 does not permit these practices.

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[9] *Id*.

[10] *United States v. Longoria*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., Gorsuch, J., statement respecting denial of cert.).

[11] USSG §3B1.3(b).

[12] *See* Proposed Amendments, 88 Fed. Reg. 7180, 7199 (proposed Feb. 2, 2023) ("2023 Proposed Amendment") (summarizing the two circuit conflicts).

[13] *Longoria*, 141 S. Ct. at 979.

### A. The Commission should clarify that §3E1.1(b) already limits the government's discretion to withhold a §3E1.1(b) motion to instances where the lack of a timely plea requires the government to perform work and expend resources for the specific purpose of preparing for trial.

#### 1. The history of §3E1.1.

Section 3E1.1, as originally promulgated, awarded a two-level downward adjustment if the district court determined that a person "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility."[14] In 1992, after receiving a recommendation from the Judicial Conference to provide a greater acceptance of responsibility adjustment "to encourage entries of pleas,"[15] the Commission amended §3E1.1, to instruct that courts should "decrease the offense level 1 additional level" if certain conditions were met:[16]

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
>
> decrease the offense level by **1** additional level.

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[14] *See* USSG §3E1.1 (Nov. 1987).; *see also* USSG App. C, Amend. 46 (Jan. 1988) (expanding scope of conduct for which person must accept responsibility from "offense of conviction" to "criminal conduct").

[15] *See* USSC, *Acceptance of Responsibility Working Group Report* app. A (1991), https://bityl.co/HN5n (noting that "[t]he two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels").

[16] USSG App. C., Amend. 459 (Nov. 1, 1992).

The Commission also added Application Note 6 to §3E1.1's commentary to explain that "[s]ubsection (b) provides an additional 1-level decrease in offense level" for someone who "tak[es] one or both of the steps set forth in subsection (b)."[17] Section 3E1.1 maintained this structure for over a decade.

In 2003, Congress passed the PROTECT Act, which contained direct amendments to §3E1.1.[18] These amendments make clear that Congress intended §3E1.1(b)'s third-level reduction to be awarded to people whose timely plea allowed the government and the court to avoid a costly trial.

Congress amended §3E1.1(b) in three ways. First, it required a government motion before the court could grant the additional third-level reduction.[19] Second, it struck §3E1.1(b)(1), which previously permitted a person to receive the third-level reduction for timely providing complete information to the government, instead tying this level exclusively to a timely guilty plea.[20] And third, it modified former §3E1.1(b)(2) to account for both government and court resources saved from avoiding trial:[21]

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[17] *Id.*; *see also* USSG § 3E1.1 background cmt. (emphasizing that if a person meets §3E1.1(b)'s criteria, the additional one-level reduction is "appropriately merit[ed]").

[18] *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003) ("PROTECT Act").

[19] *Id.* § 401(g)(1)(A).

[20] *Id.* § 401 (g)(1)(B).

[21] *Id.*

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by ~~taking one or more of the following steps:~~
>
> ~~(1) timely providing complete information to the government concerning his own involvement in the offense; or~~
>
> ~~(2)~~ timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate ~~its~~ their resources efficiently,
>
> decrease the offense level by **1** additional level.

Further confirming that it intended the §3E1.1(b) motion to be contingent upon a plea that avoids time-consuming trial preparation, Congress added the following language to Application Note 6 of §3E1.1's commentary:[22]

> *Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21.*

While recognizing that the government is in the best position to determine whether the line prosecutor has avoided preparing for trial, nothing in the PROTECT Act amendments indicated that Congress was permitting the government to withhold its motion for any other reason. In fact, aside from a small conforming change,[23] Congress retained the rest of

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[22] *Id.* § 401(g)(2)(B).

[23] Because Congress removed one of the steps by which a person could receive a 1-level reduction from §3E1.1(b), it also removed the reference in Application Note 6 to "one or both of the steps" and the background commentary to "one or more of the steps specified in subsection (b)." Now, both Application Note 6 and the background

Application Note 6, including the instruction that "[s]ubsection (b) provides an additional 1-level decrease in offense level" for a person who "take[s] the steps set forth in subsection (b)" and the background commentary explaining that a person who meets the conditions of §3E1.1(b) has "accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner [and] thereby appropriately merit[s] an additional reduction."[24] The PROTECT Act directed that the congressional amendments to §3E1.1 cannot be "alter[ed] or repeal[ed]" by the Commission.[25]

Although Congress plainly intended the government to move for the third-level reduction for acceptance of responsibility if §3E1.1(b)'s conditions were met, that has not always happened. After the implementation of the PROTECT Act, a circuit conflict emerged as to whether the government could withhold a §3E1.1(b) motion for reasons other than preparing for trial. While some circuits had permitted the government to withhold the §3E1.1(b) motion if a person refused to sign an appellate waiver,[26] the Fourth Circuit confirmed that the purpose of the third-level reduction is to permit "the efficient allocation of *trial* resources, not *appellate* resources."[27] The Second Circuit similarly determined that §3E1.1(b) does not permit the government to withhold a motion for the third-level if a person requests an evidentiary hearing on sentencing issues because the plain language of §3E1.1(b) and its commentary confirm that the government is to "determine simply whether the [person] has entered a plea of guilty and thus furthered the guideline's purpose in that matter," not whether the person "has declined to perform some other act."[28]

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commentary refer only to "the steps specified in subsection (b)." *See* PROTECT Act, § 401(g)(2)(A), (3).

[24] USSG §3E1.1, cmt. n. 6 & background cmt (2003).

[25] PROTECT Act, §401(j)(4).

[26] *See United States v. Johnson*, 581 F.3d 994, 1002 (9th Cir. 2009); *United States v. Deberry*, 576 F.3d 708, 711 (7th Cir. 2009); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008).

[27] *United States v. Divens*, 650 F.3d 343, 348 (4th Cir. 2011) (emphasis in original).

[28] *United States v. Lee*, 653 F.3d 170, 175 (2d. Cir. 2011) (quoting *Divens*, 650 F.3d at 348) (internal marks omitted).

In 2013, the Commission promulgated Amendment 775 which amended §3E1.1's commentary to address the circuit conflict on the proper interpretation of §3E1.1(b).[29] Mindful of both Congress' direct amendments to §3E1.1 and its directive that those amendments not be altered or repealed, the Commission "studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action."[30] Concluding that it "could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1,"[31] the Commission endorsed the Fourth and Second Circuit decisions, and added the following to Application Note 6: "The government should not withhold [the §3E1.1(b) motion] based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."[32]

Congress did not disapprove of this amendment, and it went into effect on November 1, 2013.[33]

Despite the plain language of §3E1.1(b) and Amendment 775's clarifying efforts, the circuits still disagree about whether the government may withhold a third-level reduction motion for reasons unrelated to §3E1.1(b), including because a person moves to suppress evidence[34] or raises sentencing challenges.[35]

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[29] *See* USSC App. C., Amend. 775 (Nov. 1, 2013).

[30] *Id.* at Reason for Amendment.

[31] *Id.*

[32] *Id.*

[33] *See* USSG §3E1.1 (2013); *see also* 28 U.S.C. § 994(p) (permitting Congress 180 days to modify or disapprove of a promulgated guideline before the guideline goes into effect).

[34] *Compare*, *United States v. Vargas*, 961 F.3d 566, 582 (2d Cir. 2020), *United States v. Price*, 409 F.3d 436, 444–45 (D.C. Cir. 2005), *United States v. Marquez*, 337 F.3d 1203, 1212–13 (10th Cir. 2003), *United States v. Marroquin*, 136 F.3d 220, 224–25 (1st Cir. 1998), *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994), *with United States v. Longoria*, 958 F.3d 372, 378–79 (5th Cir. 2020), *cert denied* 141 S. Ct. 978 (2021), *United States v. Collins*, 683 F.3d 967, 707 (6th Cir. 2012), *and United States v. Drennon*, 516 F.3d 160 162–63 (3d Cir. 2008).

[35] *Compare*, *United States v. Castillo*, 779 F.3d 318, 323 (5th Cir. 2015), *and United States v. Lee*, 653 F.3d at 173, *with United States v. Adair*, 38 F.4th 341, 355

### 2. Section 3E1.1's plain language has always identified when the §3E1.1(b) adjustment is warranted.

The circuits continue to disagree on the bases the government may use to withhold a §3E1.1(b) motion. But §3E1.1(b) and its accompanying commentary have always identified when the reduction is warranted.

Prior to the PROTECT Act, the decision to award the third-level reduction belonged only to the court.[36] During that time, all courts of appeals that had considered the question agreed that the §3E1.1(b)'s instruction to "decrease the offense level by an additional level" was required so long as §3E1.1(b)'s conditions were met.[37]

In the PROTECT Act, Congress conferred discretion to the government to determine in the first instance whether the line prosecutor had prepared for trial "because the government is in the best position" to assess its own preparation. But by changing "*who* initiates [§3E1.1(b)'s] adjustment and giving that decision deference,"[38] Congress did not give the government "a roving license to ignore" the limits of the guideline, nor did it revise the expectation that if §3E1.1(b)'s conditions were met, the third-level reduction would be awarded.[39] In fact, Congress' preservation of the rest of §3E1.1's commentary—including that a person "appropriately merit[s]" the third-level reduction if §3E1.1(b)'s conditions have been satisfied—indicates Congress intended that the government would exercise its discretion within the limits of §3E1.1(b).[40]

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(3d Cir. 2022), *United States v. Jordan*, 877 F.3d 391, 395–96 (8th Cir. 2017), *United States v. Sainz-Preciado*, 566 F.3d 708, 715–16 (7th Cir. 2009), *and United States v. Beatty*, 538 F.3d 8, 16–17 (1st Cir. 2008).

[36] *See* USSC §3E1.1 cmt. n.5 (2002).

[37] *See* Statement of Lisa Hay Before the U.S. Sentencing Comm'n, Washington, D.C., at 8 – 10 (Mar. 13, 2013)), https://bityl.co/HN8w (collecting cases) ("Statement of Lisa Hay").

[38] *United States v. Johnson*, 581 F.3d 994, 1010 (9th Cir. 2009) (M. Smith, C.J., dissenting in part), *superseded by* Amendment 775.

[39] *Divens*, 650 F.3d at 347 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)); USSG §3E1.1(b) & cmt. n.6; *see also United States v. Davis*, 714 F.3d 474, 477 (7th Cir. 2013) (Rovner, C.J., concurring).

[40] *See Divens*, 650 F.3d at 346 n.1 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 992–93 (2005)).

Further, nothing in Congress' revisions indicate an intent to extend the government's discretion to deny a §3E1.1(b) motion because it expends resources not specifically related to trial.[41] "The text of §3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice,"[42] or raising sentencing challenges,[43] or providing "the type of assistance that might reduce the expense and uncertainty" of an appeal.[44] It only requires "that the plea be sufficiently in advance of trial to avoid extensive trial preparation."[45] Indeed, a contrary reading would "produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea" to justify withholding the §3E1.1(b) motion.[46]

To be sure, there may be cases where actions other than a person's timely plea of guilty may cause the government to expend resources in a way that impacts a person's acceptance of responsibility.[47] But those actions are properly considered by the court when assessing whether a person receives a two-level reduction pursuant to §3E1.1(a). Nothing in the text of §3E1.1(b) gives the government unfettered discretion to withhold the third level from

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[41] *See, e.g.*, *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) (recognizing that interpreting §3E1.1(b) to render a person ineligible for the adjustment where "he *either* goes to trial *or* causes the government to expend resources. . . . misreads the guideline's plain language").

[42] *Vargas*, 961 F.3d at 582.

[43] *See Lee*, 653 F.3d at 174 (confirming the plain language of §3E1.1(b) and its commentary "do not refer to resources saved by avoiding preparation for a [sentencing] hearing or any other proceeding"); *Castillo*, 779 F.3d at 323 ("[A]lthough the current version of the guideline refers to efficient allocation of governmental resources, it does so only in the context of preparing for trial. . . ."); *Davis*, 714 F.3d at 479 (Rovner, J., concurring) ("[T]he guideline and commentary focus explicitly and exclusively on avoiding the need to prepare for trial (and clearing the district court's trial calendar). No proceeding or event that might occur later is mentioned or even hinted at.").

[44] *Divens*, 650 F.3d at 348 (internal marks omitted).

[45] *Vargas*, 961 F.3d at 566 (citation omitted).

[46] *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part).

[47] *See, e.g.*, USSG §3E1.1 cmt. n. 4 ("Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."); *cf. id.* at cmt. n. 1(A)–(H) (listing conduct that should be considered when "determining whether a defendant qualifies under subsection (a)").

someone who has already accepted responsibility and timely notified the prosecutor of his intention to plead guilty for reasons other than preparing for trial.[48] "The only 'resources' that may be considered in gauging the defendant's satisfaction of the guideline are those resources devoted to trial preparation."[49]

### 3. Despite §3E1.1's plain language, prosecutors' misuse of the §3E1.1(b) motion persists.

In 2013, Defenders commented that, despite the plain language of §3E1.1(b) and its accompanying commentary, some prosecutors use the government motion requirement to "obtain concessions well beyond timely guilty pleas and to impose a cost for the exercise of constitutional rights."[50] Ten years later, not much has changed. In my district and across the country, some prosecutors continue to leverage §3E1.1(b) and chill good-faith litigation. This misguided practice is inconsistent with the guideline's text and purpose.

For example, in my district, many of our clients are charged with maritime offenses pursuant to Title 46. Because the government is not permitted to proscribe drug trafficking conduct in the territorial waters of other nations, in many of these cases, we file motions to dismiss for lack of jurisdiction.[51] Recently, a prosecutor informed an attorney in my office that for any Title 46 case she is handling, she will withhold conditional pleas and the third level of acceptance of responsibility if we seek evidentiary hearings in support of these pretrial motions.

My district is not alone. A recent survey conducted of Federal Public and Community Defenders reveals that in many districts, prosecutors still

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[48] *See Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) ("Moreover, such a reading could produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea.").

[49] *Id.* at 1011 (citing *United States v. Vance*, 62 F.3d 1152, 1157 (9th Cir. 1995).

[50] Statement of Lisa Hay at 5.

[51] *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012) (Pryor, C.J.) (holding that the Maritime Drug Law Enforcement Act was unconstitutional as applied where the drug trafficking conduct occurred in the territorial waters of Panama).

see §3E1.1(b) as their own one-level "slush-fund,"[52] to withhold or threaten to withhold for a host of good-faith litigation unrelated to timely guilty pleas or government trial preparations. Defenders have observed prosecutors withhold or threaten to withhold the third level for a variety of conduct unrelated to §3E1.1(b), including:

- filing of pretrial motions, including motions to suppress, or motions to dismiss for improper jurisdiction or lack of venue;
- requesting additional discovery;
- not pleading guilty or continuing the trial date before the government's deadline for expert disclosures, even though discovery had not yet been received;
- pleading to an indictment as opposed to a plea agreement;
- obtaining a conditional plea to appeal a suppression issue;
- post-plea conduct, such as testing positive for marijuana or possessing marijuana in pretrial custody;
- raising sentencing challenges including objections to the guideline calculations in the presentence investigation report (PSR) or disputing the accuracy of the factual narratives contained in the PSR;
- failing to pay enough restitution; and
- the government's dissatisfaction with the state of the interior of a client's vehicle that was forfeited post-plea.

These practices affect the length of time our clients spend in prison. For some, losing the §3E1.1(b) reduction could "shift the Guidelines range by years."[53] For others, months.[54] And this leveraging cannot be viewed in

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[52] Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Washington, D.C., at 144 (Mar. 13, 2013) (Lisa Hay) ("2013 AOR Hearing"), https://bityl.co/HNA1.

[53] *Longoria*, 141 S. Ct. at 979.

[54] *See generally United States v. Fasion*, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) ("[I]t is crucial that judges give careful consideration to every minute that is

isolation. Rather, it is another tool in the government's "arsenal" to suppress litigation and obtain hasty dispositions.[55]

The weaponizing of the third level has impacts far beyond an increased sentence for a single client. This practice results in unwarranted disparities and has a chilling effect on the client, the attorney, and the federal criminal legal system.

***Unwarranted Disparity.*** As we recognized in 2013, not all prosecutors exercise their §3E1.1(b) motion authority in ways inconsistent with §3E1.1(b).[56] But precisely because "government practice varies across and within districts, even among similar cases in the same district," unwarranted disparities result.[57] Further, when the §3E1.1(b) motion is used as a bargaining chip to dissuade litigation unrelated to trial, sentencing disparities will result between the cases where the defense succumbs to the prosecutor's threat to withhold the third level (better ensuring the point is ultimately awarded) and where the defense does not.

***Chilling Effect.*** Our adversarial system "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question."[58] Using the third level of acceptance of responsibility to suppress meaningful investigation, litigation, and advocacy frustrates this adversarial process and obstructs counsel from providing "vigorous representation."[59]

Pressure to not pursue good-faith litigation harms our clients. For example, one colleague from Iowa was recently informed by a prosecutor that

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added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").

[55] NACDL Trial Penalty at 16 (discussing the "arsenal of tools" prosecutors have to achieve speedy convictions); *see also* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578, 2590–94 (2013) (describing pretrial detention, time-sensitive offers to cooperate, safety valve eligibility, 21 U.S.C. §851 informations, and §3E1.1 as all pressures that "have turned the system starkly away from a healthy adversarial process").

[56] Testimony of Lisa Hay, at 7.

[57] *Id.*

[58] *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal marks omitted).

[59] *Id.*

the prosecutor could withhold the §3E1.1(b) motion preemptively. After a plea of guilty without an agreement, but prior to my colleague submitting his sentencing statement, the government stated in its sentencing submission that while the client's acceptance was timely, acceptance could or could not be appropriate depending on the client's objections to the presentence report and his agreement to the applicable guideline enhancements. A blanket warning like this moves well beyond the discretion Congress conferred to the government in §3E1.1(b) and fuels the dangerous presumption that a person must choose between asserting good-faith challenges and receiving a lower sentence.

The misuse of §3E1.1(b) also harms the public. Another prosecutor recently threatened to withhold a §3E1.1(b) motion if a colleague filed a motion to suppress. My colleague, in consultation with his client, decided to file the motion despite the prosecutor's threat. After a suppression hearing, the court declined to credit the testimony of a police officer and granted the motion, prompting the dismissal of all charges. While the correct result was reached in that case, there may be countless other instances of police misconduct that would not be discovered because counsel or the client were more risk adverse.

**4. The Commission can—and should—clarify the proper interpretation of §3E1.1(b).**

Because the circuits still disagree as to the proper interpretation of §3E1.1(b), and because some prosecutors continue to withhold the third-level motion for reasons inconsistent with the guideline, the Commission "should take steps" to clarify its proper interpretation.[60]

In 2013, Defenders, DOJ, and the Commission all recognized that the Commission had the authority to clarify the proper interpretation of §3E1.1, even though the guideline was directly amended by Congress.[61] Because a clarifying amendment, by definition, does not change a guideline's meaning

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[60] *Longoria*, 141 S. Ct. at 979.

[61] *See* Testimony of Lisa Hay, at 5; DOJ Comments on the Sentencing Commission's Proposed Amendments 27 (Mar. 8, 2013); USSC, App. C., Amend. 775, Reason for Amendment (Nov. 1, 2013).

but rather confirms what it has always meant,[62] such an amendment is consistent with Congress' directive not to repeal or change the PROTECT Act amendments.

And clarification from the Commission is needed. All circuits to have addressed §3E1.1(b) since Amendment 775 agree that the scope of the government's discretion is dictated by the language of §3E1.1. But they disagree on what that language requires. Some courts correctly recognize that §3E1.1(b) permits the government to withhold its motion only for the reasons identified in that provision—that is, if an individual fails to timely notify the government of its intention to plead guilty, thereby requiring the government to prepare and expend resources for trial.[63] Others interpret Amendment 775's added commentary to permit the government to withhold a §3E1.1(b) motion as long as any interest in §3E1.1—subsections (a) or (b)—is

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[62] *See, e.g.*, *United States v. Goines*, 357 F.3d 469, 474 (4th Cir. 2004).

[63] *See, e.g.*, *Vargas*, 961 F.3d at 582–84 (2d Cir. 2020) ("The text of § 3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice; it requires that the plea be sufficiently in advance of trial to avoid extensive trial preparation."); *United States v. Knight*, 710 F. App'x 733, 736 (9th Cir. Oct. 5, 2017) ("[T]he Government does not have unbounded discretion to refuse the third point; it can only refuse to do so for the reasons articulated in section 3E1.1(b)."); *United States v. Rivers*, 572 F. App'x 206, 207 (4th Cir. May 22, 2014) (explaining that the government "may not refuse to make a §3E1.1(b) motion for reasons other than a defendant's failure to fulfill the prerequisites listed therein"); *see also generally United States v. Johnson*, 980 F.3d 1364, 1384–1385 (11th Cir. 2020) (declining address issue but recognized the split of authority and that withholding a §3E1.1(b) motion on the basis of obstruction of justice "takes us far afield from the focus on §3E1.1(b), which looks to the timeliness of a [person]'s notification to the Government that he will be pleading guilty. . . [which] allows the Government to cease the unnecessary expenditure of its resources"); *United States v. Rivera-Morales*, 961 F.3d 1, 16–17 (1st Cir. 2020) (recognizing split while confirming that "[q]uintessentially, section 3E1.1(b) is meant to reward [people] who spare the government the expense of trial").

identified.[64] And a single court recently determined that Amendment 775's added commentary is not authoritative at all.[65]

By amending §3E1.1(b)'s text, as the Commission proposes, to define "preparing for trial," and by clarifying that the scope of the government's discretion to withhold the §3E1.1(b) motion is cabined by the guideline that Congress wrote, the Commission will better ensure the uniform application of the third-level adjustment.

**a. The definition of "preparing for trial" should focus on the purpose of government preparations rather than the timing of the preparations.**

Defenders applaud the Commission for proposing to clarify what should already be clear: that not all the work performed to prosecute a case constitutes preparing for trial.

We appreciate and agree largely with the definition the Commission proposes. We agree that "preparing for trial" may be appropriately defined as the "substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial,"[66] We think the definition would be more accurate if it defined "preparing for trial" as: "substantive preparations taken ***with the specific purpose*** to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial."[67]

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[64] *See, e.g.*, *Castillo*, 779 F.3d at 323 (interpreting Amendment 775's commentary to allow the government to "withhold a §3E1.1(b) motion based on an interest identified in either subsection (a) or (b) of §3E1.1."); *Jordan*, 877 F.3d at 396 (holding that the government may withhold a §3E1.1(b) motion for preparing for a sentencing hearing, in part, because "[i]f the Commission intended to exclude contested sentencing hearings from interests identified in §3E1.1, it could have done so. It did not."); *see generally Johnson*, 980 F.3d at 1385 ("In short, in the case of a timely notification of a decision to plead guilty, it is clear the government can no longer base its refusal to move for a third level reduction on the defendant's refusal to waive appellate rights. Beyond that, nothing else is clear[.]").

[65] *See Adair*, 38 F. 4th at 358–361 (3d Cir. 2022).

[66] 2023 Proposed Amendments, at 7200.

[67] *See Marquez*, 337 F.3d at 1212 (recognizing that "even where there is substantial overlap between the issues that will be raised at the suppression hearing

We also agree with the Commission's proposal to specify actions that *do not* constitute "preparing for trial." For example, we wholeheartedly endorse the Commission's proposed language that "Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.'"[68]

We encourage the Commission to similarly confirm that preparation for pretrial proceedings conducted for purposes other than trial are not considered "preparing for trial." We fear that the Commission's proposed description of pretrial proceedings is unnecessarily limited and may inadvertently deprive deserving individuals of the third level of acceptance of responsibility. The Commission proposes that:

> Preparation for *early* pretrial proceedings (such as litigation related to a charging document, *early* discovery motions, and *early* suppression motions) ordinarily are not considered 'preparing for trial' under this subsection.[69]

Better guidance would be: ***"Preparation for pretrial proceedings, such as litigation related to a charging document, discovery motions, and suppression motions are not considered 'preparing for trial' under this subsection."*** This guidance is more straightforward than what is proposed, and it is more accurate. Preparation for the purpose of a pretrial proceeding that is unrelated to trial cannot reasonably constitute preparation for trial.

We at least urge the Commission to omit "early" from the proposed guidance. The focus of the "preparing for trial" inquiry should be the *purpose* of the preparation, not the timing. By including this temporal qualifier to describe pretrial work that ordinarily does not constitute "preparing for trial," the Commission may unintentionally imply to courts that the government's engagement in other pretrial work—even work totally

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and those that will be raised at trial," preparation for a motion to suppress would not require" the same preparation as trial).

[68] 2019 Proposed Amendments, at 7200.

[69] *id.* (emphasis added).

unrelated to trial or to a person's timely plea—does constitute "preparing for trial" if that work did not occur sufficiently "early" in the case.

Whether government preparation for pretrial proceedings properly constitutes "preparing for trial" should not hinge on timing for several reasons. First, if the preparation is not taken in order to present the government's case against a person at trial, then it should not matter when the preparation happened. The timing of the government's work is not a proxy for the purpose of that work. Indeed, the timing of cases in my district shows why. In *United States v. Miles*, our client was arraigned in October of 2019, we filed a motion to suppress in December, and his trial occurred in February 2020.[70] The pace and timing of Mr. Miles's case is not unusual.[71] But other cases take longer to litigate. In *United States v. Kachkar*, we were appointed on September 1, 2017. We filed a motion to suppress in July 2018, the judge conducted a two-day evidentiary hearing in October 2019, and Mr. Kachkar's four-week trial commenced in January 2020.[72] Because "[a]ny experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing,"[73] preparing for a suppression hearing—no matter when that hearing occurs—should not constitute "preparing for trial."

Second, by excluding only "early" pretrial preparations from "preparing for trial," the proposed language fails to account for the cause of the timing. The purpose of §3E1.1(b) is to reward someone who does not plead on the eve of trial after the government has already prepared. But permitting the government to withhold the §3E1.1(b) motion because of delay unrelated to a

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[70] *See United States v. Miles*, No. 19-cr-20687 (S.D. Fla.).

[71] *See also, e.g.*, *United States v. Knight*, No. 18-cr-20033 (S.D. Fla.) (indicted on January 19, 2018, motion to suppress filed on February 20, 2018, suppression hearing held March 5, 2018, and trial started on March 7); *United States v. Nelson*, No. 22-cr-20294 (S.D. Fla.) (arraignment in August 2022, motion to dismiss filed in October 2022, and bench trial held in November 2022); *United States v. Brown*, No. 19-cr-20360 (S.D. Fla.) (arraigned in June 2019, motion to dismiss filed in August 2019, change of plea hearing held in November 2019).

[72] *See United States v. Kachkar*, No. 16-cr-20595 (S.D. Fla.).

[73] *Vargas*, 961 F.3d at 585 (citing *Marquez*, 337 F.3d at 1211–12); *see also Divens*, 650 F.3d at 349 ("[Section] 3E1.1(b) requires the Government to consider the specific factors articulated in the guideline itself, not some other criterion that it believes to be 'closely related' to the textual requirement.") (citation omitted).

person's own conduct, like the government's late production of discovery, would nullify the benefit of the person's timely plea. If a person does everything in her power to satisfy §3E1.1(b)'s conditions, she should not be penalized for events not of her own making.

Third, a focus on the timing of the government's pretrial preparations would cause unwarranted disparities. What constitutes "early" in one district may be considered late in another because the length of a typical case varies from place to place. For example, last fiscal year in my district the median time from filing to disposition in a criminal felony case was 9 months. But in the Eastern District of New York, the median time was over triple that—almost 30 months.[74] Variations between case lengths exist even between federal districts in the same state: the median length of a criminal felony case in the Southern District of California is 7.6 months; in the Eastern District of California it is 29.1 months.[75] And what constitutes "early" in one type of case may not be early in another type of case.

If, despite these problems, the Commission retains its proposed language, we encourage the Commission to make clear in §3E1.1(b) or its commentary that the government should not withhold the motion from an otherwise eligible individual if belated government preparations were not caused by actions taken by the individual for purposes of delay.

**b. The Commission should also clarify that the government may not refuse to file the §3E1.1(b) motion for interests not identified in §3E1.1(b).**

The Commission does not need to "specify[ ] a . . . standard" to "address the breadth of the government's discretion to withhold a §3E1.1(b) motion,"[76] because the breadth of the government's discretion is already identified by the guideline and accompanying commentary.

However, we encourage the Commission to clarify that "the straightforward terms of both the guideline and the accompanying

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[74] *See* U.S. Courts, *U.S. District Court – Judicial Caseload Profile*, https://tinyurl.com/4whu9cas (last visited Feb. 27, 2023).

[75] *Id.*

[76] 2023 Proposed Amendments, at 7200.

commentary specify the criteria that control the government's assessment" of when to make the §3E1.1(b) motion.[77] The Commission proposes to delete the commentary it added in Amendment 775 that "The government should not withhold [a §3E1.1(b)] motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."[78] Instead of deleting this commentary we urge the Commission to revise it to state that:

> *The government should not withhold such a motion based on interests not identified in §3E1.1**(b)**, such as whether the defendant agrees to waive his or her right to appeal**,** **whether the defendant moves to suppress evidence, or whether the defendant raises sentencing challenges.***

This slight revision would complement the Commission's proposed clarification in §3E1.1(b)'s text to better ensure that the government does not withhold a §3E1.1(b) motion if the conditions Congress identified in §3E1.1(b) are not met and to better ensure that courts do not deny the third-level reduction for reasons not identified in §3E1.1(b), like general docket management.[79]

Contrary to the conclusion of one Third Circuit panel, clarifying the proper interpretation of this guideline would not be adding a limitation to "when the government can withhold a motion,"[80] but rather recognizing one that has always existed. Indeed, amending the guideline to expand the government's discretion beyond what Congress provided for in its direct amendments, *would* violate the PROTECT Act. For this reason, the

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[77] *Davis*, 714 F.3d at 477 ("Although the PROTECT Act made the government the arbiter of whether a defendant ought to receive the extra reduction for acceptance of responsibility, . . . the straightforward terms of both the guideline and the accompanying commentary specify the criteria that control the government's assessment.") (Rovner, J., concurring).

[78] 2023 Proposed Amendments, at 7200.

[79] *See, e.g.*, Order Setting Jury Trial at 1, *United States v. Babary*, No. 22-cr-60222 (S.D. Fla. Nov. 1, 2022), Doc. No. 8; Order Setting Jury Trial at 1, *United States v. Davis*, No. 22-cr-80181 (S.D. Fla. Nov. 29, 2022), Doc. No. 9.

[80] *Adair*, 38 F.4th at 359 (holding Amendment 775 invalid because it constitutes an alteration of Congress' PROTECT Act amendments).

Commission should not incorporate the discretion standard articulated in *Wade v. United States* that is used for §5K1.1 substantial assistance motions.[81]

Section 3E1.1(b) "involves far less expansive governmental discretion than under §5K1.1."[82] To be sure, both provisions require a "motion of the government," stating that an individual assisted authorities in a particular way.[83] But unlike §5K1.1, §3E1.1(b) and its accompanying commentary are "explicit about what conduct warrants the favorable exercise of the government's discretion,"[84] For example, §3E1.1(b) contains a description of the precise assistance necessary to warrant relief. Section 5K1.1 does not.[85] Section 3E1.1's commentary articulates the reason for the government's discretion. Section 5K1.1 does not.[86] Section 3E1.1's commentary identifies the precise "steps" a person must take to "appropriately merit[ ]" the reduction. Section 5K1.1 contains no such prescription.[87]

The Commission wisely rejected the opportunity to incorporate the *Wade* framework into §3E1.1 in 2013.[88] It should do so again by clarifying

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[81] *See* 2023 Proposed Amendments, at 7200 (citing *Wade v. United States*, 504 U.S. 181, 185–86 (1992)).

[82] *Divens*, 650 F.3d at 345–46 (quoting USSC §3E1.1, cmt. n.6 & background commentary).

[83] *Compare* USSG §§3E1.1(b), *with* 5K1.1.

[84] *Davis*, 714 F.3d at 477 (Rovner, J., concurring).

[85] *Compare* USSG §§5K1.1, *with* 3E1.1(b) ("[U]pon motion of the government stating that the defendant has assisted authorities. . . *by timely notifying authorities of his intention to enter a plea of guilty,* thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently[.]" (emphasis added)).

[86] *Compare* USSG §§5K1.1, *with* 3E1.1 cmt. n.6 ("*Because* the Government is in the best position to determine whether the defendant has assisted authorities *in a manner that avoids preparing for trial*, an adjustment under subsection (b) may only be granted upon a formal motion by the Government." (emphasis added)).

[87] *Compare* USSG §§5K1.1, *with* 3E1.1 background cmt. (confirming that a person who "tak[es] the steps specified in subsection (b). . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction").

[88] *Compare* DOJ Comments on the Sentencing Commission's Proposed Amendments 27 - 28 (Mar. 8, 2013) (requesting the Commission incorporate a *Wade*-like standard into §3E1.1 that would allow the government to withhold the

that the government may not refuse to file the §3E1.1(b) motion for interests not already identified in §3E1.1(b).

## II. Controlled Substance Offense

The Commission has proposed two options to resolve a circuit split regarding the definition of "controlled substance." Option 1 would adopt the federal definition from 21 U.S.C. § 802(6) and provide that "controlled substance" means "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq*.)."[89] Option 2 would include those federally controlled substances and also substances "otherwise controlled under applicable state law."[90]

Long-documented problems with the career offender guideline are set forth in detail in the Statement of Juval Scott on the Commission's proposed amendments to the career offender guideline, and although she will be testifying after me, I hope you will consider my comments in the context of her written testimony.[91] These problems are magnified when the career offender guideline's application is triggered by convictions for "controlled substance offenses."[92] The Commission should take this opportunity to define controlled substance offense to reach no further than what is required by the statutory directive, 28 U.S.C. § 994(h).[93] The simplest and most parsimonious

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§3E1.1(b) motion if it was unable to allocate any resources—related to trial or not—efficiently), *with* USSG App. C., Amend. 775, Reason for Amend. (Nov. 1, 2013) ("the Commission in its study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1").

[89] 2023 Proposed Amendments, at 7201.

[90] *Id.*

[91] *See* Statement of Juval O. Scott on Proposed Amendments to the Career Offender Guideline at 3-12.

[92] See USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 3 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements ("2016 Career Offender Report") ("Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.").

[93] Section 994(h) reads:

way to achieve this is to define "controlled substance offense" to mirror the federal offenses enumerated in § 994(h)(1)(B), (2)(B):

> The term "controlled substance offense" means an offense, punishable by imprisonment for a term exceeding one year, described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

If the Commission decides not to limit "controlled substance offense" to the mandate, then, at a minimum, it should limit the definition of "controlled substance" to the finite and known category of federally controlled substances, consistent with Option 1.

Option 2 would create unwarranted disparity, spawn new litigation, and vastly expand the number and variety of offenses that would trigger the career offender guideline and Chapter Two and Four recidivist enhancements. Judges already impose a below-guideline sentence in nearly 80% of cases identified by the career offender guideline; expanding its reach would further diminish its influence, when it is already at an all-time low.[94]

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(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and–

(1) has been convicted of a felony that is–

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is–

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

[94] See USSC, Quick Facts: Career Offenders (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf ("*2022 Career Offenders Quick Facts*"); USSC, The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes,

### A. The Commission should contract, not expand, the reach of the career offender guideline.

The career offender guideline calls for such high sentences because Congress, at 18 U.S.C. § 994(h), directed the Commission to assure that the Guidelines specify a sentence at or near the maximum term for categories of defendants convicted of a felony crime of violence (undefined in the statute) or one of a list of certain enumerated felony drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses. The Commission promulgated the career offender guideline, USSG §§4B1.1, 4B1.2, to implement this directive.[95]

But, as set forth in more detail in Ms. Scott's testimony, the directive and the guideline implementing it are highly flawed. The guideline calls for sentences that are too high for most of the individuals it captures. As a result, judges impose a sentence below the range called for by the career offender guideline in an increasing percentage of cases to which it applies.[96] And the gap between the average guideline minimum and the average sentence judges impose continues to widen.[97]

The reason for the career offender guideline's ever-waning influence is that it has no empirical basis. Commission research over decades reflects that recidivism rates are most closely correlated with total criminal history points, not career offender status, and the Commission has never stated any *other* empirical rationale for imposing near-maximum sentence on this category of individuals.[98]

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2005-2017 55–56 (2020), https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing ("*Influence Report*").

[95] *See 2016 Career Offender Report* at 14–15.

[96] *See id.* at 22.

[97] *See Influence Report* at 55–56.

[98] *See 2016 Career Offender Report* at 43 (noting that Commission's research over decades reflects that recidivism rates are "most closely correlated with total criminal history points"); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18-19 (2016), https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing*

The guideline also exacerbates racial disparity in guideline sentencing, with Black individuals nearly six times as likely to be identified as career offenders as white individuals.[99] In light of these problems, the Commission should contract, not expand, the reach of this guideline, especially as applied to drug offenses.

In its *2016 Career Offender Report*, the Commission itself recommended to Congress that it amend the career offender directive to remove from its coverage those who qualify based solely on drug-trafficking offenses, and it also expressed concern about including those for whom drug-trafficking offenses played any role in their career offender status.[100] As it now stands, the career offender guideline is already the least influential guideline: In FY2021, judges imposed sentences below the recommended guideline range in nearly 80% of career offender cases.[101] For the Commission to now expand the guideline by defining "controlled substance offense" to reach still more drug offenses would give judges even more reasons not to follow it. Instead, the Commission should follow the evidence and limit the definition to what is required by § 994(h).

### B. The Commission should limit §4B1.2(b) to the offenses enumerated in § 994(h).

The specific directive that resulted in §4B1.1 identifies a short, discrete list of federal drug felonies for which Congress has mandated near-maximum guidelines ranges.[102] The Commission should mirror this list in the guideline definition of a "controlled substance offense." This limitation is consistent with the Commission's 2016 recommendation to Congress that it remove those identified as career offenders solely on the basis of drug-trafficking

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*Guidelines* 9, 37 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

[99] This figure was derived from USSC, *Individual Datafiles FY 2017-2021,* which reflect that 6.9% of Black individuals sentenced under the Guidelines were identified as career offenders, whereas 1.2% of non-Black individuals were identified as career offenders).

[100] *See 2016 Career Offender Report* at 43, 44.

[101] *See 2022 Career Offenders Quick Facts*.

[102] *See* 28 U.S.C. § 994(h)(1)(B), (2)(B).

convictions from the reach of the career offender directive.[103] It would also respond to the Probation Officer Advisory Group's suggestion that "limiting the number of controlled substance offenses that are included as predicate offenses will help create simplicity in guideline application and address sentencing disparities throughout the country."[104] Only convictions for the enumerated offenses would qualify.

Limiting the definition to federal drug felonies enumerated in § 994(h) would also resolve several circuit splits and anomalies in the current guideline. It would resolve the circuit conflict addressed in Proposed Amendment 6C in favor of removing inchoate offenses not included in § 994(h), and it would moot the proposal in Proposed Amendment 6D to expand the definition of "controlled substance offense." It would also resolve the anomaly that the guideline definition includes offenses like 21 U.S.C. § 952(b), which Congress deliberately excluded from § 994(h).[105]

Further, it would remedy another anomaly, which appears to permit state offenses that would be misdemeanors if charged under 21 U.S.C. § 841 (the offense enumerated in § 994(h)) to constitute career offender predicates simply because a state chooses to classify those offenses as felonies. [106] For example, distributing a schedule V controlled substance and distributing a small amount of marijuana for no remuneration are misdemeanors under § 841, and thus not felonies described in any of the offenses enumerated in

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[103] *See 2016 Career Offender Report* at 3.

[104] Probation Officers Advisory Group's Comments on the United States Sentencing Commission's Proposed Priorities 9 (Oct. 17, 2022).

[105] *See United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009) (discussing Congress's deliberate choice to direct that the career offender guideline "include[] 21 U.S.C. § 952(a), which prohibits the importation of schedule I and II controlled substances and narcotic drugs in schedule III, IV, or V, but [to] carefully exclude[] 21 U.S.C. § 952(b), which prohibits the importation of nonnarcotic schedule III, IV, and V substances"). Likewise, Congress did not include export offenses described in 21 U.S.C. § 953, but § 4B1.2 includes exporting a controlled substance in its definition of a "controlled substance offense."

[106] *Cf. Lopez v. Gonzales*, 549 U.S. 47, 53, 60 (2006) (holding, for Immigration-and-Nationality-Act purposes, that when a state offense proscribes conduct that would only qualify as a misdemeanor under federal drug-trafficking law then that offense does not count as a "felony punishable under the Controlled Substance Act" even if the state classifies it as a felony).

§ 994(h).[107] But distributing many of those same schedule V substances is a felony in some states, and until recently distributing a small amount of marijuana for no remuneration remained a felony in most states. [108] Mirroring § 994(h) in the definition of "controlled substance offense" would ensure that only felonies under the enumerated statutes would constitute career offender predicates.

Finally, limiting the definition of "controlled substance offense" to the enumerated offenses is consistent with § 994(h)'s directive that the career offender enhancement should apply to individuals with felony drug convictions "described in" the enumerated list of exclusively federal statutes. As the Supreme Court has made clear, it is the coupling of "described in" with a reference to state offenses that expands a statute's reach to non-federal offenses.[109] We recognize that this proposal, if adopted, would significantly narrow the reach of the career offender guideline. But, as the Commission acknowledged in its *2016 Career Offender Report*, the evidence plainly supports this restriction, especially when the career offender guideline is triggered by drug-trafficking convictions.[110] Thus, now is the time to revise §4B1.2 to reflect, to the extent practicable, advancement in knowledge of

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[107] *See* 21 U.S.C. § 841(b)(3), (4).

[108] *See, e.g.*, Ala. Code §§ 13A-5-6, 13A-12-215 (distribution of any controlled substance in Alabama schedules I through V punishable as Class B felony with statutory range of 2 to 20 years); 720 Ill. Comp. Stat. Ann. 570/401(h) , 730 Ill. Comp. Stat. Ann 5/5-4.5-40(a) (punishing distribution of Illinois schedule V substance as Class 3 felony, punishable by determinate sentence 2 to 5 years); Ind. Code. Ann. §§ 35-48-4-4(e), 35-50-2-6(a) (punishing distribution of between 10 and 28 grams of Indiana schedule V substance as Level 5 felony, punishable by fixed term of 1 to 6 years); *Moncrieffe v. Holder*, 469 U.S. 184, 204 (2013) (noting that about half the states criminalized marijuana distribution through statutes that did not require remuneration or any minimum quantity of marijuana).

[109] *See Torres v. Lynch*, 578 U.S. 452, 460–66 (2016). Where Congress has used the phrase "described in" to reach non-federal offenses, it has said so expressly. *See, e.g.*, 18 U.S.C. § 3559(c)(2) ("[T]he term 'serious violent felony' means . . . a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111). . . ."); 8 U.S.C. § 1101(a)(43) ("The term aggravated felony means . . . an offense described in . . . [§ 844(i)] . . . whether in violation of Federal or State law. . . .").

[110] *See 2016 Career Offender Report* at 43, 44.

human behavior as it relates to the criminal legal process.[111] To do any less would be to continue to maintain the unsupportable status quo.

### C. At a minimum, the Commission should clarify that "controlled substance" in §4B1.2 means *federally* controlled substance.

If the Commission insists on retaining state drug offenses as predicates, it should at minimum limit its definition of a "controlled substance offense" to state and federal offenses that can reasonably be said to be "described in" § 994(h)–*i.e.,* offenses that prohibit manufacturing, importing, or distributing, or possessing with the intent to manufacture, import, or distribute, *federally* controlled substances. As set forth above, § 994(h) enumerates only federal drug offenses, which by definition prohibit conduct involving only federally controlled substances. If the Commission declines to mirror § 994(h), it should elect Option 1, defining "controlled substance" consistent with federal law.

#### 1. Fairness and consistency support limiting the definition of "controlled substance" to federally controlled substances.

Until recently, it was uncontroversial that "controlled substance" under the Federal Sentencing Guidelines referred to substances on the five federal drug schedules.[112] But this changed after the Supreme Court's 2015 decision in *Mellouli v. Lynch*, which drew widespread attention to the fact that some states control substances that the federal government does not control.[113] In *Mellouli*, the Supreme Court held that an immigrant's

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[111] *See* 28 U.S.C. § 991(b) (Commission to establish sentencing policies and practices "to assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]" and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); *id.* § 994(o) (Commission to periodically review and revise the guidelines).

[112] *See, e.g., United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661–62 (8th Cir. 2011); *United States v. Leiva-Deras*, 359 F.3d 183, 189 (2d Cir. 2004); *United States v. Kelly*, 991 F.2d 1308, 1316 (7th Cir. 1993).

[113] 575 U.S. 798 (2015).

conviction of a Kansas drug paraphernalia offense did not trigger removal under the Immigration and Nationality Act because Kansas controlled at least nine substances, including salvia and jimson weed, that were not included on the five federal drug schedules.[114] Following *Mellouli*'s lead, defendants argued that convictions under these overbroad state statutes should not trigger enhanced penalties under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or under the career offender guideline.

Every court to consider the question has recognized this to be correct with respect to the ACCA, which like the INA expressly incorporates the federal definition for "controlled substance" set forth at 21 U.S.C. § 802(6).[115] But the courts of appeal are now split with respect to the career offender guideline, with the Second and Ninth Circuits reasserting that the federal definition controls, and the Third, Fourth, Seventh, Eighth, and Tenth Circuits defining "controlled substance" in a variety of other ways.[116]

To be clear, this new circuit conflict about the meaning of the phrase "controlled substance" in §4B1.2 is not about the correct interpretation of § 994(h). The words "controlled substance" appear in § 994(h) only as part of the titles of the Controlled Substances Act and the Controlled Substances Import and Export Act, both of which, of course, incorporate the federal

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[114] *Id.* at 808, 813.

[115] *See United States v. Brown*, 47 F.4th 147, 149 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 498–99 (4th Cir. 2022); *United States v. Fox*, 2021 WL 3747190, at *4 (6th Cir. Aug. 25, 2021); *United States v. Perez*, 46 F.4th 691, 698–99 (8th Cir. 2022); *United States v. Cantu*, 964 F.3d 924, 927, 934 (10th Cir. 2020); *United States v. Latson*, 2022 WL 3356390, at *2–3 (11th Cir. Aug. 15, 2022).

[116] *Compare United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (federal definition controls for guidelines purposes), *and United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (same), *with United States v. Lewis,* 58 F.4th 764, 771 (3d Cir. 2023) ("a drug regulated by either state or federal law"), *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) ("[W]e look to *either* the federal or state law of conviction. . . ."), *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) ("any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law" (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987)), *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) ("no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law"), *and United States v. Jones*, 15 F.4th 1288, 1295 (10th Cir. 2021) ("substances not found in the CSA").

definition of controlled substance.[117] Indeed, courts that have interpreted "controlled substance" in §4B1.2 to include non-federally controlled substances understand their interpretation to result from what they perceive to be the Commission's choice to include offenses beyond what is required by § 994(h).[118]

The Commission should resolve the circuit conflict by expressly clarifying that "controlled substance" refers only to substances prohibited by the federal Controlled Substances Act. *First*, defining "controlled substance" consistent with federal law is all that § 994(h) requires. Indeed, as explained above, it is *more* than § 994(h) requires, since Option 1 of the proposed amended guideline would encompass not just federal but also state offenses involving the trafficking of substances listed on the federal drug schedules. If the Commission elects to expand the highly problematic career offender guideline beyond what is required, it should do so in the most limited manner possible.

*Second*, restricting "controlled substance" to federally controlled substances conforms guideline recidivist enhancements to statutory recidivist enhancements and other federal consequences, ensuring that federal consequences are triggered by uniform definitions independent of the labels employed by the various states. For example, a conviction that could have been for salvia does not trigger deportation.[119] It also does not serve as a predicate for the ACCA or for 21 U.S.C. § 841(b)'s recidivism enhancements.[120] But, because the Tenth Circuit holds that "controlled

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[117] *See* 21 U.S.C. § 802(6) ("The term 'controlled substance' [for purpose of both Controlled Substances Act and Controlled Substances Import and Export Act] means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.").

[118] *See Lewis*, 58 F.4th at 769; *Jones*, 15 F.4th at 1294–95; *Henderson*, 11 F.4th at 718–19; *Ward*, 972 F.3d at 371–72; *Ruth*, 966 F.3d at 652.

[119] *See Mellouli*, 575 U.S. at 808, 813.

[120] *See Cantu*, 964 F.3d at 934 (ACCA); *see also United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021) (same analysis applies under § 841(b)); 21 U.S.C. § 802(57) (defining "serious drug felony"—which triggers § 841(b) enhancements—in relevant part as "an offense described in [the ACCA]").

substance" under the Guidelines is not limited to federally controlled substances, it *does* trigger guideline enhancements.[121]

This anomaly is especially perverse for guidelines like USSG §2K2.1. The increased base offense levels in §2K2.1 triggered by prior convictions for controlled substance offenses were promulgated to provide "proportionality" with ACCA sentences.[122] But the ACCA would never be triggered by a conviction for an offense involving a non-federally controlled substance. There is no good reason why the same should not be true for USSG §2K2.1.

*Third*, limiting the definition to federally scheduled substances places control over federal sentencing enhancements applied by federal judges in federal prosecutions for federal offenses where it belongs: in the hands of the federal government.

*Finally*, as explored in more detail below, any definition of "controlled substance" that goes beyond federally controlled substances will open the door to wildly divergent applications of these severe federal enhancements.[123] Conduct that is perfectly lawful in one state would constitute a career offender predicate in another. For example, distribution of Salvinorin A is legal in the District of Columbia. In Maryland, possession is legal for adults, but a citable offense for those under 21, and distributing to a person under 21 is a misdemeanor subject to a fine.[124] In Virginia, Salvinorin A is a schedule I controlled substance, and distribution is punishable by 5 to 40 years' imprisonment.[125] Conduct that is perfectly legal in D.C. and subject only to a fine in Maryland, would make someone a career offender if done in Virginia. Likewise, because jimson weed is a schedule I controlled substance in

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[121] *See Jones,* 15 F.4th at 1290.

[122] *See* USSC, *Firearms and Explosive Materials Working Group Report* 18–23 (Dec. 1990), https://www.ojp.gov/pdffiles1/Digitization/145575NCJRS.pdf.

[123] 28 U.S.C. § 994(f) (guidelines should reduce unwarranted sentencing disparities).

[124] *See* Md. Code Ann., Criminal Law § 10-130, *et seq*.

[125] *See* Va. Code Ann. §§ 54.1-3446, 18.2-248(C).

Kansas, but legal in Missouri, conduct legal in Kansas City, Kansas, would constitute a career offender predicate in Kansas City, Missouri.[126]

### 2. The Commission should use a clarifying amendment to define "controlled substances" as federally controlled substances.

If the Commission amends §4B1.2 to define "controlled substance" consistent with the federal definition, it should identify this as a clarifying amendment. Over the years, the Commission has amended §4B1.2's definition of "controlled substance offense" many times, but it has never expanded it to include non-federally controlled substances.[127] In the first Guidelines, the Commission enumerated several federal offenses "and similar offenses."[128] There was no indication that the Commission believed "similar offenses" would include offenses that were not in fact similar because they involved substances not prosecutable as an enumerated federal offense. The Commission quickly amended the guideline or commentary twice, each time describing the changes as non-substantive.[129]

In 1989, the Commission adopted a new definition of "controlled substance offense," which is close to its current definition.[130] The Commission

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[126] *Compare* Kan. Stat. Ann. §§ 65-4105(a), (d)(31), *with* Mo. Rev. Stat. § 195.017.

[127] *See 2016 Career Offender Report* at app. A (describing history of career offender guideline).

[128] *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18046, 18095 (May 13, 1987). In Commentary, the Commission explained that "'controlled substance offense' was defined to include the offenses described in 28 U.S.C. § 994(h), as these offenses have been modified by amendments to the Controlled Substances Act made by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570." *Id.*

[129] *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 44674 (Nov. 20, 1987); Sentencing Guidelines for United States Courts, 53 Fed. Reg. 1286 (Jan. 15, 1988). Although it's debatable whether the changes were non-substantive, they did not expand the definition to include non-federally controlled substances.

[130] This new definition defined "controlled substance offense" to mean an offense "under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." USSG App. C, amend. 268 (Nov. 1, 1989). The current guideline adds "dispensing" to the list of conduct. USSG § 4B1.2(b).

described this as a clarifying amendment, and it did not expand the reach of the guideline to non-federally controlled substances.[131] In explaining its amendment, the Commission said that it "sought a definition that was well-established in legislative history and that had the prospect of cohesive case law development."[132] "The Commission concluded that the definition from 18 U.S.C. § 924(e) [the ACCA] would be preferable to the previous definition because the previous definition 'introduces a new offense description into the drug law, one which will have no legislative history and less interpretive case law than would a term already adopted by Congress.'"[133] The new definition did not quite mirror § 924(e).[134] But, in seeking a well-established federal definition, which was itself limited to federally controlled substances, the Commission did not purport to expand the definition to include offenses that could not be prosecuted federally.

By amending §4B1.2 expressly to reach only federally controlled substances, the Commission would be clarifying what it has always meant.[135]

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[131] *See* USSG App. C, Amend. 268 (Nov. 1, 1989) ("The purpose of this amendment is to clarify the definitions of crimes of violence and controlled substance offense used in this guideline.").

[132] *2016 Career Offender Report* at app. A-9 (citing Memorandum from Gary J. Peters presenting the report of the career offender working group at 22–24 (March 25, 1988) ("*Peters Memorandum*")).

[133] *Id.* (citing Peters Memorandum at 22).

[134] 18 U.S.C. § 924(e)(2)(A) defines "serious drug offense" as:

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law[.]

[135] *See, e.g.*, *United States v. Jerchower*, 631 F.3d 1181, 1184 (11th Cir. 2011) (recognizing that a clarifying amendment "provide[s] persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline" (quoting *United States v. Descent*, 292 F.3d 703, 707–08 (11th Cir. 2002)).

To expressly say that the amendment is clarifying would help to ensure consistent treatment by courts.[136]

### D. Option 2 unnecessarily expands the definition of "controlled substance offense" and with no limiting principle.

Once again, the Commission should not expand the definition of "controlled substance offense" beyond what is required by § 994(h). But Option 2 goes much further. It wouldn't just expand that definition; it would do so recklessly, by creating a category with no limiting principle, which neither Congress nor the Commission would control, and with unknown parameters.

Option 2 would define "controlled substance" as "a drug or other substance, or immediate precursor, either included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq*.) or otherwise controlled under applicable state law." The Commission has not released any data on how many more individuals would be subject to career offender or other recidivist enhancements under Option 2, nor do Defenders think it would be possible for it to estimate. But the numbers are likely to be enormous. Adopting Option 2 would mean that any offense prohibiting conduct involving any drug or substance (or an immediate precursor) that a State has chosen to regulate might qualify as a "controlled substance offense"—because those substances all would be, by definition, "controlled under applicable state law." The Commission should not cede to the states the power to decide what triggers a severe federal sentencing penalty.

Option 2 broadens the definition of "controlled substance" as used to trigger federal guideline enhancements to include substances that the federal government has elected not to schedule—substances like hemp (an agricultural fiber),[137] mature stalks of cannabis,[138] salvia (a Oaxacan

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[136] *Id.* at 1185 (in determining whether an amendment is clarifying, court looks to the Commission's own description of it).

[137] *See Bautista*, 989 F.3d at 705.

[138] *See Said v. U.S. Att'y Gen.*, 28 F.4th 1328, 1333 (11th Cir. 2022).

ceremonial herb),[139] jimson weed (a traditional medicinal herb),[140] thenylfentanyl (an inert substance with no abuse potential),[141] human chorionic gonadotropin (the pregnancy hormone),[142] and morpholine (a food additive used as wax coating for fruit).[143]

Indeed, Option 2 proposes to reach substances Congress affirmatively *de*scheduled (like hemp),[144] substances the temporary scheduling of which the Drug Enforcement Administration deliberately permitted to expire (like thenylfentanyl),[145] and even substances the Food and Drug Administration has affirmatively approved under its regulatory authority (morpholine).[146]

And these are just some of the substances we know about. We are unaware of any compilation of the many substances controlled by various states that are not federally scheduled. And of course, such a compilation (if it existed) would be subject to change whenever any state legislature or agency (depending on state law) chose to control some additional substance. Thus, Option 2 would have the consequence of expanding the reach of severe federal sentencing enhancements to an unknown—and unknowable—list of substances.

It is worth keeping in mind that "control" means "[t]o regulate or govern."[147] States regulate and govern all manner of drugs, substances, and precursors under diverse statutory and regulatory schemes. Most states employ a broad definition of "drug," like the one from Pennsylvania, which includes, among other things, "substances (other than food) intended to affect

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[139] *See Mellouli*, 575 U.S. at 808.

[140] *See id.*

[141] *See Hnatyuk v. Whitaker*, 757 F. App'x 10, 11 (2d Cir. 2018).

[142] *See Townsend*, 897 F.3d at 74.

[143] *See Johnson v. Barr*, 967 F.3d 1103, 1106–07 (10th Cir. 2020).

[144] *See* Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908, 5018 (2018).

[145] *See* Schedules of Controlled Substances, 50 Fed. Reg. 43698-02, 43701 (Oct. 29, 1985); *see also Ragasa v. Holder*, 752 F.3d 1173, 1176 n.3 (9th Cir. 2014) (noting that temporary scheduling of thenylfentanyl in 1985 was allowed to expire after one year).

[146] *See* 21 C.F.R. § 172.235.

[147] *Control*, Black's Law Dictionary 416 (11th ed. 2019) (second definition).

the structure or any function of the human body or other animal body."[148] In Pennsylvania, selling any misbranded "drug," where the drug has been misbranded with intent to defraud, is a crime punishable by up to three years' imprisonment.[149] In Delaware, delivering or possessing with intent to deliver a *non-controlled* prescription drug is a crime punishable by up to two years' imprisonment.[150] Option 2 is likely to spawn litigation over whether these are offenses that prohibit delivering a "drug . . . controlled under applicable state law." And if they are, courts are likely to reject the application of the career offender guideline in even more cases, rendering the guideline even less influential than it currently is.

Nor would adding a qualifier like "dangerous" help narrow this definition's reach. Whereas Montana defines "dangerous drug" to mean a drug, substance, or immediate precursor in Montana's dangerous drug schedules,[151] Texas defines "dangerous drug" to mean "a device or drug that is unsafe for self-medication and that is *not* included in schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act)."[152] Delivering or offering to deliver a dangerous drug is a Texas jail felony, punishable by up to two years.[153] Parties will no doubt litigate whether a drug that is not scheduled, but is deemed by Texas to be unsafe for self-medication, is "controlled," making delivery a career offender predicate.

Even requiring a substance to be considered a "controlled substance" under applicable law would not result in uniformity and would still likely spawn litigation:

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[148] 35 Pa. Cons. Stat. Ann. § 780-102.

[149] *See* 35 Pa. Cons. Stat. § 780-113(a)(7), (8), (b).

[150] *See* Del. Code Ann. tit. 16, § 4761(a), (c) ; *id.* tit. 11, § 4205(b)(7).

[151] Mont. Code Ann. § 50-32-101(6).

[152] Tex. Health & Safety Code Ann. § 483.001(2) (emphasis added).

[153] *See* Tex. Health & Safety Code Ann. § 483.042(d) ; Tex. Penal Code Ann. § 12.35(a).

- Maine's Health and Welfare Code has a definition of "controlled substance" that mirrors the federal definition,[154] but its Criminal Code does not include the term "controlled substance" at all.[155]

- Vermont defines "controlled substance" as federally controlled substances in some specific statutes,[156] but describes the substances *it* regulates as "regulated drugs."[157]

- Tennessee defines "controlled substance" as a substance in one of its schedules, of which it has not five, but seven.[158]

- Virginia has six schedules[159]; South Dakota four.[160]

- Long before Illinois legalized cannabis, that state regulated cannabis separately from its controlled substance schedules.[161]

- By contrast, in New Jersey, "controlled dangerous substance" means a drug, substance, or precursor in its schedule I through V, *or* marijuana, *or* hashish, *or* any substance the distribution of which is specifically prohibited by five separate statutes, *and* any drug or substance that, when ingested, is metabolized or otherwise becomes a controlled dangerous substance in the human body.[162] The term further includes any substance that is an immediate precursor of a controlled dangerous substance (regardless of whether that

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[154] *See* Me. Rev. Stat. Ann. tit. 22, § 7246(1).

[155] *Cf.* Me. Rev. Stat. Ann. tit 17-A, § 1102 ).

[156] *See, e.g.*, Vt. Stat. Ann. tit. 18, § 4201(26).

[157] *See id.* § 4201(29).

[158] *See* Tenn. Code Ann. § 39-17-402(4). Distributing a schedule VII substance is a felony. *See id.* § 39-17-417(h).

[159] *See* Va. Code Ann. § 18.2-247(A).

[160] *See* S.D. Codified Laws § 34-20B-3. South Dakota places most federal schedule V substances in schedule IV, the distribution of which is a felony. *See id.* §§ 34-20B-25, 22-42-4.

[161] *Compare* Cannabis Control Act, 720 Ill. Comp. Stat. 550/1 *et seq*. *with* Illinois Controlled Substances Act, 720 Ill Comp. Stat. 570/100 *et seq.*

[162] *See* N.J. Stat. Ann. § 2C:35-2.

> precursor is scheduled) *and* any controlled substance analogue (regardless of whether intended for human consumption).[163]

Simply put, the proposed definition of any drug, substance, or precursor "controlled under applicable state law" (Option 2) is too broad, and there is no viable way to limit it to capture the same types of offenses across jurisdictions. Prior state felony convictions involving any random substance might constitute career offender predicates simply because, by definition, they will be convictions for an offense involving a substance controlled under the applicable state law—an expansive proposition that will surely invite fierce litigation. And should the courts decide this proposition is correct, below-range sentences will continue to increase.

The best way to define "controlled substance offense" and "controlled substance" is to follow § 994(h) and limit the offenses to the enumerated federal felonies. Or at minimum, to limit the substances to federally controlled substances.

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[163] *See id.*